PRIVATIVE CLAUSES—AN UPDATE ON THE LATEST DEVELOPMENTS

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Introduction

Three months ago, at a forum very similar to this one, I delivered a paper entitled 'Privative Clauses – Latest Developments'.[1] That paper analysed the decision of the Full Federal Court in *NAAV v Minister for Immigration and Multicultural Affairs and others* ('***NAAV***'),[2] a case which examined the validity and effect of the privative clause contained in s 474 of the *Migration Act 1958* (Cth) ('the **Act**'). *NAAV* gathered together five applications for review by failed visa applicants and thus gave the Full Federal Court the opportunity to determine the validity and effect of the Commonwealth's new privative clause legislation across a wide cross-section of possible circumstances and grounds for review.

In the normal course of events, one would have expected the *NAAV* cases to make their way to the High Court on appeal, at which point the Court would have had the opportunity – aided by the reasoning below of five of the most senior judges of the Federal Court of Australia[3]– to determine finally the validity and effect of the privative clause across the same wide cross-section of possible circumstances and grounds for review.

The Commonwealth has always taken the view that one of the central policy questions in the area of migration has been the question of 'queue jumping', so it is ironic that, in what one might see as an example of litigious 'queue jumping', the High Court was asked to address the validity and effect of the privative clause legislation before it heard *NAAV*. This occurred, without the benefit of intermediate court consideration, in two cases brought in the Court's original jurisdiction, which the Court handed down together on 4 February 2003.[4]

In this paper, I propose to update my previous paper[5] by examining the High Court's decisions and their impact on the law of privative clauses. As will be seen, in practical terms, I think the recent decisions settle very little of the uncertainty surrounding privative clauses in Australian law. Most of the issues remain to be

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decided by the High Court, probably in those of the *NAAV* cases that find their way to the Court on appeal.

Privative Clauses – A Brief History

It is desirable first to put the problems raised by privative clauses in their context. The problems raised by privative clauses have been compared to the classical philosophical conundrum of what happens when an 'irresistible force' meets an 'immovable object'?[6]

The 'irresistible force' is the principle of parliamentary supremacy. Parliament has a general, plenary power to make laws 'subject to the Constitution' and it is well established that an argument that a particular law is unfair or unjust or wrong or ill-advised is beside the point of whether the law is valid.[7]

The 'immovable object' is the principle of the rule of law by which is meant, in this context, that it is for the courts to have the final word on the interpretation of the law in its application to particular cases. The role of the courts in judicial review in this sense is constitutionally entrenched by the presence, in s75(v) of the Constitution, of the High Court's original jurisdiction in all matters, 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. The High Court has held that this entrenches the Court's power to review decisions by Commonwealth officials and bodies for 'jurisdictional error', by granting what it now calls the 'constitutional writs' of mandamus and prohibition.

When Parliament invests a particular administrative decision-maker with power to make a decision under a statute and then says, in what is called a 'privative clause', that the decision is final and shall not be questioned in the courts, these two principles come into conflict: a 'supreme' parliament should be able to pass such a law; but the courts must retain the final word on the legal validity of administrative action. Which principle prevails?

Hickman

In what some commentators have seen as an innovative but expedient compromise,[8] the High Court appeared to reconcile these conflicting principles in the 1945 case of *R v Hickman, ex parte Fox and Clinton* ('***Hickman***').[9] In that case, the National Security (Coal Mining Industry Employment) Regulations 1941 (Cth)[10] conferred on Local Reference Boards the power to settle disputes between employers and employees 'in the coal mining industry'.[11] Regulation 17 contained a classic privative clause – decisions of the Local Reference Boards were:

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

Mr and Mrs Fox were general haulage contractors who sometimes carried coal. They sought a writ of prohibition to prevent a Local Reference Board from holding a hearing to settle a dispute in which they were involved. In spite of the privative clause, the Court unanimously granted prohibition on the basis that the dispute was not 'in the coal mining industry'. In coming to this conclusion, the Court did not find

the privative clause invalid, but instead sought to reconcile it with the Local Reference Board's limited grant of dispute resolution power through a process of statutory interpretation. In a statement that came to be described as 'classical',[12] Dixon J (as he then was) set out this interpretive approach:[13]

> 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*. [italics added]

The effect of exposition of Dixon J in *Hickman's* case was 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. Section 75(v) of the constitution demands no less. That lesser measure of control was expressed in the last (italicised) part of the passage quoted above, which became known as the '*Hickman* provisoes'. Thus a privative clause was seen as a kind of drafting device that, instead of outsing the jurisdiction of the courts, expanded the jurisdiction of the decision-maker to the very limits of its possible scope.

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[14], and industrial legislation.[15] In time his doctrine came to be affirmed by other members of the Court[16] and indeed by 1960 Menzies J, as I have already said, described it as 'classical'.[17]

The Hickman provisoes

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.[18]

There is an obvious reason for this. A decision-maker who 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. Section 75(v) of the Constitution invests the High Court with the responsibility of preventing this sort of

thing. But how? The problem was solved by the three 'exceptions' to the operation of a *Hickman* clause stated by Dixon J in his 'classical' formulation.

Bona fides

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.[19] 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[20]; another has suggested that being motivated by an improper purpose might mean the absence of bona fides.[21] However, the content of the concept of good faith has not yet been fully explored.[22] 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.'[23]

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.[24] There is High Court authority, in the *Hickman* context, for the proposition that the true test is whether there has been 'an honest attempt to deal with the subject matter confided' to the decision-maker.[25] There are also three recent decisions of the Full Federal Court in South Australia limiting the scope of 'actual bias' which is an aspect of absence of bona fides[26].

Relation to the legislative subject matter and the specific power

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 similar.[27] The decision must be 'reasonably capable of reference to the power given to the body'. The difference between these two exceptions is subtle. One relates to the statute as a whole and the other to the provisions conferring jurisdiction. For example, if a dog inspector under our hypothetical Dog Licensing Act were given the power to fine owners of unlicensed dogs, but instead decided to confiscate the dogs, the decision would 'relate to the subject matter of the legislation' but not be 'reasonably capable of reference to the power given to' the inspector. Together, the two provisoes mean that it is enough that the decision, on its face, does not exceed the authority of the decision-maker.[28]

That is a less demanding test than whether there was a 'jurisdictional error' of the kind discussed by the House of Lords in *Anisminic*[29] and by the High Court in *Craig v South Australia.*[30] 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. 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.

Inviolable limitations?

Some argue that in certain circumstances there is a fourth *Hickman* proviso. Statutes that confer power on decision-makers empower them to act in certain circumstances and 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. As Dixon J himself said in *Hickman*: [31]

> 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.

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 the original three set out by Dixon J.[32] The contrary argument is that the competing provision is read merely as indicating what the decision must *attempt* in good faith to do rather than creating a jurisdictional pre-requisite. In the end, it is a matter of statutory construction. For this reason, the so-called 'fourth' proviso to *Hickman*, even if it exists, will not always operate.

Indeed, the Commonwealth has argued that that, by inserting a *Hickman* clause into the *Migration Act*, Parliament was clearly indicating that decisions of the relevant kind should be treated as invalid if, and only if, one of the first three *Hickman* conditions is not met. The use of a *Hickman* clause evinces 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 to be no other 'inviolable limitations'.

The Migration Act Privative Clause

Section 474 of the *Migration Act* was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) and came into effect on 2 October 2001. It contains the following privative clause:

> (1) A privative clause decision:
> (a) is final and conclusive; and
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

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

The similarity between sub-s (1) and the clause in *Hickman* was by no means coincidental, as the Minister's Second Reading Speech made clear:[33]

> 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.

In practice, the decision is lawful provided:

- the decision-maker is acting in good faith;

- the decision is reasonably capable of reference to the power given to the decision-maker – that is, the decision-maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member;

- the decision relates to the subject matter of the legislation – it is highly unlikely that this ground would be transgressed when making decisions about visas since the major purpose of the Migration Act is dealing with visa applications; and

- constitutional limits are not exceeded – given the clear constitutional basis for visa decisions making in the Migration Act, this is highly unlikely to arise.

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

The view of the Federal Court – NAAV

As I have said, five of the most senior judges of the Federal Court, Black CJ and Beaumont, Wilcox, French and von Dousa JJ, examined the effect of this privative clause in five cases heard and decided together by the Full Court last year. The cases covered a cross-section of circumstances and grounds of review – procedural fairness, misunderstanding the issue, taking into account an irrelevant considerations, error of law, making a decision under the wrong power and failure to comply with specific statutory requirements – in other words, most of the species of 'jurisdictional error' identified in *Craig v South Australia.*[34]

With respect to the so-called fourth *Hickman* proviso, the question whether the Act contained '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 the judges.

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.[35] 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.[36]

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.' [37] 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 reasonably capable of reference to the power given to the decision-maker.[38]

Black CJ agreed that the inviolable limitations in the *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 so as not to be relaxed by the *Hickman* clause.[39] Wilcox and French JJ reached similar conclusions, although their reasoning was not the same.[40]

With respect to the requirement to act bona fide, I have already said that this is a relatively undeveloped area of law. Indeed, in one of the *NAAV* cases an applicant 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. In *NAAV*, only French J seemed to countenance a potentially significant degree of overlap.[41] The opinions of the other judges in *NAAV* are less clear. It is an issue which may arise in future cases.

With respect to procedural fairness, a majority of the Court (consisting of Black CJ and Beaumont and von Doussa JJ) held that, to the extent that there had been a failure to follow common law rules of procedural fairness in the case before them, that had been cured by the *Hickman* clause.[42] In dissent, Wilcox J 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.[43] Somewhere in between these two positions was French J. He said that: [44]

> 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…

Thus a majority of the Full Federal 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 applied similarly to matters such as misunderstanding a central fact, taking into account irrelevant considerations, and failing to take into account relevant considerations.

The (incomplete) view of the High Court

As I have said, before the appeal from *NAAV*, the High Court addressed the issue of the validity and effect of the privative clause in two cases in the Court's original jurisdiction: *re Minister for Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Applicants S134/2002*[45] and *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*').[46] The first mentioned of these cases was decided upon its facts and the principles laid down in the second case, thus that second case will be the focus of the remainder of this paper.

The plaintiff in *Plaintiff S157* was a failed visa applicant who claimed that, but for the privative clause (and the new time limits on claims in s 436A of the Act) he would have been able to challenge the decision of the Refugee Review Tribunal ('the **Tribunal**') to not grant him a protection visa on the ground that the Tribunal failed to comply with the rules of procedural fairness. The plaintiff also challenged the new time limits on applications in the High Court's original jurisdiction in s 468A. Gummow J stated a case on these two issues to the Full Court.

The plaintiff's primary argument with respect to the privative clause was that it was directly inconsistent with the terms of s 75(v) of the Constitution and was thus wholly invalid.

The Commonwealth argued that, consistent with the clear legislative intent and the history of the *Hickman* doctrine, s 474 had the effect of expanding the Tribunal's jurisdiction such that it had the power to make any decision that was a bona fide attempt to exercise its power, that related to the subject matter of the Act (ie related to migration decisions) and that was reasonably capable of reference to the power given to the Tribunal by the Act. Thus, even if the Tribunal had not fully complied with the rules of procedural fairness, this would not have been a ground for judicial review of the Tribunal's decision.

The judgments

The Court unanimously rejected the plaintiff's argument and upheld the validity of the privative clause in s 474. However, in doing so, the Court disagreed with the Commonwealth's view of the effect of the privative clause upon the Tribunals' jurisdiction and thus the grounds of review available to an applicant for review of a Tribunal decision.

The Court delivered three judgments: a joint majority by Gaudron, McHugh, Gummow, Kirby and Hayne JJ and separate concurring judgments by Gleeson CJ and Callinan J.

The joint majority (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

The joint majority confirmed that the presence of a privative clause in a statute required the Court to attempt, as a matter of statutory construction, to reconcile the privative clause with the other terms of the Act.[47] Further, the joint majority also affirmed that the presence of a privative clause may mean that certain statutory requirements and prerequisites for decision-making, which would otherwise invalidate a decision if not complied with, become merely guidelines for decision-making.[48]

However, the joint majority rejected the Commonwealth's argument that the privative clause expanded the Tribunal's jurisdiction, or impliedly repealed other requirements in the Act, so that the only restrictions upon the Tribunal's decision-making power were those in the first three *Hickman* provisoes – that is, that the decision be a bona fide attempt to exercise the Tribunal's power, that it be related to the subject matter of the Act and that it was reasonably capable of reference to the power given to the Tribunal by the Act. The joint majority wrote:[49]

> Rather, the position is that the 'protection' which the privative clause 'purports to afford' will be inapplicable unless those provisos are satisfied. And to ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause in question. Thus, contrary to the submissions for the Commonwealth, it is inaccurate to describe the outcome in a situation where the provisos are satisfied as an 'expansion' or 'extension' of the powers of the decision-maker in question. [footnotes omitted]

Thus, the *Hickman* provisoes represent the outer maximum of a decision-maker's *possible* jurisdiction, a bare minimum for judicial review. They represent the limit of the jurisdiction which a decision-maker *may* have, but not necessarily the limit which it *does have* where the statute contains both a privative clause and other apparent limitations on the decision-maker's power. The actual limits of a decision-maker's power will lie somewhere between the *Hickman* provisoes and any apparent limits provided for in the statute – determined in each case by a process of interpretative reconciliation.

Then, when it applied these principles to the case at hand, the joint majority did something very strange. The joint majority said this:[50]

> When regard is had to the phrase 'under this Act' in s474(2) of the Act, the words of that sub-section are not apt to refer either to decisions purportedly made under the Act or, as some of the submissions made on behalf of the Commonwealth might suggest, to decisions of the kind that might be made under the Act.

They then went on to say: [51]

> Once it is accepted, as it must be, that s474 is to be construed comformably with Ch III of the Constitution, specifically s75, the expression 'decisions[s] … under this Act' must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act.

On its face, this is remarkable reasoning. It would certainly astonish administrative lawyers to be told that a decision infected by jurisdictional error was not a 'decision under an enactment' for the purposes of the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.[52] Does this mean that all the grounds of review that the Court found in *Craig* may give rise to jurisdictional error – for example failure to accord procedural fairness, taking into account irrelevant considerations or failing to take account of relevant considerations? No. In the very next paragraph, the joint majority said:[53]

> Thus, if there has been jurisdictional error because, for example, of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints', the decision in question cannot properly be described in the terms used in s474(2) as 'a decision … made under this Act' and is, thus, not a 'privative clause decision' as defined in ss474(2) and (3) of the Act.
>
> To say that a decision that involves jurisdictional error is not 'a decision … made under [the] Act' is not to deny that it may be necessary to engage in the reconciliation process earlier discussed to ascertain whether the failure to observe some procedural or other requirement of the Act constitutes an error which has resulted in a failure to exercise jurisdiction or in the decision maker exceeding jurisdiction.

So, the privative clause does not apply to a decision infected by jurisdictional error; but what constitutes jurisdictional error is determined by interpreting the Act in the light of the privative clause. This looks like the expanded, four provisoes version of *Hickman* expressed in a form of circular reasoning – the privative clause does not apply to decisions that are not a bona fide attempt to exercise power, do not relate to the subject matter of the Act, are not reasonably capable of reference to the power given to by the Act *or contravene an inviolable limitation or imperative duty laid down by the Act*.

Then in one paragraph, the joint majority applies this reasoning to the plaintiff's claim of a breach of the rules of procedural fairness:[54]

> Because, as this Court has held, the constitutional writs of prohibition and mandamus are available only for jurisdictional error and because s 474 of the Act does not protect decisions involving jurisdictional error, s 474 does not, in that regard conflict with s 75(v) of the Constitution and, thus, is valid in its application to the proceedings which the plaintiff would initiate. The plaintiff asserts jurisdictional error by reason of a denial to him of procedural fairness and thus s 474, whilst valid, does not upon its true construction protect the decision of which the plaintiff complains. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a 'privative clause decision' within s 474(2) of the Act.

What is really surprising is that, apart from an early paragraph in which the joint majority *describes* the plaintiff's claim,[55] this paragraph is the only place in the whole of the joint judgment in which the phrases 'procedural fairness' or 'natural justice' appear. We are told that procedural fairness is an inviolable limitation upon decision-makers under the Act, but we do not know why and we do not know what other inviolable limitations there may be nor whether it applies to every failure to render procedural fairness, however minor. As will be seen, Callinan J supports a distinction between categories of denial of procedural fairness. On reading the joint judgment, one begins to sympathise with Sir Anthony Mason's recent comments about judicial reasoning that 'conceals rather than reveals the reasoning process.'[56]

The concurring judgment of Gleeson CJ

The question of why procedural fairness was an 'inviolable limitation' was addressed by Gleeson CJ in his separate judgment. He said:[57]

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

Gleeson CJ identified the 'relevant principles of statutory construction' in this case as:

(a) **International law:** where a statute is enacted pursuant to Australia's international obligations, such as the Migration Act with respect to refugees, in the case of ambiguity the Court should favour an interpretation that accords with those international obligations.[58]

(b) **Fundamental rights:** the Court should not impute to Parliament an intention to abrogate or curtail fundamental human rights without clear, unambiguous and unmistakable language.[59]

(c) **Rule of law and access to justice:** the fundamental importance to the rule of law of judicial review and thus the Court should not impute to Parliament an intention to deprive citizens of access to the courts without clear words or necessary implication.[60]

Having examined the general scheme of the Act in the light of these principles, Gleeson CJ concluded that the presence of the privative clause was insufficient to enable him to conclude that the Tribunal was not bound by the rules of procedural fairness. If Parliament wished to circumscribe the Tribunal's obligations of procedural fairness, it would have to say so more clearly.[61]

The concurrence of Callinan J

Callinan J also held that privative clause did not apply to the plaintiff's action but he also held that, '[i]t may be … that to attract the remedies found in s75(v) of the Constitution when jurisdictional error is alleged, no less than a grave, or serious breach of the rules of natural justice will suffice, a matter which it is unnecessary to decide at this stage of proceedings.'[62] This may appear to be a similar position to that of French J in *NAAV* – that the presence of the privative clause may pare down the requirements of natural justice.[63] However Callinan J appears to be raising the more fundamental point that the constitutionally protected writs in s75(v) may only extend to a limited form of natural justice and that, since a privative clause could constitutionally exclude all review apart from that under the 'constitutional writs' in

the High Court, such a clause would have the effect, through a different route to that taken by French J in the Federal Court, of paring down the requirements of procedural fairness.

Implications

When he was still President of the New South Wales Court of Appeal, Kirby J said the following in a case on the interpretation of an industrial relations statute:[64]

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

In *Flaherty v Girgis*, Mason ACJ and Wilson and Dawson JJ cast doubt on this principle on the basis that, 'the difficulty is determining the existence of parliamentary approval'.[65] However, one would be hard pressed to think of a case in which the 'existence of legislative approval' was clearer than that of s 474 of the Migration Act. The Courts interpreted the same privative clause as in s 474 in *Hickman* as having a certain meaning. Taking the hint, Parliament re-enacted those same words with the clear intention – made crystal clear by the Minister's Second Reading Speech and the Explanatory Memorandum – that it be interpreted in the same way. The Court told Parliament that a *Hickman* clause was code for giving decision-makers jurisdiction to make any decision that was bona fide and related to the subject matter of the legislation and the grant of power and Parliament duly cooperated by adopting the code.

True it is that the High Court appears to have nailed its colours to the mast of the 'four proviso' version of the *Hickman* doctrine; whereas the Commonwealth took the view that there were only three provisoes. But, as I have said, the so-called fourth proviso is a matter of statutory interpretation in each case and there will be cases in which the fourth proviso has no content. Given the clear intention of Parliament in enacting s 474, one would have thought that this was a case in which the fourth proviso had little or no content.

Nevertheless, after the High Court's privative clause decisions we now know procedural fairness is an 'inviolable limitation' upon decision-makers under the Act as then drafted. The High Court has said that it requires Parliament to make its intentions absolutely clear if it wants to exclude or limit obligations of procedural fairness. The Court has removed from the Commonwealth's armoury the convenient drafting device of the *Hickman* 'code' – but it has made it clear that Parliament can exclude or limit procedural fairness (and presumably other limitations on administrative discretion) by using unmistakably clear language.[66]

This Parliament has done by passing the *Migration Legislation Amendment (Procedural Fairness) Act 2002*. This legislation amends the Act to provide that the provisions of certain explicitly outlined requirements in the Act are all that is required for a decision-maker to comply with the hearing rule of natural justice. This, I would submit, is exactly the sort of explicit language that the Court has said is required to narrow the ambit of procedural fairness.[67] These amendments had not yet come into

effect with respect to the plaintiff in the High Court privative clause cases and were thus not there considered.

However, the question of what other limitations on jurisdiction apply in the wake of the privative clause remain to be decided. Unlike the Federal Court in *NAAV*, the High Court did not have the benefit of a wide cross section of 'test cases' and many of the issues in *NAAV* are yet to be decided in the High Court. Gleeson CJ acknowledged as much when he said:[68]

> As French J observed in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, the Act is 'replete with official powers and discretions, tightly controlled under the Act itself and under the Regulations by conditions and criteria to be satisfied before those powers and discretions can be exercised'. In that case, and a number of related cases heard at the same time, the Full Court of the Federal Court dealt with several different kinds of challenge to decisions under the Act, and the operation of s 474 in relation to each of them. Here we are concerned with only one kind of challenge, involving a claim of denial of natural justice. A rejection of the Commonwealth's global approach to the operation of s 474 does not mean that the opposite conclusion follows in relation to every possible kind of challenge to a decision.

It may be – now that the *Hickman* doctrine has been held to require such a subjective judgment as to which requirements in the Act are and are not 'inviolable limitations' – that the Parliament will choose to put the issue beyond doubt by passing similar legislation with respect to other possible grounds of review.

Conclusion

Thus, in practical terms, the High Court privative clause decisions come to very little. We now know that the High Court adopts the 'four proviso' version of the *Hickman* doctrine - where a statute contains both a privative clause and specific limitations on a decision-maker's power, the limits of the decision-maker's power will lie somewhere between the first three *Hickman* provisos and any apparent limits provided for in the statute – determined in each case by a process of interpretative reconciliation. We know that procedural fairness applies under the old Act, but we are yet to find out whether it applies now that Parliament has passed the *Migration Legislation Amendment (Procedural Fairness) Act*. And all the other issues dealt with by the Federal Court in *NAAV* remain to be decided, perhaps in one or more of the four *NAAV* cases in which special leave to appeal to the High Court has been sought.

All the queue jumping seems to have achieved for the law is the multiplication of further litigation.

Endnotes

1 (2002) 34 *AIAL Forum* 11.
2 (2002) 193 ALR 449; [2002] FCFCA 228 (15 August 2002).
3 Black CJ, Beaumont, Wilcox, French and von Dousa JJ.
4 *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; 195 ALR 24 and *Re Minister for Immigration and Indigenous Affairs; ex parte Applicants S134/2002* [2003] HCA 1; 195 ALR 1.
5 Op cit n 1.

6 G Loughton, 'Privative Clauses and the Commonwealth Constitution: A Primer', unpublished paper delivered to the Australian Government Solicitor's Constitutional Law Forum at Old Parliament House in Canberra on 23 October 2002.
7 *Nelungaloo Pty Ltd v Commonwealth* (1947) 75 CLR 495 at 503-504 (Williams J): 'It is trite law that the powers conferred upon the Commonwealth Parliament by s51 of the Constitution are plenary powers of legislation as large and of the same nature as those of the Imperial Parliament itself.' See also *R v Burah* (1878) 3 App Cas 889 at 904; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
8 See for example, M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed, LBC Information Services, Sydney, 2000) at 689; A Mason, 'The Foundations and Limitations of Judicial Review' 31 *AIAL Forum* 1 at 20; HWR Wade and CF Forsyth, *Administrative Law* (7th ed, Oxford Clarendon Press, 1994) at 742; but note the insistence of Dixon J that, 'there is nothing artificial in such an interpretation' in *The King v Murray; ex parte Proctor* (1949) 77 CLR 387 at 146.
9 (1945) 70 CLR 598.
10 Made under *National Security Act 1939* (Cth).
11 Regulation 14.
12 *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 455 (Menzies J).
13 *Hickman* (1945) 70 CLR 589 at 614-5.
14 *The King v The Commonwealth Rent Controller; ex parte National Mutual Life Association of Australia Ltd* (1947) 75 CLR 361 at 369 (Latham CJ, Dixon J); *The King v Central Reference Board; ex Parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123 at 146 (Dixon J*); The King v Murray; ex parte Proctor* (1949) 77 CLR 387 at 398, 400 (Dixon J).
15 *The King v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 249 (Dixon J); *The Queen v Australian Stevedoring Industry Board; ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 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 at 443, 446 (Dixon CJ).
16 *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 at 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 at 252-253 (Kitto J); *North West County Council v Dunn* (1971) 126 CLR 247 at 269 (Walsh J).
17 *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 455 (Menzies J).
18 See *The King v Commonwealth Rent Controller; ex Parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361 at 369 (Latham CJ, Dixon J).
19 See *SBAP v Refugee Review Tribunal* [2002] FCA 590 at [49] (Heerey J).
20 *NAAX v MIMA* [2002] FCA 263 (Gyles J).
21 *SBAP v Refugee Review Tribunal* [2002] FCA 590 (Heerey J); and see also HWR Wade and CF Forsyth *Administrative Law* (7th ed, Oxford Clarendon press, 1994) at 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 at 287 (Deane, Gaudron and McHugh JJ).
22 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 249 (Mason CJ). See also *Smith v East Elloe Rural District Council* [1956] AC 737 at 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'.
23 *Biddulph v The Vestry of St George, Hanover Square* (1863) 33 LJ Ch 411 at 417.
24 *NAAP v MIMA* [2002] FCA 805 (Hely J).
25 *The King v Murray; ex parte Proctor* (1949) 77 CLR 387 at 398 and 400 (Dixon J); and see *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 249-250 (Mason CJ).
26 *Minister v SBAN*, *Minister v WAAK* and *Minister v WAAG* [2002] FCAFC 431.
27 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 287 (Deane, Gaudron, McHugh JJ).
28 *The King v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 249 (Dixon J).

29 *Anisminic and Foreign Compensation Commission* [1969] 2 AC 147 at 171 (Lord Reid).
30 *Craig v South Australia* (1995) 184 CLR 163 at 176-179 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).
31 *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 597 at 616 (Dixon J).
32 *The King v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 (Dixon J); *The Queen v Coldham; ex parte Australian Workers' Union* (1982) 153 CLR 415 at 419 (Mason ACJ, Brennan J).
33 *Commonwealth Parliamentary Debates*, *House of Representatives*, 26 September 2001 at 31, 561.
34 *Craig v South Australia* (1995) 184 CLR 163 at 176-179 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).
35 [2002] FCAFC 228 at [15] (Black CJ).
36 [2002] FCAFC 228 at [624].
37 [2002] FCAFC 228 at [625].
38 [2002] FCAFC 228 at [626].
39 [2002] FCAFC 228 at [30]-[31], [37].
40 See [2002] FCAFC 228 at [366], [377] (Wilcox J), [524], [579], [592] (French J).
41 [2002] FCAFC 228 at [527].
42 [2002] FCAFC 228 at [113] (Beaumont J), [638], [648] (von Doussa J). On this point Black CJ agreed with von Doussa J at [4].
43 [2002] FCAFC 228 at [329]-[331].
44 [2002] FCAFC 228 at [536]; and see also [555]-[556].
45 [2003] HCA 1.
46 [2003] HCA 2.
47 [2003] HCA 2 at [60].
48 [2003] HCA 2 at [69].
49 [2003] HCA 2 at [64].
50 [2003] HCA 2 at [75].
51 [2003] HCA 2 at [76].
52 I am indebted to Stephen Gaegler SC, of the New South Wales Bar, for pointing out this contradiction between the interpretation of the phrase 'decision under this Act' in the Act and 'decision under an enactment' in the *Administrative Decision (Judicial Review) Act*.
53 [2003] HCA 2 at [76]-[77].
54 [2003] HCA 2 at [83]
55 [2003] HCA 2 at [45].
56 Sir Anthony Mason, speech at the dinner honouring the centenary of the High Court in Sydney, 28 February 2003. Text available at <http://www.justinian.com.au/Mason_speech.html>.
57 [2003] HCA 2 at [26].
58 [2003] HCA 2 at [29].
59 [2003] HCA 2 at [30].
60 [2003] HCA 2 at [31]-[32].
61 [2003] HCA 2 at [37].
62 [2003] HCA 2 at [159].
63 See [2002] FCAFC 228 at [536].
64 *Public Service Association of New South Wales v Industrial Commission of New South Wales* (1985) 1 NSWLR 627 at 640.
65 (1987) 162 CLR 574 at 594. See also *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576 at 584 (PC).
66 See, for example, [2003] HCA 2 at [59].
67 [2003] HCA 2 at [24] (Gleeson CJ).
68 [2003] HCA 2 at [36].