RESTRICTIONS on JUDICIAL REVIEW

PRIVATIVE CLAUSES

Federal Level

RULE: a privative clause does not purport to oust review in cases where decisions are infected by jurisdictional error (\textit{Plaintiff S157})

- \textit{s 75(v)} preserved to HC an \textbf{entrenched minimum provision of judicial review} jurisdiction to ensure that officers of the Commonwealth neither exceeded nor neglected ‘any jurisdiction which the law confers on them’
- Parliament cannot deprive courts of this jurisdiction to issue the constitutional remedies on the basis of jurisdictional error

\textit{Plaintiff S157}

\textbf{Was there JE e.g. PF? Did matter concern human rights?, argument against very wide discretionary powers}

FACTS: \textit{Migration Act} privative clause had been drafted in similar terms to the clause in \textit{Hickman}, in the hopes that it would be interpreted in the same way (intention was to take advantage of interpretation in \textit{Hickman})

\textit{s 474} of the Migration Act provided that: \textit{A privative clause decision}:

\begin{itemize}
  \item \textit{(a)} is final and conclusive;
  \item \textit{(b)} must not be challenged, appealed against, reviewed, quashed or called into question in any court; and
  \item \textit{(c)} is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account."
\end{itemize}

A \textbf{privative clause decision} was defined as ‘a decision of an administrative character made, proposed to be made, or required to be made ... under this Act …’
s 486A required applications to the High Court in respect of a privative clause decision to be made within 35 days, which could not be extended.

HELD:

- Reinterpreted the *Hickman* principle, placing more emphasis on the constitutional significance of s 75(v).
  - *Hickman provisos* are conditions which must be satisfied before the ‘protection’ which the privative clause ‘purports to afford’ will be applicable
  - Thus suggests that the provisos are threshold requirements of some sort which must be met before any reliance can be placed on a privative clause

- The Migration Act privative clause applied only in relation to decisions made ‘under the Act’
  - A decision infected by JE is not a decision ‘under the Act’ – because a jurisdictionally flawed decision is ‘regarded as no decision at all’
  - Court emphasised that jurisdiction of the HC under s 75 can’t be removed, and that parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction (THIS IS AN ARGUMENT AGAINST VERY WIDE DISCRETIONARY POWERS TOO – goes to separation of powers)

- Therefore need to determine whether there was a JE
  - The alleged JE here was a denial of procedural fairness and thus the privative clause did not protect the challenged decision from review

- Suggestion that when matter concerns human rights less likely to limit s 75(v) jurisdiction of the court/limit people’s access to the court
  - Gleeson CJ: People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness

- Remedies:
  - *Prohibition* and *mandamus* are limited to jurisdictional error
  - *Certiorari* available for JE, but not for non-JE on the face of the record
  - Court also noted that an *injunction* may be issued under s 75(v) on wider grounds than mandamus or prohibition, and not limited to JE
    - The Hickman proviso that a decision has to be made bona fide ‘presumably [means] s 474 permits review’ for ‘fraud, bribery, dishonesty or other improper purpose’. [although it is likely these would constitute jurisdictional error anyway!]
    - Suggests very limited role for injunction, and in almost all circumstances a privative clause is only going to apply to valid decisions which aren’t affected by JE
    - Additionally, in *Futuris*, the court indicated that constitutional injunction might be limited to jurisdictional error. Therefore very limited
• In response to suggestion that Parliament could defer a discretion on the minister as to whether non-citizen people could come to Australia or not:
  o Would appear to lack that hallmark (the minimum requirement that should exist) in the exercise of legislative power …namely the determination of the ‘content of a law as a rule of conduct or a declaration as to power, right or duty’.
  o Moreover, there would be delineated by the Parliament no factual requirements to connect any given state of affairs with the constitutional head of power.

State level

**Rule:** judicial review of State Supreme Courts is protected in the same way that judicial review jurisdiction of the HC was protected by s 75(v) (Kirk)

• Despite there being no constitutional provision analogous to s 75(v) to protect the supervisory jurisdiction of the Supreme Courts of the states

**Kirk**

**Held:**

• Court held that if this clause prevented review for jurisdictional error it would be invalid. Based on statutory interpretation, held that this privative clause did not.

• **Three reasons** for same entrenched minimum provision of judicial review at state level:
  o Chapter III of Constitution requires the continuing existence of a judicial institution which answers the constitutional description of the ‘Supreme Court of a State’
    ▪ This is because s 73(ii) provides that the High Court shall have appellate jurisdiction from ‘the Supreme Court of any state’
  o Legislature cannot deprive such an institution of its character as Supreme Court
  o The power to ensure that inferior courts and tribunals stayed within the limits of their authority was an essential or defining characteristic of state Supreme Courts

• Reconcentrated view of judicial review in Australia such that **jurisdictional error** is an important concept in Cth admin law and State admin law

• Need to prevent the creation of ‘islands of power’ and development of ‘distorted positions’, due to rule of law

**Alternatives to Privative Clauses**
**No invalidity clauses**

Indicates that an act done or decision made in breach of a statutory requirements or other administrative law norm does not result in the invalidity of that act or decision.

- Removes basis for those remedies that rely on invalidity.
- The general approach is to focus on ordinary methods of statutory interpretation given in *Project Blue Sky: Futuris*
  - A no invalidity clause, properly interpreted, **could mean that breach of statutory requirements only result in non-jurisdictional error**: *Futuris*
- But a broad no-invalidity clause may run into problems referred to in allowing broad discretion on administrative decision makers

**Note that if there is an additional requirement then more likely no invalidity clause will be valid:**

- In *Palme*, it was held that an explicit no invalidity clause, attached to a **requirement to give reasons**, meant that breach of the requirement did not amount to an excess or denial of jurisdiction and thus the constitutional writs were not available
- In *Futuris*, provision for merits review by the AAT and appeals to the Federal Court after AAT were important in accepting validity of s 175

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**Commissioner of Taxation v Futuris Corp**

FACTS: s 175 Income Tax Assessment Act (Cth) provided that ‘the validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with’. Additionally, other provisions in Part IVC provided for merits review by the AAT and appeals to the Federal Court after an AAT review, which went beyond jurisdictional error.

HELD:

- Accepted validity of s 175: Joint judgment was willing to read s 175 alongside provisions providing for alternative means of redress (in Part IVC) through the AAT, to say that ‘validity of an assessment is not affected by failure to comply with any provision of the Act, but a dissatisfied taxpayer may object to the assessment in the manner set out in Pt IVC’
  - s 175 was to be read with provision for review under Part IVC ‘in the manner indicated in *Project Blue Sky*’ (i.e. ordinary methods of statutory interpretation)
  - Need to ask whether it was a purpose of the Act that a failure by the Commissioner in the process of assessment to comply with provisions of the Act renders the assessment invalid
- However, the s 175 did not apply to the decision in question
  - There had not been an ‘assessment’ for the purposes of s 175. An Assessment must be sufficiently final and did not include a deliberate failure to comply with the provisions of the Act.
  - Hence such errors are not protected by s 175 and can give rise to jurisdictional error.
Demonstrates that courts are going to interpret no invalidity clauses in very restrictive fashion in terms of what decisions the clause applies to

- A no invalidity clause, properly interpreted, could mean that breach of statutory requirements only result in non-jurisdictional error

**No Duty to Consider Clauses**

A decision maker does not have a duty to consider whether to exercise a particular power, whether requested to do so or in other circumstances.

- No duty to consider, so mandamus is not available, and certiorari will therefore similarly have no utility

*Plaintiff M61/2010E v Commonwealth*

FACTS: No consideration clause in the *Migration Act* which related to the minister’s powers to (1) allow an ‘offshore entry person’ to make a valid application for a visa; and (2) grant a visa to such a person.