PRIVATIVE CLAUSES

What is a privative clause? → Introduction

- A PC seeks to limit or exclude the courts power to conduct JR. It is a statutory attempt to oust the jurisdiction of a particular court to challenge an administrative decision.
- Plt enacts these in situations where they want to ensure the DM’s decision is final and will not be subject to JR
- In order to effectively (Prima Facie) oust JR, the PC must refer to JR and not any other form of appeal (*Hockey v Yelland*), and must also refer to all decisions, not only legally made ones (*Anisminic*)

What is the issue with PCs?

- PCs are controversial because they have the potential to *reduce the means* by which a person wishing to challenge an administrative decision may *seek JR of that decision*
- The law regarding PCs is unclear due to the *contradicting desires of Plt*, who enacts the clauses, and the courts, who invariably attempt to read them down

Courts arguments for why they should be able to PCs down

* They offend against a number of principles of the CL, most notably:

Separation of powers
- **PCs improperly limit the entrenched function of the courts**, which is to interpret the law and decide if actions were legal
- **Admin decisions need to be evaluated by the courts** – not for the executive to decide if they were made legally
- **If executive decides** the jurisdiction, they are *carrying out the courts’ role* of statutory interpretation

Rule of law
- From the perspective of the rule of law, privative clauses are subversive as the rule of law is concerned with transparency, accountability and the fact that no one is above the law (*A.V. Dicey*) including administrative DMs. Yet privative clauses essentially place administrative DMs above the law, allowing them to make illegal decisions w/o being subject to review
- **PC in Migration Act** described as “fascinating legislative derogation from the rule of law” (*The Rule of Law, Saunders & Le Roy*)

* JR is a necessary part of our govt, and our society
- **Govt** is limited in what it can do by written rules (Consti) and unwritten principles (Principle of legality).
- Therefore it is important to define the limits on power given to DMs, and allow JR to ensure they act within their power and are not given too much discretion, especially regarding decisions relating to fundamental human rights.
- **JR maintains public confidence** in the system.
PC cuts of only avenue of review, often no other appeal rights. Render unfair decisions unreviewable.

The purpose of section 75(v) was to ‘make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Cth from exceeding federal power’ – Dixon J in *Bank of NSW v Cth*

* PC’s cause inconsistency and confusion
  - Tensions b/w rule of law and SOP, and Pltry sovereignty
  - Case law is not consistent
  - Courts objectives do not match Plt
  - Leads to artificial reading down of Pltry intention
  - No general rule for PCs (*Plaintiff S157*) – interpret each separately.
  - Applicant may not know whether a PC will actually exclude their right to review.

**Legislature’s arguments for enacting PCs**

*Notion of Parliamentary supremacy*
  - Which contends that Plt has unlimited legislative power
  - As such, if Plt wants to oust the jurisdiction of the courts to intervene through PCs, it should be able to
  - It has been argued by some that judicial interpretation of PCs narrowly, such as in the case of *Anisminic*, is contrary to the doctrine of parliamentary sovereignty

*Important in politically sensitive areas*
  - Can be enacted in areas like migration and labour relations, which are politically sensitive
  - This was seen in the amendments to the Migration Act in 2001, which attempted to reduce the scope of review (*Dr Caron Beaton-Wells: Restoring the Rule of Law*)
  - Arguably, due to polycentric nature of these decisions, these decisions should be controlled by Plt and not the courts JR itself

*Legislature seems limits in the courts*
  - Legislature enact PCs because the perceive limitations within JR itself
  - Certainly, JR is no panacea (Crock and Santow)
  - JR can only be used to remedy errors relating to the process of decision-making rather than the merits of the decision
  - At most, success in JR will result in no more than the referral of a matter back to the original DM

*Important WRT specialist bodies*
  - Where the ability to make certain decisions requires considerable expertise in particular field, the legislature will argue that they want to be sure that the relevant DM is sufficiently qualified
  - Legislature will argue that a court, which lacks the same expertise and direction, should not be able to review these decision (*Dr Caron Beaton-Wells: Restoring the Rule of Law*).
  - However, it could be argued that the HC hears so many political cases, eg regarding migration, that they do have the requisite expertise.
  - Moreover *Heydon J* in *Kirk’s* case: criticised specialist courts
- Lose touch with the traditions, standards and mores of the wider profession and judiciary
- Become over-enthusiastic about vindicating the purposes for which they were set up and exult that purpose, above all other considerations.
- Para [122]: cited Walker in The Rule of Law (Melb Uni Press, 1988, p35): be suspicious of specialist courts and tribunals. Usually established because, if the cases were conducted in a normal court, Plt wouldn't get the outcome it wanted.

*Where there is a right to MR, JR isn’t needed*
- This is in line with the doctrine of exhaustion, which states that avenues of review should be exhausted available avenues before another review is sought.
- Under ADJR remedies (s16) courts have discretion to refuse a remedy, and this may be done if the applicant failed to seek MR first.
- However there is nothing to prevent them from seeking JR, and clogging up the courts with matters which are more appropriately heard in a different jurisdiction.

Privative Clauses and ADJR
- In the ADJR Act, the tension is arguably not that pronounced as Plt has conferred the jurisdiction to review decisions on the federal court by statute and therefore as a matter of principle, there is nothing offensive in Plt taking that jurisdiction away by the same method.
- *Campbell and Groves* too, asserted that where a jurisdiction is defined by statute and thus Plt brought it into being, Plt can remove or restrict the jurisdiction previously conferred.

Privative Clauses and jurisdiction of the High Court
- However, the tension is more pronounced when dealing with the inherent jurisdiction of the s 75(v) of the Constitution because the right of review is entrenched in the Constitution.
- Prima facie, it is not possible for Plt to validly restrict or remove that right so courts have had to be creative in their interpretation of PCs to ensure the original juri of the HC is not infringed and to ensure parliamentary supremacy is upheld.