

Not part of the sample, sorry ;)

- **Is there any reason why the court will deny remedies?**
 - Factors (BUT not lightly withheld: *Ainsworth*; *Peko*)
 - More convenient and satisfactory remedy exists
 - If no useful result could ensue (*Ainsworth*)
 - If the party has been guilty of unwarrantable delay
 - If there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made.
 - Discretionary considerations in granting injunction or declaration
 - the extent to which people were benefitted or inconvenienced by the decision;
 - delay in seeking the declaration or injunction;
 - the injustice of the administrative error;
 - economic loss;
 - waiver;
 - the triviality of the matter or futility;
 - whether the declaration or injunction would cause undue hardship or inconvenience to parties and non-parties; and
 - another remedy is more appropriate.
- **Privative clause**
 - Identify the type of clause
 - *S157: s474* defined clauses as "private clause decisions" and applied particular requirements to them (final and unreviewable, not subject to prohibition, mandamus or certiorari)- PRIVATE
 - *Kirk*: decision of Industrial court is "final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal"-PRIVATE
 - *Futuris*: validity of tax assessment not affected by failure to comply-NO INVALIDITY
 - *Graham*: denial of access to evidence upon which Minister had relied on in exercising power- NO EVIDENCE
 - Approach for privative
 - Clause cannot oust review for jurisdictional error, nor limit ability to grant relief under the Constitution

- for jurisdictional error (*S157*)
 - ◆ *S75(v)* entrenched minimum provision of judicial review
 - ◆ ALSO cannot remove state supreme courts' power to grant relief for jurisdictional error as part of integrated court system (*Kirk*)
- CONSIDER if the breach is a jurisdictional error and INVALID from the beginning
 - ◆ If so, privative clause does not apply because it is not a 'decision made under the Act' (*S157* citing *Bhardwaj*)
- Read down the clause for restricted operation rather than invalidity
 - ◆ Construe legislation as whole: privative clause cannot override all other provisions of the Act which would otherwise limit the exercise of powers conferred (*S157*)
 - ◆ CONSIDER presumptions:
 - ◇ Preserving Parliament supremacy
 - ▶ courts must give effect to provision and reconcile privative clause with other provisions of act
 - ◇ Presumed that Parliament did not intend to oust court jurisdiction without express/necessary implication (*S157*)
 - ◇ Consistency with the Constitution
 - ▶ Cannot confer a non-judicial body with power to conclusively determine limits of its jurisdiction (*Boilermakers*)
 - ▶ Cannot validate decision beyond Commonwealth constitutional power
- Approach for no invalidity
 - An intention to make all decisions 'valid' will redefine errors that would have been jurisdictional errors to become non-jurisdictional errors not amenable to judicial review whether they otherwise might have been (*Futuris*)
 - CONSIDER
 - ◆ Scope of clause and what it applies to
 - ◆ Intention of Parliament to be consequences of breach, with regard to language of relevant provisions, scope and purpose of statute (*PBS*)
 - ◆ Is there an alternative review mechanism?
 - ◇ *Futuris*: elaborate review mechanism in Act increased acceptability of the invalidity clause
 - ◆ Bad faith
 - ◇ Invalidity clauses cannot encompass conscious maladministration because there is general requirement to act with care, diligence and honesty (*Futuris*)
- Approach for no evidence
 - A statute cannot operate in practice to preclude a purported exercise of power from judicial scrutiny; this means that they cannot control the disclosure of evidence to a court and enact laws with practical/legal operation of denying the court jurisdiction under *s75(v)* (*Graham*)
 - Test
 - ◆ Whether or not the clause transgresses will depends on the practical impact of the law on the ability of the court to discern lawful exercise of power conferred on officer (*Graham*)
 - ◇ Substance and degree- "substantial curtailment" that shields a decision maker from scrutiny (*Graham*)
 - ▶ Is the excluded info a substantial or sole contributor to the final outcome (*Graham*)
 - ◇ If the restriction is a "blanket or inflexible" one that ignores the importance of the info, and the interest sought to be protected by the confidentiality provision (*Graham*)
 - Invalid to the extent of its substantial curtailment (*Graham*)