

4. 'within a reasonable time' (s 8(3))

## Vic: VCAT Act

s 45(1) 'A person who is entitled to apply to the Tribunal for review of a decision, or to have a decision referred to the Tribunal for review, may request the decision-maker to give the person a written statement of reasons for the decision'

1. Decision reviewable by VCAT
  - o s 42(1) where enabling enactment provides review by VCAT
  - o s 3 'enabling enactment' is an enactment by which it confers jurisdiction on VCAT
2. Person with standing before VCAT
  - o s 48(a): may be invoked by a person entitled to do so by or under an enabling enactment
  - o ^ looking to enabling enactment for standing requirements; Victorian statutes usually say 'a person whose interests are affected'
  - o s 5 defines 'interests affected' broadly
3. 'The findings on material questions of fact that led to the decision, referring to the evidence or other material on which those findings were based (s 46(2))
4. 28 days or such other period as set down in enabling enactment (s 46(1))
  - o s 3 'enabling enactment' is an enactment by which it confers jurisdiction on VCAT

Operates separately from ALA Act, can apply to both

## Remedial options

AAT s 28(5)

- Application to AAT
- AAT may declare the statement to be inadequate, need to make new statement

ADJR s 13(7)

- Application to FCA or FCC
- FCA or FCC may declare the statement to be inadequate, need to make new statement

VCAT s 47

- Application to VCAT
- VCAT may declare the statement to be inadequate, need to make new statement

ALA s 8(4)

- SCV may order person to provide reasons
- SCV can make an order that would have quashed the original decision as if it had been affected by an error of law

## Privative Clauses

### Introduction

Focus shifting to statutory provisions addressed to the judiciary, which limit the ability of the courts to undertake judicial review of administrative action

These provisions appear in the same statute that reposes power to the ODM

Dilemma: how can a statute that reposes necessarily limited powers in an executive actor simultaneously remove or restrict the ability of the courts to supervise those limits?

- Dixon J in *Hickman*: view the privative clause as impliedly expanding the ODM's powers, but only if the decision under review:
  - 'was a bona fide attempt to exercise its power';
  - 'relates to the subject matter of the legislation'; and
  - 'is reasonably capable of reference to the power given to the body'
- BUT subsequent cases held ^ does not apply where there was a refusal to perform an **imperative** duty or where the decision goes beyond **inviolable** limitations or restraints (similar standard as jurisdictional error requirement, which would oust privative clause anyway)
- *Hickman* is no longer the leading Australian approach, it is just a factor
- Current approach is more **constitutional**

Privative clause: a legislative provision that purports to remove the supervisory jurisdiction of the courts

- Often allows the ODM to commit errors that would ordinarily be unlawful
  - Essentially turns what would be a jurisdictional error into a non-jurisdictional errors
- Some provisions *impair* rather than *remove* the supervisory jurisdiction of the courts

Rationale of privative clauses:

- Signals that Parliament considers the finality of administrative decisions to be more important than perfection in the decision-making process
- Signals that Parliament considers a particular tribunal to be the best decision-maker, and that judicial review would be inappropriate
- Politics: e.g. migration

Example of privative clause: *Migration Act*

- **s 474 Decisions under Act are final**
- 1. A privative clause decision:
  - a. Is final and conclusive; and
  - b. Must not be challenged, appealed against, reviewed, quashed or called in question by 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 discretion or not), other than a decision referred to in subsection (4) or (5)...

How does HCA respond to privative clause?

- Dominant approach is to construe the clause as having a limited domain of operation
  - Indicates respect for separation of powers
- *Some* case law of HCA invalidating clauses instead ^

Four pillars of privative clause jurisprudence that enable HCA to avoid invalidation

1. Centrality of the concept of jurisdictional error

- HCA has held that an **administrative decision infected by jurisdictional error will not be protected by privative clause**
- Therefore, if jurisdictional error is found, court CAN conduct judicial review and issue remedies despite privative clause
- 2. General law principles used in statutory interpretation of privative clauses
  - Not for executive tribunal to determine the limits of its own jurisdiction: that is a task for the supervising court
  - A decision infected by jurisdictional error is no decision at all
- 3. Statutory construction
  - Pay close attention to the legal status of the decision to which the privative clause the decision is intended to attach
  - E.g. s 474 *Migration Act* interpreted as: only decisions not infected by jurisdictional error (S157)
- 4. Constitutional principles
  - If privative clause in Cth legislation: s 75(v) 'minimum entrenched provision of judicial review' in the form of the availability of the constitutional writs that cannot be removed by Parliament (S157)
  - If privative clause in state legislation: s 73: State Supreme Courts have a constitutionally guaranteed inherent jurisdiction to issue writs by virtue of their place in the judicial system established under the constitution (*Kirk*)

### Approach

1. Presence of jurisdictional error?
  - Would Parliament have intended that this particular breach would lead to invalidity of the decision? (*Project Blue Sky*)
  - What were the preconditions to, and conditions on, exercise of this power?
2. Materiality (*Hossain*)

### Commonwealth legislation: S157

Statutory construction principles used in S157 from past cases:

- 'under this Act' means decision given legal force and effect by the Act (*Hossain*)
- A decision infected by jurisdictional error is properly to be regarded, in law, as 'no decision at all'

Therefore, a decision infected by jurisdictional error is a purported decision, rather than a decision given legal force and effect by the Act

	<i>Plaintiff S157</i>
Issues	Does the privative clause apply?
Facts	<p><i>Migration Act 1958</i> (Cth)</p> <ul style="list-style-type: none"> <li>• <b>s 474 Decisions under Act are final</b> <ol style="list-style-type: none"> <li>1. A privative clause decision:               <ol style="list-style-type: none"> <li>a. Is final and conclusive; and</li> <li>b. Must not be challenged, appealed against, reviewed, quashed or called in question by any court; and</li> <li>c. Is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account</li> </ol> </li> <li>2. In this section:               <ul style="list-style-type: none"> <li>○ 'privative clause decision' means a decision of an</li> </ul> </li> </ol> </li> </ul>

	<p>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 discretion or not), other than a decision referred to in subsection (4) or (5)...</p> <ul style="list-style-type: none"> <li>• <b>s 486A Time limit on applications to the High Court for judicial review (since amended)</b> <ol style="list-style-type: none"> <li>1. Application to HCA for writ, decision or injunction in respect of a <b>privative clause decision</b> must be made within <b>35 days</b> of actual notification of decision</li> <li>2. HCA must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection 1 outside that 35 day period <ul style="list-style-type: none"> <li>• HCA prohibited from making an order outside of this period</li> </ul> </li> </ol> </li> </ul> <p>P is Bangladesh citizen, arrived in Australia, applied for a protection visa, refused. This decision was affirmed by multiple Tribunals, P wished to challenge this to HCA on the basis that Tribunal breached rules of procedural fairness because it took into account relevant and adverse material without giving P an opportunity to comment.</p> <p>Since s 474 ostensibly precluded judicial review, P brought a challenge to the constitutionality of ss 474 and 486.</p> <ul style="list-style-type: none"> <li>• P argued those sections conflicted with s 75(v) of the constitution.</li> <li>• Minister argues that if properly construed in accordance with <i>Hickman</i> approach, the provisions are consistent with s 75(v).</li> </ul>
Held	Clause read down to not apply
Reasoning	<p><u>Gaudron, McHugh, Gummow, Kirby and Hayne JJ:</u></p> <p><b>s 474</b></p> <p>s 474(1)(c) cannot be read in isolation from the definition s 474(2)</p> <p>s 474(2) does not refer to decisions <i>purportedly</i> made under the Act</p> <p>s 474 must be construed conformably with Ch III of the Constitution, specifically s 75</p> <p>Therefore, 'as a matter of general principle' s 474 'must be read to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act'</p> <p>Applying this, the decision in question cannot be construed as a decision made under this act per s 474(2), which means it falls outside the ambit of s 474(1) and is subject to judicial review</p> <p><b>s 486A</b></p> <p>s 486A also refers to 'privative clause decision' as defined in s 474(2)</p> <p>Therefore, a s 486A does not apply to a decision that involves jurisdictional error</p> <p><b>General principles</b></p> <p>'The jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament'</p>

	<ul style="list-style-type: none"> <li>'Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed'</li> </ul> <p>'the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction'</p> <p>s 75(v) introduces 'an entrenched minimum provision of judicial review'</p> <ul style="list-style-type: none"> <li>Ensures that 'officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them'</li> <li>'The centrality, and protective purpose, of the jurisdiction of this Court in that regard places <b>significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action</b>'</li> <li>'the Court must be obedient to its constitutional function'</li> <li>s 75 'limits the power of the Parliament or of the Executive to avoid, or confine, judicial review'</li> </ul>
Ratio	<p>Privative clauses are subject to the Constitution</p> <ul style="list-style-type: none"> <li>Cannot oust decision infected by jurisdictional error because HCA has jurisdiction to grant relief in such cases under s 75(v)</li> <li>Cannot confer Ch III power on a non-judicial body, i.e. by allowing a decision-maker to determine their own jurisdiction</li> <li>Parliament cannot touch the 'entrenched minimum provision of judicial review' under s 75(v) <ul style="list-style-type: none"> <li>What does 'minimum' mean?</li> </ul> </li> </ul> <p>Since HCA adopted a statutory construction approach rather than constitutional invalidity approach, this judicial decision also applies to privative clause cases brought before all judicial review tribunals, including the Federal Court under s 39B <i>Judiciary Act</i></p>

### State legislation: Kirk v Industrial Court of NSW

	<i>Kirk v Industrial Court of NSW</i>
Issues	Does the privative clause apply?
Facts	<p><i>Industrial Relations Act 1996</i> (NSW): NSW Industrial Court has jurisdiction to hear and determine criminal charges for offences against the <i>Occupational Health and Safety Act 1983</i> (NSW)</p> <ul style="list-style-type: none"> <li><b>s 179 Finality of decisions</b> <ol style="list-style-type: none"> <li>A decision of the Industrial Court is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.</li> <li>...</li> <li>5. This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or</li> </ol> </li> </ul>