Privative clause

- A privative clause is a provision in a statute that aims to prevent or restrict judicial review of administrative or other action, even if that action is flawed or illegal.
- Privative clauses are often found in the most litigated areas, for example
    - Migration Act 1958 (Cth), s 474 (*Plaintiff S157/2002 v Cth* (2003))
    - s 179 Industrial Relations Act (*Kirk v Industrial Court of NSW* (2010))

Reasons for Caution around PC?

- Undermines:
    - fundamental duty of courts to ensure public power is exercised according to law
    - separation of powers
    - right of individual to enforce their legal rights in court
    - human rights protections
- Increases:
    - government power without any check or accountability measure
    - parliamentary sovereignty at expense of rule of law
- Therefore it would appear unconstitutional to seek to deprive the High Court jurisdiction to require officers of the commonwealth to act within the law.

Rationales for Privative Clauses?

- Frees up government to make policy choices free from judicial scrutiny.
- Reduces:
    - high volume of court challenges
    - incentive to mount challenge in order to delay
    - cost of administration of justice
- Enhances:
    - certainty of administrative decisions
    - parliamentary sovereignty

Court's approach to PC (Cth)

- Courts have taken a very restrictive (and highly creative) interpretation of privative clauses.
- *Cth Constitution ('CC').*
    - The s 75(v) *Cth Constitution* has been interpreted as providing for an **'entrenched minimum provision of judicial review'** that must be respected by both Cth and State Parliaments.
    - If read **literally**, any statutory attempt to prevent the issue of these named remedies would be rendered invalid.
    - Yet, PC's interpreted creatively as consistent with CC (despite their terms) to preserve their validity.
    - Current position: Parliament cannot deprive HC of its original jurisdiction to issue the constitutional remedies on the basis of a jurisdictional error
    - This battle will keep going