

Privative clauses: epic fail

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INTRODUCTION

1. This paper discusses the effectiveness of privative clauses in Commonwealth and State legislation in light of the High Court of Australia's modern treatment of that subject in the following trilogy of cases: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*); *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 (*Futuris*); and *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 (*Kirk*).
2. A privative clause is a provision that purports to either restrict or preclude access to courts for judicial review of administrative or judicial exercises of power. There are several different types of mechanisms that can be used to achieve this,¹ but the type of privative clause I am concerned with in this paper, the 'true privative clause', is exemplified by s 474 of the *Migration Act 1958* (Cth) as it stood at the time *Plaintiff S157* was decided. With some minor editing, it stated that:

A decision ... made... under this Act:

 - (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
3. A true privative clause is one that seeks to prohibit a court from either entertaining any form of legal proceeding to impeach a decision, or from issuing specified remedies. Section 474 purported to do both and thus represented a 'double-barrelled' attack upon the supervisory jurisdiction of the courts.²
4. Courts have long struggled with the idea of a statute imposing legal constraints on a public body while simultaneously forbidding courts of law from policing those constraints. As Griffith CJ said in 1909, '[a] grant of limited jurisdiction coupled with a declaration that the jurisdiction shall

* Senior Lawyer, Australian Government Solicitor, Sydney (nick.gouliaditis@ags.gov.au). The views expressed in this article are my own. I should say something about the title of my paper. My grammatical slip (using 'fail' as a noun) is intentional. 'Fail', as an interjection, is a relatively new Internet meme (B Zimmer, 'How Fail Went From Verb to Interjection', *The New York Times*, 7 August 2009, <http://www.nytimes.com/2009/08/09/magazine/09FOB-onlanguage-t.html>). It, either alone or in conjunction with an adjective relevant to the failure, is often superimposed as a caption onto photos or short videos depicting unsuccessful events or people falling short of expectations. And, as one language commentator has observed: "The highest form of *fail* – the *epic fail* – involves not just catastrophic failure but hubris as well." (C Beam, 'Epic Win', *Slate*, 15 October 2009, <http://www.slate.com/id/2202262/>).

¹ Including, e.g., time limits on instituting proceedings: see *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

² E Campbell and M Groves, 'Privative clauses and the Australian Constitution' (2004) 4 OJCLJ 51, 57.

not be challenged seems to me a contradiction in terms'.³ For this reason courts approach privative provisions in legislation with what has been described as 'a suspicion sometimes bordering on hostility',⁴ and typically respond to attempts to oust their jurisdiction by reading down privative clauses and giving them a limited effect.

5. The text of s 474(1) of the *Migration Act* reflected this struggle. It used a variety of formulations to overcome earlier decisions that have read down efforts to exclude courts. The phrase 'final and conclusive' (used in par (a)) has been held to be 'relatively weak' and not to affect the availability of certiorari.⁵ A provision that attempts to oust certiorari (by stating that a decision should not be 'challenged' or 'quashed', etc – such as in par (b)), has been held to only protect against non-jurisdictional errors of law on the face of the record.⁶ But it is difficult to construe provisions that seek to exclude mandamus and prohibition (as in par (c)) as not intended to protect decisions affected by at least some types of jurisdictional error, given those writs are only available in the first place if jurisdictional error is shown.⁷

THE FEDERAL SPHERE: *PLAINTIFF S157*

6. The matter is complicated in the federal sphere by constitutional considerations, especially the conferral on the High Court, by s 75(v) of the Constitution, of original jurisdiction in all matters in which 'a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.⁸ In the words of the Chief Justice in *Plaintiff S157*, s 75(v):

... secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.⁹

7. The joint judgment of five members of the High Court in that case stated that s 75(v) introduces into the Constitution 'an entrenched minimum provision of judicial review' and 'places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action'.¹⁰

³ *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 131 (Griffiths CJ).

⁴ *Svecova v Industrial Commission (NSW)* (1991) 24 ALD 732, 733 (Kirby P).

⁵ *Totalisator Agency Board (NSW) v Casey* (1994) 54 IR 354, 359 (Kirby P).

⁶ *Darling Casino Ltd v NSW Casino Control Authority* (1996) 191 CLR 602, 633 (Gaudron and Gummow JJ).

⁷ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, [41] (Gaudron and Gummow JJ, Gleeson CJ agreeing).

⁸ These constitutional considerations do not apply to federal courts other than the High Court: *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601.

⁹ *Plaintiff S157* (2003) 211 CLR 476, [103] (Gleeson CJ).

¹⁰ *Plaintiff S157* (2003) 211 CLR 476, [103]-[104] (Gaudron, McHugh, Gummow, Kirby, Hayne JJ).

8. So how do you reconcile a provision such as s 474(1)(c) of the *Migration Act* with the irrevocable grant of jurisdiction under s 75(v) of the Constitution?
9. One answer is found in the judgment of Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 (*Hickman*), a case that concerned the jurisdiction of an industrial tribunal created to settle disputes, by arbitral award, in the coal mining industry. Dixon J confirmed that a privative clause could not take away the High Court's jurisdiction to prevent federal bodies acting in excess of their authority. A privative clause could, however, be taken into account in 'ascertaining ... the true limits of the authority of the [tribunal], and whether its decision is void'.¹¹ The outcome of the reconciliation process in *Hickman* was to give the privative clause the following operation, as expressed by Dixon J:

[N]o decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a **bona fide attempt to exercise its power**, that it **relates to the subject matter of the legislation**, and that it is **reasonably capable of reference to the power given to the body**.¹²
10. These three conditions are generally known as 'the *Hickman* provisos'. Errors of this type are often referred to as 'manifest errors'.¹³
11. In later cases Dixon J also referred to '**imperative duties or inviolable limitations or restraints**' that may be imposed by legislation, contravention of which would not be protected by a privative clause.¹⁴ This, of course, is just another way of saying that a privative clause must be evaluated in each particular statutory context to determine whether particular limitations are covered by the insulating effect of the protection offered by the privative clause. Dixon J referred to this process as a 'second step'.¹⁵ Brennan J described it as a 'fourth condition', if not inherent in the three-fold *Hickman* formulation. Spigelman CJ has argued that it has the appearance of an alternative mechanism of reconciliation to that identified in *Hickman*.¹⁶
12. Read in accordance with the *Hickman* principle, true privative clauses were understood to be constitutionally valid. They were not thought to deprive a court of jurisdiction to grant relief in respect of decisions made in excess of power. Rather, true privative clauses were treated as

¹¹ *Hickman* (1945) 70 CLR 598, 614; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 418 (Mason ACJ and Brennan J).

¹² *Hickman* (1945) 70 CLR 598, 614-615 (Dixon J) (emphasis added). See also *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 398 (Dixon J).

¹³ *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, [68] (Spigelman CJ); *Plaintiff S157* at [18] (Gleeson CJ).

¹⁴ See, e.g., *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248.

¹⁵ *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399-400.

¹⁶ *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, [86].

having an implicit effect on the substantive law, by extending the lawful authority and powers of the decision maker. Nor was there any perceived conflict with separation of powers.¹⁷

13. Then came *Plaintiff S157*, which concerned the validity of s 474 of the *Migration Act*. In that case the majority (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) rejected the characterisation of privative clauses as somehow ‘expanding’ the powers of decision-makers.¹⁸ Further, their Honours said:

A proper reading of [the cases] is not that a privative clause is construed as meaning that decisions are protected so long as they conform to ‘the three *Hickman* provisos’. Rather, the position is that the ‘protection’ which the privative clause ‘purports to afford’ will be inapplicable unless those provisos are satisfied. And to ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause in question.¹⁹

14. Their Honours then proceeded to give s 474 what has been described as ‘a very narrow and somewhat strained interpretation’.²⁰ Picking up on what was said in *Bhardwaj*,²¹ that an administrative decision which involves jurisdictional error is ‘regarded, in law, as no decision at all’, the majority held, contrary to earlier authority,²² that the words ‘decision ... made ... under this Act’ were not apt to refer to decisions ‘purportedly’ made under the *Migration Act* (e.g., decision made in excess of jurisdiction). So, as a matter of construction, s 474(1) was held not to apply to decisions tainted by jurisdictional error. There was therefore no conflict between the privative clause and s 75(v) of the Constitution.
15. This construction given by the majority to s 474(1) is surprising. It was clear from the terms of s 474 of the *Migration Act*, and the extrinsic material, that Parliament intended the privative clause to protect against review for at least some types of jurisdictional error.²³
16. Then the High Court gave the following warning. The joint judgment said that, had the privative clause been construed to apply to **purported** decisions, it:

... would be in direct conflict with s 75(v) of the Constitution and, thus, invalid. Further, [the clause] would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate

¹⁷ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, [20]-[21] (Black CJ), [105] (Beaumont J), [308] (Wilcox J), [538]-[546] (French J), [640]-[646] (von Doussa J).

¹⁸ *Plaintiff S157/2002* (2003) 211 CLR 476, [67]-[68].

¹⁹ *Plaintiff S157/2002* (2003) 211 CLR 476, [64].

²⁰ R Sackville, ‘The 2003 Term: The Inaccessible Constitution’ (2004) 27 UNSWLJ 66, 70.

²¹ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [51] (Gaudron and Gummow JJ), [63] (McHugh J), [152] (Hayne J).

²² *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.

²³ *Plaintiff S157/2002* (2003) 211 CLR 476, [55], [70]. Gleeson CJ took a more orthodox approach to construing the privative clause (consistent, in my view, with the *Hickman* principle). His Honour rejected that Commonwealth submission to the effect that, once s 474(1) of the *Migration Act* was enacted, there were no ‘imperative duties’, and no ‘inviolable limitations’ on the powers and jurisdiction of decision-makers under the Act. Instead he simply held that s 474(1) did not evince a clear intention to insulate decisions from review where there had been a denial of procedural fairness: [34]-[38].

implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.²⁴

THE STATE SPHERE: *KIRK*

17. The historical conflict between courts and legislatures has not been limited to the federal sphere.²⁵ Industrial legislation in this State has, since 1901, included a privative clause in an attempt to make awards and decisions of NSW industrial courts final. For a long time, despite repeated legislative attempts by the NSW Parliament to enhance its privative clauses, the High Court and the NSW Court of Appeal resisted reading them in a way that excluded review of decisions for jurisdictional error, on the basis that such privative clauses were intended to apply only to **lawful** 'decisions'.²⁶
18. In 1996, however, in what has been described as a 'blunt [response] to ... defiant judicial reasoning',²⁷ the NSW Parliament enacted s 179 of the *Industrial Relations Act 1996* (NSW). Although slightly different in form, it was in essence identical to the privative clause considered in *Plaintiff S157*, except it referred to both 'decisions' and 'purported decisions', and did not include the words 'made under this Act'.
19. In *Mitchforce v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, Spigelman CJ noted that the extension of the scope of s 179 beyond a 'decision' to encompass a 'purported decision' was intended to afford decisions of the Commission 'protection from jurisdictional error to a substantial degree'.²⁸ Nonetheless, the Supreme Court's supervisory jurisdiction was 'not wholly extinguished'.²⁹ Spigelman CJ referred to statements from various High Court judgments which said that a State legislature has the power to make an inferior court the sole judge of the extent of its jurisdiction,³⁰ including *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, where Gaudron and Gummow JJ, two of the authors of the joint judgment in *Plaintiff S157*, had stated that:

... provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle.³¹

²⁴ *Plaintiff S157/2002* (2003) 211 CLR 476, [75] (emphasis added).

²⁵ I do not consider, in this paper, the position of Territorial courts. See *Kruger v Commonwealth* (1996) 190 CLR 1, 174 (Gummow J, allowing for the possibility that s 75(v) of the Constitution applies to judges of Territorial courts on the footing they are 'officers of the Commonwealth'); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, [27]-[28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, holding that Territorial courts **may** exercise federal jurisdiction under Commonwealth laws, which brings into play the appeal rights in s 73(ii) of the Constitution).

²⁶ *Mitchforce v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, [61] (Spigelman CJ).

²⁷ M Sexton and J Quilter, 'Privative clauses and State constitutions' (2003) 5 CLPR 69, 69-70.

²⁸ *Mitchforce* (2003) 57 NSWLR 212, [65].

²⁹ *Mitchforce* (2003) 57 NSWLR 212, [65].

³⁰ See, e.g., *Clancy v Butchers Shop Employees Union* (1904) 1 CLR 181, 204 (O'Connor J); *Baxter v Commissioners of Taxation* (NSW) (1907) 4 CLR 1087, 1142 (Barton J).

³¹ *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 634

20. Applying the reconciliation process required by *Plaintiff S157*, Spigelman CJ concluded that s 179 of the *Industrial Relations Act* was effective in excluding judicial review except in relation to ‘manifest defects’ (i.e., decisions that did not satisfy the three *Hickman* provisos) and contraventions of ‘inviolable limitations or restraints’ (the so-called fourth condition or second step).³² His Honour also emphasised that, in the context of State legislation, the *Hickman* principle ‘operates by a process of statutory construction without a constitutional overlay’.³³
21. Section 179 was amended in 2005 to remove references to ‘purported decisions’ except in relation to a class of decisions that are not presently relevant.³⁴ In 2006 the NSW Court of Appeal held (in part of the litigation leading to *Kirk* in fact) that the effect of the amendments was to restore the Supreme Court’s supervisory jurisdiction to correct jurisdictional errors after the Full Court of the Industrial Court had dealt with any appeal to it.³⁵
22. So by the time we come to the recent case of *Kirk*, there was no question as to whether s 179 protected decisions of the Industrial Court of NSW from review for jurisdictional error. It was clear that s 179 did not have that effect. The issue on which the High Court disagreed with the Court of Appeal was whether the errors identified were jurisdictional.³⁶
23. It was therefore unnecessary for the High Court to deal with the issue of whether State legislatures can enact effective privative clauses.³⁷ Despite this, and picking up on submissions advanced by the Commonwealth, the Court unanimously held, for the first time, and contrary to previous authority, that it is beyond the legislative competence of a State Parliament to ‘strip the Supreme Court of the State of its authority to confine inferior courts [and tribunals] within the limits of their jurisdiction by granting relief on the ground of jurisdictional error’.³⁸
24. How did the Court come to this result? There were three steps. The first two, which are uncontroversial, were that, first, Ch III of the Constitution requires that there be a body fitting the description ‘the Supreme Court of a State’, and, secondly, that it is beyond the legislative power of a State to so alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.³⁹ The third, novel, step, was to say that a defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide, by granting relief in the nature of prohibition, mandamus and certiorari on the grounds of jurisdictional error.

³² *Mitchforce* (2003) 57 NSWLR 212, [68]-[70], [92]. See, also, [142] (Mason P), [204]-[207] (Handley JA).

³³ *Mitchforce* (2003) 57 NSWLR 212, [71].

³⁴ *Industrial Relations Amendment Act 2005* (NSW).

³⁵ *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 66 NSWLR 151, [31] (Spigelman CJ), [52] (Beazley JA), [83] (Basten JA); *Kirk v Industrial Relations Commission of NSW* [2008] NSWCA 156; 173 IR 465, [21] (Spigelman CJ; Hodgson JA and Handley JA agreeing).

³⁶ *Kirk* (2010) 239 CLR 531, [44] and [48].

³⁷ And the Court should have declined to answer the unnecessary constitutional question: see *Wurridjal v Commonwealth* (2009) 237 CLR 309, [355] (Crennan J) and the cases there cited; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, [141] (Hayne, Kiefel and Bell JJ) and the cases there cited.

³⁸ *Kirk* (2010) 239 CLR 531, [55].

³⁹ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [63].

25. This is remarkable, both in terms of the result, and methodology used to obtain it. There are four brief points I wish to make.
26. First, the Court puts forward only one authority to support the argument that, at federation, the jurisdiction of the Supreme Courts referred to in s 73 of the Constitution included an unassailable power to issue the writ of certiorari to an inferior court or tribunal. But the (pre-federation) Privy Council decision the Court cites, *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 (*Willan*), which considered the operation of a privative clause on the jurisdiction of the Supreme Court of Victoria, only appears to refer to inferior courts.⁴⁰ Even then, the case suggests that the entrenched supervisory jurisdiction of a Supreme Court only extended to ‘**manifest defects of jurisdiction**’ or ‘**manifest fraud**’.⁴¹ As Gleeson CJ, noted in *Plaintiff S157*, when discussing Dixon J’s formulation in *Hickman*:

The echoes of what was said by the Privy Council in *Willan* are discernible. The concepts of ‘manifest defect of jurisdiction’ and ‘manifest fraud’ are the obverse of what ‘appears to be within power’ and ‘a bona fide attempt to act in the course of ... authority’ ...⁴²
27. It therefore appears to me that *Willan* is only authority for the proposition that a privative clause cannot operate to prevent a State Supreme Court from reviewing errors made by inferior courts that do not satisfy the *Hickman* provisos.
28. Secondly, saying that State Supreme Courts had a supervisory jurisdiction at 1901 to review for certain types of errors does not explain why that jurisdiction was, and is, characteristic of those courts, in the constitutional sense.⁴³ The conclusion seems primarily policy driven. Under s 73 of the Constitution, subject to some exceptions, the High Court has jurisdiction to hear appeals from all judgments, decrees, orders and sentences of the Supreme Courts of each State.⁴⁴ If there is no avenue of review from inferior State courts to a Supreme Court, that jurisdiction is stymied. The majority in *Kirk* said that, ‘[t]o deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint’.⁴⁵ But as I have already noted, it has ever suggested that immunity is absolute.
29. Thirdly, no mention is made of earlier decisions that held that State privative clauses could insulate decisions against review for jurisdictional error subject to the *Hickman* principle.
30. Fourthly, the High Court does not explain why State privative clauses cannot be read in accordance with the *Hickman* principle, which is what the NSW Court of Appeal concluded in *Mitchforce*. The possibility is not acknowledged. In fact *Mitchforce* is not even referred to, which is

⁴⁰ *Willan* (1874) LR 5 PC 417, 440-442.

⁴¹ *Kirk* (2010) 239 CLR 531, [97].

⁴² *Plaintiff S157/2002* (2003) 211 CLR 476, [18].

⁴³ See C Finn, ‘Constitutionalising supervisory review at State level: The end of Hickman?’ (2010) 21 PLR 92, 99.

⁴⁴ *Kirk* (2010) 239 CLR 531, [98].

⁴⁵ *Kirk* (2010) 239 CLR 531, [99].

unfortunate.⁴⁶ But the constitutional imperatives that were said to dictate the outcome in *Plaintiff S157* do not exist in the State sphere. There is no direct conflict with s 75(v) of the Constitution. Nor are State Parliaments prevented, in general, from conferring on non-judicial decision-makers the power to determine conclusively the limits of their own jurisdiction (normally a judicial function). Even if the latter limitation applied, the decision-maker in *Kirk* was a court.

31. One possible explanation may come from the joint judgment's treatment of *Craig v South Australia* (1995) 184 CLR 163. In that case the High Court drew a distinction between the types of errors that attract certiorari in the context of decisions made by administrative tribunals and courts.⁴⁷ The basis of this distinction was founded on the fact that, unlike administrative tribunals, courts of law generally have jurisdiction to 'authoritatively' determine questions of law. In *Kirk*, the High Court suggested that this distinction, and the concept of inferior courts being able to decide questions of law 'authoritatively', is 'at least unhelpful'.⁴⁸ Authoritative decisions, the Court says in somewhat circular reasoning, are those not attended by jurisdictional error and thus not open to review.⁴⁹

NO-INVALIDITY CLAUSES: *FUTURIS*

32. There may, however, still be good policy reasons for wanting to insulate some types of decision from review for certain types of errors. For example, many judges have recognised that specialised industrial tribunals are better placed than courts to determine industrial policy, to prevent and resolve industrial disputes in the public interest, and to set wages and conditions on an industry-basis. These types of decisions affect broad segments of the community, and there is a strong need for finality.⁵⁰ If privative clauses do not work, what will? One answer may be so-called 'no-invalidity clauses' or *Project Blue Sky* clauses.⁵¹
33. Not every failure to comply with a statutory precondition to the exercise of a power will lead to invalidity. Whether a contravention of a particular condition goes to jurisdiction is to be determined by a process of statutory construction as discussed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. If the key question is whether Parliament intended the consequence of the particular breach to go to validity,⁵² there must be a role for provisions that not only prescribe a condition regulating the exercise of a statutory power but also **expressly** state that a breach of that condition should not lead to invalidity.⁵³ Such provisions are not

⁴⁶ Similarly, in *Plaintiff S157*, the joint judgment made no mention of *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, the leading authority on s 424 of the *Migration Act* at that time, despite overturning it: see R Sackville, 'The 2003 Term: The Inaccessible Constitution' (2004) 27 UNSWLJ 66, 86.

⁴⁷ *Craig v South Australia* (1995) 184 CLR 163, 177-180.

⁴⁸ *Kirk* (2010) 239 CLR 531, [69]-[70].

⁴⁹ See C Finn, 'Constitutionalising supervisory review at State level: The end of Hickman?' (2010) 21 PLR 92, 95-96.

⁵⁰ *Baxter v NSW Clickers' Association* (1909) 10 CLR 114, 161 (Isaacs J); *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 147-148 (Deane J).

⁵¹ M Aronson, 'Nullity' (2003) 40 *ALAL Forum* 19, 25.

⁵² *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, [107] (Spigelman CJ).

⁵³ *Plaintiff S157* (2003) 211 CLR 476, [25] (Gleeson CJ).

privative clauses.⁵⁴ They do not purport to exclude review for jurisdictional error. Instead they alter the characterisation of the errors from jurisdictional to non-jurisdictional.

34. It seems to be possible for Parliament to state that non-compliance with a **specific** statutory requirement will not lead to invalidity.⁵⁵ But there is a real question about whether a single no-invalidity clause can ‘set out to “cure” breaches of a broader sweep of provisions’.⁵⁶ An example of such a provision is s 175 of the *Income Tax Assessment Act 1936* (Cth), which states:

The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

35. In the recent case of *Futuris*, the majority said:

Where s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the Constitution or under s 39B of the [*Judiciary Act 1903*].⁵⁷

36. It is difficult to know what to make of this statement. *Futuris* was decided in a legislative context that allowed for merits review by the Administrative Appeals Tribunal, and appeals on questions of law to the Federal Court.⁵⁸ And it seems to me that an all-encompassing *Project Blue Sky* clause gives rise to the same type of contradiction that a true privative clause does: a grant of powers circumscribed by specific conditions, combined with a general provision intended to ensure those limits do not operate.⁵⁹

37. But in any event *Project Blue Sky* clauses are not bullet-proof. For the purposes of the income tax legislation there still needs to be something that meets the statutory description of an ‘assessment’. In *Futuris* this was held to exclude so called tentative or provisional assessments, or assessments created by conscious maladministration (i.e., bad faith).⁶⁰ Further, s 175 only addresses the effect of non-compliance with express statutory requirements, not common law or implied statutory obligations (e.g., procedural fairness, reasonableness, etc), although it could be drafted so as to cover those grounds. And, finally, it is likely that courts would require clear language before concluding that Parliament intended that non-compliance with what the court regarded as an ‘essential’ requirement did not affect the validity of a decision. In other words, I

⁵⁴ *Futuris* (2008) 237 CLR 146, [64].

⁵⁵ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, [42]-[46] (Gleeson CJ, Gummow and Heydon JJ), [55] (McHugh J). However Kirby J, in dissent, expressed reservations about the constitutional validity of s 501G(4): at [129].

⁵⁶ M Aronson, ‘Nullity’ (2003) 40 *ALAL Forum* 19, 27.

⁵⁷ *Futuris* (2008) 237 CLR 146, [24] (Gummow, Hayne, Heydon and Crennan JJ).

⁵⁸ *Taxation Administration Act 1953* (Cth), Part IVC, Divs 3 and 4; *Administrative Appeals Tribunal Act 1975* (Cth), s 44.

⁵⁹ L McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *PLR* 14, 20.

⁶⁰ *Futuris* (2008) 237 CLR 146, [25]. It could be argued these fall within the *Hickman* provisos but the Court eschewed any reliance on that case: at [68].

think courts would still undertake a process similar to the ‘imperative duties or inviolable limitations or restraints’ test.⁶¹

CONCLUDING REMARKS

38. So we have now reached a point where both the Commonwealth and the State Parliaments are effectively prevented from enacting effective true privative clauses in relation to the High Court and State Supreme Courts. By effective I mean, of course, effective subject to the *Hickman* principle. The High Court reaches these convergent conclusions via different constitutional avenues. Consequently, in my view, there is now little value in including a true privative clause in State or Commonwealth legislation. While they still may be effective in restricting review for non-jurisdictional error on the face of the record, the ever-expanding concept of jurisdictional error, combined with the limited meaning given to the term ‘record’, makes it hardly worthwhile.⁶² It is telling that the Commonwealth Parliament has decided not to include a privative clause in the *Fair Work Act 2009* (Cth), despite a long history of such clauses in federal industrial law.
39. It might have been thought that, if you were going to discern jurisdictional limits by looking at an Act as a whole, the existence of a privative clause would have **some** role to play in determining what legal errors are jurisdictional. The joint judgment in *Plaintiff S157* did say, after all, that ‘it may be that, by reference to the words of s 474, some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of a decision’.⁶³ But this did not come to pass. It has since been confirmed that s 474 is not capable of ‘curing’ what would otherwise be jurisdictional error.⁶⁴
40. At its centre, the controversy over privative clauses is a battle between the legislature and the courts. Either Parliament can circumscribe the powers of courts to review exercises of judicial or executive power or they cannot. What the cases seem to be driving at is that you cannot do it directly. But if you can get to the same result using a no-invalidity clause, I cannot see how that is different in substance.⁶⁵ The problem is we simply do not know how far legislation can go in making jurisdictional errors non-jurisdictional, or what errors that will always be jurisdictional. The High Court has thus far not directly grappled with these issues, because it refuses to interpret privative clauses as intended to expand a decision-maker’s jurisdiction to meet those limits.

⁶¹ This process may be necessary for constitutional purposes. A Commonwealth law cannot be so open-ended that it no longer determines ‘the content of a law as a rule of conduct or a declaration as to power, right or duty’: *Plaintiff S157* (2003) 211 CLR 476, [102].

⁶² There is an invitation in *Kirk* to challenge *Craig* insofar as it rejected an expansion of the concept ‘record’ to encompass both the reasons for decision and the transcript of proceedings of an inferior court: *Kirk* (2010) 239 CLR 531, [84]-[87].

⁶³ *Plaintiff S157/2002* (2003) 211 CLR 476, [69].

⁶⁴ C Beaton-Wells, ‘Judicial review of migration decisions: life after *S157*’ (2003) 33 FLR 142, 157-160, citing the special leave applications in *Minister for Immigration and Multicultural and Indigenous Affairs v Scargill* and *Minister for Immigration and Multicultural and Indigenous Affairs v Lobo* [2004] HCATrans 21, and *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 78 ALJR 992, [47]-[57] (Gummow and Hayne JJ, Gleeson CJ agreeing).

⁶⁵ The joint judgment in *Plaintiff S157* insists that ‘what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble’: (2003) 211 CLR 476, [98].

41. The High Court has, however, suggested there are limits, as s 75(v) is said to do more than embed the jurisdiction of the High Court when writs are sought, but also entrench some of the grounds on which the writs may issue.⁶⁶ It may be that they will arrive to a similar conclusion about the powers of State Supreme Courts.
42. It has argued that legislative drafting that ‘confers on an administrator a jurisdiction that complies with the *Hickman* principle will be sufficient to satisfy any constitutional minimum that may exist’.⁶⁷ If that is correct then *Plaintiff S157* and *Kirk* appear to be a victory of form over substance.
43. In terms of what grounds of review are entrenched, in *Plaintiff S157* the majority noted that the *Hickman* requirement that a decision be made bona fide ‘presumably has the consequence’ that s 474 of the *Migration Act* continues to permit review for ‘fraud, bribery, dishonesty or other improper purpose’. Otherwise, they said, there would ‘be a real question as to the constitutional validity of s 474’.⁶⁸ But are aspects of natural justice also entrenched? The High Court has not dealt with this issue, but has hinted that might be the case.⁶⁹ At present what can be said is that some breaches of the rules of natural justice may be so serious as to amount to an exercise of power falling outside the *Hickman* principle. In those cases certiorari will be available.⁷⁰
44. But whatever the constitutional limits are, there is also a practical one. It is unlikely that Parliament would pass a law expressly providing that a decision-maker could act arbitrarily, capriciously, irrationally or unreasonably – and in the absence of such direct language courts will not construe a law as seeking to achieve that result.⁷¹

⁶⁶ *Plaintiff S157/2002* (2003) 211 CLR 476, [104].

⁶⁷ S Gageler, ‘The legitimate scope of judicial review’ (2001) 21 ABR 279 at 291, 289.

⁶⁸ *Plaintiff S157/2002* (2003) 211 CLR 476, [87]. See, also, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Futuris* (2008) 237 CLR 146 at [11]-[13], [54]-[57] (Gummow, Hayne, Heydon and Crennan JJ).

⁶⁹ *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23, [49]-[55] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁷⁰ *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 287 (Deane, Gaudron and McHugh JJ), 305 (Dawson J, with whom Toohey J agreed); *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, 111 (Spigelman CJ). See, also, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR).

⁷¹ J Basten, ‘Constitutional elements of judicial review’ (2004) 15 PLR 187, 201; J Kirk ‘The entrenched minimum provision of judicial review’ (2004) 12 AJAdminL 64, 71.