# Judicial Review of Administrative Action: The Validity of Privative Clauses and Time Limits

## Privative Clauses and Time Limits in the High Court

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1. On 4 February this year the High Court delivered judgment in two keenly awaited decisions on the validity and meaning of the privative clause and time limit that were inserted into the Migration Act in 2001.

2. In the first case, *Plaintiff S157*,[1] the court unanimously (though in three separate judgments) upheld the validity of ss 474 and 486A of the Act. However, it held that these provisions did not apply to the application that the plaintiff proposed to bring alleging that the Refugee Review Tribunal's decision was vitiated by a jurisdictional error (namely, a failure to comply with the requirements of procedural fairness).

3. In the second case, *Applicants S134*,[2] the majority held that the Tribunal and Minister had not committed reviewable errors. The dissentients, Gaudron and Kirby JJ, held that the Tribunal had committed such an error, not protected by the privative clause.

[1] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 (4 February 2003).

[2] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1 (4 February 2003).

4. In this paper I will briefly outline and critique the reasoning in the first case and where appropriate make some mention of the second case.

## *Background*

5. Section 75(v) of the *Constitution* entrenches as part of the original jurisdiction of the High Court 'all matters ... [i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. In this way the High Court is guaranteed jurisdiction in matters in which claimants seek judicial review of Commonwealth administrative action via one of the named remedies. Short of a constitutional alteration approved by the people at a referendum, that jurisdiction cannot be removed by the Parliament. Section 75(v) is rightly regarded as a guarantee of the rule of law in Australia.[3]

6. But how thick is that guarantee? Is s 75(v) a substantive guarantee or a purely formal one?

7. The answer provided by the two recent decisions is ultimately somewhat unclear.

## *Privative clause*

8. The Migration Act privative clause, s 474, was plainly framed with Justice Dixon's judgment in *R v Hickman; Ex parte Fox and Clinton*[4] in mind (the 2nd reading speech and Explanatory Memorandum confirm as much). The section provides (amongst other things) that certain decisions 'of an administrative character made, proposed to be made, or required to be made ... under [the Migration] Act' and its subordinate instruments are 'not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'. (These decisions are defined as 'privative clause decisions'.)

9. The drafters of the Minister's speech and the Explanatory Memorandum seem to have expected that, following *Hickman*, s

[3] Eg *Plaintiff S157/2002* [2003] HCA 2 [5], [103].

[4] (1945) 70 CLR 598.

474 would operate to expand decision-makers' jurisdiction and protect their decisions from challenge provided only:

- first, that each 'decision is a bona fide attempt to exercise [the decision-maker's] power'
- second, 'that it relates to the subject matter of the legislation', and
- third, 'that it is reasonably capable of reference to the power given to the [decision-maker]'.[5]

10. (It seems convenient to call these 'the three *Hickman* provisos' as the joint judgment does.[6])

## Interpreting privative clauses

11. The joint judgment in *Plaintiff S157* (that of Justices Gaudron, McHugh, Gummow, Kirby and Hayne) confirms that the *Hickman* principle, whatever its content, is an interpretive principle 'allowing for the reconciliation of apparently conflicting statutory provisions'[7] -- the limited empowering provisions and the privative clause that appears to contemplate that relief will not be available when those limits are exceeded.[8]

12. In particular, the joint judgment emphasises that the interpretive process of reconciliation must be carried out for each privative clause -- there is 'no general rule as to the meaning or effect of privative clauses'.[9]

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[5] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 614-615.

[6] *Plaintiff S157/2002* [2003] HCA 2 [62], [64], [91], [99] (following the Commonwealth's submissions).

[7] Ibid [60].

[8] '[I]t is necessary, if there is apparent conflict between a privative clause and a statutory provision imposing limitations or restraints upon jurisdiction or power, to attempt a reconciliation of those provisions. It is not necessary that a reconciliation be effected. Indeed, a reconciliation with the particular provision in question may be impossible, as will be the case if, for example, it imposes an "inviolable" jurisdictional restraint. However, if reconciliation is possible, the provision pursuant to which the act in question has been done or the decision taken will be construed so that observance of specified requirements or restraints is not essential to the validity of that act or decision.' *Applicants 134* [2003] HCA 1 [79] (footnote omitted) (Gaudon and Kirby JJ dissenting).

[9] *Plaintiff S157/2002* [2003] HCA 2 [60].

13. How is that interpretive process to be carried out?

- First, an interpretation consistent with the *Constitution* will be adopted if it is fairly open.[10]

- Secondly, it will be presumed 'that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question *expressly so states or necessarily implies*'.[11] (Gleeson CJ traced this proposition to the assumption that the *Constitution* was framed on the rule of law and the presumption that Parliament does not intend 'to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language'.[12])

- Thirdly, what is to be interpreted is the legislation as a whole. It is wrong to focus on the privative clause and subordinate the rest of the legislation to that provision.[13]

- Fourthly, where the privative clause is expressed in terms of a limitation of the powers of the courts to grant remedies (as s 474 is), it is unlikely that the proper interpretation will be that the privative clause impliedly repeals statutory limitations and restraints on the powers of decision-makers.[14]

- Fifthly, the court must consider (again using the words of the joint judgment)

  > whether particular limitations on power and specific requirements as to the manner in which the tribunal shall be constituted or shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action.[15]

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[10] Ibid [71].

[11] Ibid [72] (emphasis added).

[12] Ibid [30]-[32].

[13] Ibid [65]; cf ibid [33] (Gleeson CJ).

[14] Ibid [66]; cf ibid [162] (Callinan J).

[15] Ibid [65] quoting *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400. Gleeson CJ added another consideration: '[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international

14. The joint judgment regarded these fourth and fifth points as significant in rejecting what was seen as a dangerous misapprehension about the nature and operation of the *Hickman* provisos. It was not accurate to say (as the Commonwealth did in argument) that 'the outcome in a situation where the provisos are satisfied [is] an "expansion" or "extension" of the powers of the decision-makers in question'.[16]

> Rather, the position is that the "protection" which the privative clause "purports to afford" will be inapplicable unless those provisos are satisfied.[17]

15. But, with respect, *it is* accurate, if metaphorical, to describe the outcome of the process of reconciliation as 'an "expansion" or "extension" of the powers of the decision-makers in question' compared with a baseline statute from which the privative clause is missing.

16. It is rather surprising that the joint judgment is so adamant that the distinction it draws is 'real and substantive' and 'not some verbal or logical quibble'.[18] The distinction between the approved notion -- that the three *Hickman* provisos qualify the protection which the privative clause affords -- and the disapproved notion -- that the *Hickman* provisos qualify the otherwise expanded powers of decision-makers[19] -- only appears substantial if one adopts a narrow and stilted formulation of the *Hickman* principle that ignores the fact that that principle includes the proposition that privative clauses do not protect against failures to comply with imperative duties and inviolable conditions or limitations on power discerned on a full reading of the statute. Perhaps the explanation for the adamant tone lies in the fact that the Commonwealth *did indeed* attempt to have the court adopt such a formulation of the *Hickman* principle and had had some success in having that formulation accepted by members of the Federal Court in *NAAV*.[20]

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convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations': Ibid [29].

[16] Ibid [64].

[17] Ibid [64].

[18] Ibid [98].

[19] Ibid [99].

[20] *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 193 ALR 449.

### *Interpreting s 474*

17. How then is s 474 to be interpreted, using these interpretive guidelines? Section 474 defined 'privative clause decision[s]' as decisions 'made, proposed to be made, or required to be *made ... under this Act*'. The joint judgment laid stress on those last words -- 'made ... under this Act'.[21] The definition was 'not apt to refer either to decisions *purportedly* made under the Act or ... to decisions of the kind that *might* be made under the Act'.[22] Section 474 on its terms then did not purport to prevent review of decisions 'purportedly made under the Act or ... to decisions of the kind that might be made under the Act', in other words, decisions affected by jurisdictional error and which were 'regarded, in law, as no decision at all'.[23]

18. This textual analysis -- which alone would be but a slender reed where a substantial eucalypt was needed -- was bolstered by two substantive constitutional considerations. If s 474 precluded review of unauthorised conduct by officers of the Commonwealth then, first, it would be 'in direct conflict with s 75(v) ... and, thus, invalid' and, secondly, it would allow non-judicial decision-makers 'to determine conclusively the limits of [their] jurisdiction' and, thus, infringe the separation of powers impliedly required by Ch III.[24]

19. It followed that 'decision ... made under this Act' in the definition of 'privative clause decision' was to be read to refer to decisions which do not involve jurisdictional error. Decisions involving jurisdictional error are not 'privative clause decisions' and are not protected by s 474.[25]

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[21] *Plaintiff S157/2002* [2003] HCA 2 [74]-[77]; cf ibid [19], [41] (Gleeson CJ).

[22] Ibid [75] (emphasis added).

[23] Ibid [76] citing *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598, 606 [51] (Gaudron and Gummow JJ), 608 [63] (McHugh J), 624-625 [152] (Hayne J); 187 ALR 117 at 129, 131, 154-155.

[24] Ibid [75].

[25] This interpretation clearly rests on the constitutional imperative implied from *Constitution* s 75(v). Does it apply equally when review is sought under other heads of jurisdiction, in particular *Constitution* s 75(iii) (in the High Court) and *Judiciary Act 1903* (Cth) s 39B(1A)(c) (in the Federal Court)? Most likely, relief for non-jurisdictional errors is precluded, subject to the *Hickman* provisos and the situations (if any) in which an injunction would be available under s 75(v), and relief for jurisdictional errors is available in the Federal

20. Gleeson CJ's approach, although broadly similar, was slightly narrower. He focussed on the particular error alleged by the plaintiff (a failure to comply with the requirements of procedural fairness) and considered whether on a proper reading of the Act those requirements were no longer an indispensable condition of the valid exercise of power.[26]

21. Finally, Callinan J focussed much less closely on the terms of s 474 and concluded as a more general matter (it seems) that mandamus, prohibition and injunction may go to cure 'manifest errors of jurisdiction' notwithstanding the presence of a privative clause.[27]

### *What constitutes jurisdictional error?*

22. It is therefore necessary to identify what constitutes jurisdictional error. Once again, the court must return to interpretation of the statute and each particular statutory limitation or restraint on power.[28] As the joint judgment says:

> Although s 474 does not purport to effect a repeal of statutory limitations or restraints, it should be noted 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.[29]

23. Some procedural or other requirements may be seen to be 'imperative duties' or 'inviolable limits or restraints' -- failure to comply with them will constitute jurisdictional errors not protected by the privative clause.

24. What of this case?

25. The joint judgment deferred the reconciliation process until the subsequent proceedings to be brought by the plaintiff. Then it would be possible to determine 'whether, as a result of the reconciliation process, the decision of the Tribunal does or does

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Court and Federal Magistrates Court, subject to any remaining excisions from their jurisdiction (see text at n 48 below).

[26] *Plaintiff S157/2002* [2003] HCA 2 [37].

[27] Ibid [160].

[28] Ibid [69].

[29] Ibid [69].

not involve jurisdictional error and, accordingly, whether it is or is not a "privative clause decision"'.[30]

26. Gleeson CJ however did spell out in a little more detail how the reconciliation process led to the conclusion that decisions affected by a failure to accord procedural fairness were not protected by the privative clause. He argued:

> People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If Parliament intends to provide that decisions of the Tribunal, although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the Tribunal in order for its decisions to be effective under the Act, then s 474 does notsuffice to manifest such an intention.[31]

27. The joint judgment's reticence on the operation of the reconciliation process is disappointing; a disappointment reinforced by the decision of the majority in *Applicants S134* where the issue was not reached. The High Court could not have obviated the need for ongoing litigation to identify which decision-making powers are protected by s 474 and which are not; but it could have identified some higher level principle that would assist in that process.

28. The dissentients in *Applicants S134*, Gaudron and Kirby JJ, however, did take some steps in this direction. In their view,

> [R]econciliation of a particular provision with s 474 ... is very difficult, if not impossible, if ... there is detailed specification of conditions which must be satisfied before a particular act can be done or a particular decision taken and there is also prescription of the precise act that must be done or the precise decision that must be reached if the specified conditions are met.[32]

29. Section 65 of the Act, which spells out the matters which the Minister must be satisfied of before he grants a visa and obliges him to grant a visa if so satisfied, was such a provision. On the other hand, a decision made under a power with 'a significant discretionary element or in respect of which there is no detailed specification as to matters that must be satisfied' might be protected because, construed in light of the privative clause, the

[30] Ibid [78].

[31] Ibid [37].

[32] [2003] HCA 1 [80]-[81].

conditions attached to the power are not essential to the validity of its exercise.

30. Their Honours remarks are somewhat narrower -- and (with respect) therefore more persuasive than -- the wider interpretation of the *Hetton Bellbird Collieries*[33] proposition that *whenever* a decision-maker's power depends on his or her satisfaction as to some fact, an error of law in reaching that state of satisfaction is a jurisdictional error.[34] They may provide a useful starting point in carrying out the reconciliation process.

### *Time limit*

31. I can now turn to the time limit. Section 486A provided that applications to the High Court for named remedies 'in respect of a privative clause decision' must be made within a non-extendible 35 day period after notification of the decision.

32. Gleeson CJ and the members of the joint judgment held that s 486A did not apply to the plaintiff's proposed application. This was because s 486A by its terms applied only to a 'privative clause decision'. That term had the meaning given it by s 474(2) which included that the decision be 'made under [the] Act'. A decision involving a jurisdictional error was not 'made under [the] Act', therefore was not a 'privative clause decision', and therefore was not a decision to which s 486A applied to impose a non-extendible 35 day time limit for an application for judicial review.

33. Of course, as the judges recognised, this makes s 486A largely superfluous -- it does not apply to most of the decisions (those in which there has been jurisdictional error) in respect of which relief is available. Such an interpretation would ordinarily be avoided.[35] But Parliament had enacted ss 474 and 486A on the basis of a misunderstanding of *Hickman* and accordingly it was not surprising that the legislation miscarried somewhat.[36] Moreover, s 486A retained some useful purpose if injunctions

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[33] *R v Connell; ex parte The Hetton Bellbird Collieries Limited* (1944) 69 CLR 407.

[34] David Bennett, 'Privative Clauses – Latest Developments' (2002) 34 *AIAL Forum* 11, 19.

[35] *Plaintiff S157/2002* [2003] HCA 2 [90].

[36] Ibid [91].

were available in relation to decisions not involving jurisdictional error.[37]

34. Callinan J's analysis was necessarily different given his approach to s 474. He accepted that the Parliament could 'regulate the procedure by which proceedings for relief under s 75(v) may be sought and obtained', including by stipulating time limits. Such regulations served the interests in finality of litigation and in predictability regarding the resources required to operate the system of judicial review.[38]

35. However, any such regulation 'must be truly that and not in substance a prohibition'.[39] Section 486A was invalid in relation to the constitutional remedies available under s 75(v) because it rendered 'any constitutional right of recourse virtually illusory'.[40]

> '[T]he persons seeking the remedies may be incapable of speaking English, and will often be living or detained in places remote from lawyers' and therefore the effect of the section 'effectively would [be] ... to deny applicants recourse to the remedies for which it provides, particularly when, as here, the section purports to deny power to the Court to extend the time that it might otherwise have'.[41]

36. I think we may ask where the 'virtually illusory' standard of review comes from. Why is a limitation period not invalid unless it makes the right of constitutional recourse 'absolutely illusory' or if it merely makes it 'slightly less effective'? Why is it appropriate to determine whether the right of recourse is 'virtually illusory' on the basis of judicial notice rather than evidence? Why not take into account the legislature's legitimate interests in enacting the limitation period in an explicit proportionality analysis? I am not suggesting that Callinan J's approach is necessarily wrong; but like all prudential-ethical argumentation in judicial decision-making,[42] it requires careful

[37] Ibid [91].

[38] Ibid [176].

[39] Ibid [173].

[40] Ibid [176].

[41] Ibid [174]-[175].

[42] See Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term', address to the Gilbert + Tobin Centre of Public Law Constitutional Law Conference, 21 February 2003. Kenny J's differentiation between modes of constitutional reasoning is reminiscent of (but in delivery did not explicitly draw on) the work of Phillip Bobbit (see *Constitutional*

justification and substantiation of the premises on which it rests.[43]

### *Implications and possible responses*

37. What then is the significance of *Plaintiff S157*?

38. It confirms the High Court's adherence to the distinction between jurisdictional errors and non-jurisdictional errors, a distinction abandoned elsewhere, but now assuming constitutional status in Australia.[44] It is worth considering whether the distinction is as sharp as the language suggests and is any clearer than an approach that recognises a range of standards of review and seriousness of errors. (There are some traces of such an approach in the judgments of Gleeson CJ and Callinan J.[45])

39. It does not address two important questions about the relationship of the decision to two other relatively recent

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*Interpretation* (1991) and *Constitutional Fate* (1982)) though he is by no means the only author to use this language. Bobbit made the further claim that it was use of the various modes of argumentation (and not one single mode of interpretation) that *justified* the process of constitutional review. That is a claim worthy of consideration in the Australian context.

[43] Prudential-ethical reasoning as a non-textual mode of reasoning is often associated with what is loosely termed 'judicial activism' and the implication of rights. Callinan J's judgments demonstrates that it is equally capable of supporting the opposite conclusions: see eg *Roberts v Bass* [2002] HCA 57 (12 December 2002) [285]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 [338]-[348].

[44] Note Kirby J's willingness to abandon the distinction in *Re Minister for Immigration and Multicultural Affairs v Holland* (2001) 185 ALR 504, [22].

[45] *Plaintiff S157/2002* [2003] HCA 2 [13], [159]-[160].

decisions of the High Court, *Craig v South Australia*[46] and *Project Blue Sky Inc v Australian Broadcasting Authority*.[47]

40. As a practical matter, it opens up the possibilities for judicial review of migration decisions, not just in the High Court, but also in the Federal Court and the Federal Magistrates Court. This follows from the manner in which the excisions from their jurisdiction are defined, in terms of the now much narrowed concept of privative clause decisions. In particular, review of primary decisions appears to be available and review may be possible under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), an attractive possibility given the potentially wider remedial options.[48] Of course, the Executive may attempt to close off this possibility using the regulation making power under s 19.

41. And the legislation illustrates a danger for statutory drafters. Where legislation depends on a central concept -- in this case 'privative clause decision' -- the effects of that definition miscarrying propagate widely and unpredictably throughout the statute.

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[46] (1995) 184 CLR 163. In *Craig*, the Court said:

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it. (Ibid 179; followed *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [82] (McHugh, Gummow and Hayne JJ).)

The joint judgment in *Plaintiff S157* does not indicate whether it adheres to this conception of jurisdictional error in the context of *Constitution* s 75(v) but there is no good reason to assume that it does not. Nonetheless, given the presence of s 474, it will be necessary to engage in the interpretive reconciliation process to determine whether the apparent error is within the scope of the protection afforded by the privative clause.

[47] (1998) 194 CLR 355. *Plaintiff S157* turns on the established principle that decisions involving jurisdictional error are no decision at all and have no effect on the legal rights of persons purportedly affected by the decision. *Project Blue Sky* also concerns the question when a decision that is made unlawfully has legal effect.

[48] Note the paradox. Review is available under the ADJR Act of 'decision[s] ... made, proposed to be made, or required to be made ... under an enactment', a formulation that has never been taken in the context of that Act to exclude decisions involving a jurisdictional error. This highlights just how is slender the textual foundation for the decision in *Plaintiff S157*.

### *Responses*

42. The Executive and Legislative response to *Plaintiff S157* is not yet known. But the High Court has provided some indications of its likely attitude to certain possibilities. Most clearly, any attempts to limit s 75(v) review will have to openly acknowledge in the clearest terms that legislative provisions do not impose imperative duties or inviolable conditions or limitations on the exercise of power.

43. However, the joint judgments' further comments on such alternative legislative models are quite mysterious. The Commonwealth argued 'that the Parliament might validly delegate to the Minister "the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia", subject only to this Court deciding any dispute as to the "constitutional fact" of alien status'.[49] Undesirable though such legislation may be, and hardly consistent with the rule of law, it is not unprecedented,[50] and, *pace* Justices Gaudron, McHugh, Gummow, Kirby and Hayne, it is hard to see how it raises issues about the delegation of legislative power *or* how it raises the possibility of such a delegation miscarrying because it fails to delegate *legislative* power *or* how it involves a failure to supply a connection between a head of power and the facts on which the law is said to operate.[51]

44. *However*, their Honours' comments make more sense if they are addressed to another suggestion made by the Commonwealth, that the privative clause allows the administrative powers under the Migration Act to be 'read up', as a 'legislative stipulation for the expansion of decision-making powers under the Act up to the boundaries of designated heads of power in s 51 of the Constitution'.[52] As the joint judgment says, the courts *cannot* be

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[49] *Plaintiff S157/2002* [2003] HCA 2 [101].

[50] Recall that the Migration Act 1958 (as amended to 1973) provided in s 6: '(2) An officer may, in accordance with this section and at the request or with the consent of an immigrant, grant to the immigrant an entry permit. (3) An entry permit shall be in a form approved by the Minister and shall be expressed to permit the person to whom it is granted to enter Australia or to remain in Australia or both.'

[51] *Plaintiff S157/2002* [2003] HCA 2 [102]. Contrast ibid [139]-[140] (Callinan J).

called on to supply the connection the legislature has failed to articulate.

## Conclusion

45. Given the time limit imposed on me today, at this point I can only list some of the other aspects of the judgments that would call for comment in a longer paper:

- First, I would note the different implications of the constitutional separation of powers, for the joint judgment reinforcing a *Marbury v Madison* style judicial supremacism whereas for Callinan J requiring judicial deference to executive and legislature in certain matters.[53]

- Secondly, scope of injunctions under s 75(v) is largely unexplored. The joint judgment hints that they may be entrenched in certain cases of non-jurisdictional error and more strongly in cases of fraud, bribery, dishonesty or other improper purpose.[54] On the other hand Callinan J takes a distinctly more limited view, on originalist grounds, seeing injunctions essentially as an adjunct to prohibition, and otherwise not entrenched.[55]

- Thirdly, Callinan J suggests that relief under s 75(v) might only be available for *serious* jurisdictional errors,[56] perhaps related to Gleeson CJ's suggestion that a privative clause will only protect against jurisdictional errors that do not involve '*manifest* defect[s] of jurisdiction'.[57]

- Fourthly, interesting historical and methodological questions arise from Callinan J's perceptions of the framers' legal

[52] Ibid [100]. In other words, the comments in [102] make sense if directed to the proposal set out in [100] but not if directed to those in [101].

[53] Ibid [159], see also ibid [118], [123], [125].

[54] Ibid [82].

[55] Ibid [131].

[56] Ibid [159].

[57] Ibid [12]-[13]. Gleeson CJ and Callinan J both referred to the Privy Council's decision in *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.

knowledge and unanimity. His perceptions inform his conclusions about injunctions under s 75(v)[58] and the omission of certiorari from s 75(v).[59]

- Fifthly, the question, how the validity of time limits is to be determined, is left unanswered by all justices except Callinan J.[60]

46. In conclusion, then, what of the claim that '[s 75], and specifically s 75(v), introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of judicial review.'[61] Following *Plaintiff S157* we can say that:

- the availability of mandamus, prohibition and injunction is entrenched in cases of jurisdictional error

- the availability of injunction *may* be entrenched in cases of non-jurisdictional error and perhaps cases involving fraud, bribery, dishonesty or other improper purpose

- the availability of certiorari is *not* entrenched in any case (certiorari remains available in cases of jurisdictional error under the Migration Act only because s 474 is drafted as preventing courts from granting it in relation to privative clause decisions)

- no attempt to exclude judicial review may result in an administrator being given conclusive power to determine the limits of his or her own jurisdiction

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[58] Ibid [131].

[59] Ibid [123]-[124].

[60] Gleeson CJ noted that there were also particular questions left unanswered, including:

- Could a limitation period prevent review of a decision procured by corrupt inducement where the inducement was not discovered until after the end of the limitation period? (Ibid [39].)

- And how does s 486A operate in relation to failure or refusal to make a decision or conduct preparatory to the making of a decision? (Ibid [42].)

[61] Ibid [103].

- no attempt to exclude judicial review may require the courts to reconstruct the link between a decision-maker's decision and a head of power under which he or she acted

47. But none of this is new.

48. Moreover, important questions are unanswered. In particular, *Plaintiff S157* adds nothing to the previous uncertainty about whether any core obligations of procedural fairness are constitutionally entrenched, apart from the inconclusive comments about fraud, bribery, dishonesty and other improper purposes.

49. In summary, s 75(v) remains a guarantee of the rule of law to some uncertain extent. We will only know to what extent it does, *if* -- let us hope *not when* -- the Parliament goes further than it attempted in 2001 to test that guarantee.