Plaintiff S157/2002 v Commonwealth - [2003] HCA 2

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

PLAINTIFF S157/2002 PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

Plaintiff S157/2002 v Commonwealth of Australia

[2003] HCA 2
4 February 2003
S157/2002

ORDER

The questions reserved for consideration by the Full Court are answered as follows:

Question 1

Is section 486A of the Migration Act *1958 (Cth) invalid in respect of an application by the plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?*

Answer

Upon its proper construction, s 486A does not apply to the proceedings the plaintiff would initiate. No question of the validity of s 486A arises in that regard.

Question 2

Is section 474 of the Migration Act *1958 (Cth) invalid in respect of an application by the plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?*

Answer

Section 474 would be invalid if, on its proper construction, it attempted to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution . However, on its proper construction, it does not attempt to do so. Section 474 is valid but does not apply to the proceedings the plaintiff would initiate.

Question 3

By whom should the costs of the proceeding in this Honourable Court be borne?

Answer

The Commonwealth should pay 75 per cent of the costs of the plaintiff of the proceeding.

Representation:

D J Colquhoun-Kerr with G J Williams for the plaintiff (instructed by Parish Patience Immigration Lawyers)

D M J Bennett QC, Solicitor-General of the Commonwealth with N J Williams SC, S B Lloyd and G R Kennett for the defendant (instructed by Australian Government Solicitor)

Intervener:

B M Selway QC, Solicitor-General for the State of South Australia with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor for the State of South Australia)

CATCHWORDS

Plaintiff S157/2002 v Commonwealth of Australia

Statutes – Construction – Privative clauses – Whether the decision by the Refugee Review Tribunal affirming the decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refusing the plaintiff's application for a protection visa is a "privative clause decision" within s 474 of the *Migration Act* 1958 (Cth) ("the Act") – Whether s 474(1) of the Act is construed as ousting judicial review by the High Court.

Constitutional Law (Cth) – Whether s 474 and s 486A of the Act are invalid – Whether s 474(1)(c) of the Act is directly inconsistent with s 75 of the Constitution – Whether s 474 (1)(a) and (b) of the Act are inseparable from s 474(1)(c) of the Act and are consequently invalid – Whether s 486A of the Act will apply to a "decision" when there has been jurisdictional error – Whether s 486A of the Act is a law incidental to the legislative power conferred by ss 51(xix) , (xxvii), (xxix) of the Constitution – Whether s 486A of the Act is within the express incidental power conferred by s 51 (xxxix) of the C onstitution – Whether s 486A of the Act is inconsistent with s 75(v) of the Constitution .

Immigration – Refugee Review Tribunal – Whether decision affirming the decision of a delegate of the Minister refusing application for a protection visa is a "privative clause decision" within s 474 of the Act – Whether s 474(1) of the Act ousts judicial review by the High Court pursuant to s 75 of the Constitution – Whether s 486A of the Act is constitutionally valid.

Words and Phrases: "privative clause decision".

Constitution, ss 51 (xix), (xxvii), (xxix), (xxxix), 75, 76.
Migration Act 1958 (Cth), ss 5(1), 36, 474, 486A .
Judiciary Act 1903 (Cth), ss 39B, 44 .

1. GLEESON CJ. The plaintiff wishes to institute proceedings against the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"), and the Refugee

Review Tribunal ("the Tribunal"), invoking the jurisdiction of this Court under s 75(v) of the Constitution to issue writs of prohibition and mandamus against officers of the Commonwealth, and the power, in an appropriate case, to grant ancillary relief in the form of certiorari [1]. The proceedings in contemplation concern a decision of the Tribunal confirming a refusal to grant the plaintiff a protection visa. The proposed challenge to the decision is based upon the ground of a denial of natural justice "in that [the Tribunal] took into account material directly relevant and adverse to [the plaintiff's claim of refugee status] without giving him notice of the material or any opportunity to address it". The merits of that contention are not presently in issue. Sections 474 and 486A of the *Migration Act* 1958 (Cth) ("the Act") present potential obstacles to the proceedings. However, the plaintiff contends that those provisions are invalid. He commenced an action in this Court, against the Commonwealth, seeking declarations of their invalidity. Gummow J stated a case for the consideration of a Full Court, asking, as to each section, in its application to the plaintiff's proposed application under s 75(v), whether it is invalid.

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[1] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14].

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2. The questions, and the terms of the legislative provisions, are set out in the judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ ("the joint judgment"). For the reasons that follow, I agree with the answers proposed in the joint judgment. It is convenient to begin with a consideration of s 474.

Section 474

3. The first step in the plaintiff's argument, in support of the contention that s 474 is invalid, is an assertion that the section means what it says. It is argued that, in their ordinary and natural meaning, the words of s 474 purport to prevent any applicant from seeking, and any court, including this Court, from granting, any relief with respect to any application for review of a decision of an administrative character (save for some minor exceptions) under the Act. Therefore, the section purports to oust the jurisdiction conferred upon this Court by s 75(v) of the Constitution. The Parliament has no power to do that.

4. The Commonwealth accepts that, if read literally, s 474 would purport to oust the jurisdiction of this Court, and at least to that extent would be invalid. However, the Commonwealth contends that s 474 does not have that meaning. It has a more restricted meaning than that which, at first sight, it appears to convey. It was enacted against a background of established judicial interpretation of similar provisions, and Parliament acted in the light of that interpretation. Furthermore, s 15A of the *Acts Interpretation Act* 1901 (Cth) requires that an Act is to be "read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth."

5. **Following paragraph cited by:**

Deripaska v Minister for Foreign Affairs (27 March 2025) (Wigney, Stewart and Neskovcin JJ)

Section 75(v) of the Constitution confers upon this Court, as part of its original jurisdiction, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. It 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. In the Convention debates at the time of the framing of the Constitution , Mr Barton explained the purpose of the provision [2]:

> "This will give the High Court original jurisdiction … in these cases, so that when a person wishes to obtain the performance of a clear statutory duty, or to restrain an officer of the Commonwealth from going beyond his duty, or to restrain him in the performance of some statutory duty from doing some wrong, he can obtain a writ of mandamus, a writ of prohibition, or a writ of injunction.
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> …
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> This provision is applicable to those three special classes of cases in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that the High Court may exercise its function of protecting the subject against any violation of the Constitution , or of any law made under the Constitution ."

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[2] *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898, vol 2 at 1884-1885.

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6. **Following paragraph cited by:**

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (23 November 2021) (Kenny, Besanko, Griffiths, Mortimer and Charlesworth JJ)

> 167. Through s 75 , and s 75(v) in particular, the High Court has a "constitutional function of protecting the subject against any violation of the Constitution , or of any law made under the Constitution". There are two limbs to that statement by Gleeson CJ in *Plaintiff S157/2002 v*

> *Commonwealth* [2003] HCA 2; 211 CLR 476 at [6] , the first being relevant to s 61 of the Constitution . The High Court, and any Chapter III Court invested with the same jurisdiction through s 39B of the Judiciary Act , has a constitutional function of protecting the subject against any violation of s 61 , where such protection is warranted because of the way in which an exercise of s 61 affects the rights and interests of an individual.

The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution , or of any law made under the Constitution . However, in relation to the second aspect of that function, the powers given to Parliament by the Constitution to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court.

7. Privative clauses which deprive, or purport to deprive, courts of jurisdiction to review the acts of public officials or tribunals in order to enforce compliance with the law, or which limit, or purport to limit, such jurisdiction, may apply in either State or federal jurisdiction. Many of the considerations relevant to their interpretation and application are common to both [3] .

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[3] See, eg, *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602; *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78.

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8. Speaking of a nation with a unitary constitution, Denning LJ said [4] :

> "If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end."

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[4] *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586.

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9. In a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, there is a further issue that may be raised by a privative clause. It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power. [5]

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[5] *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419.

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10. Legislation which confers power or jurisdiction on officials or tribunals, or imposes public duties, or enacts laws which govern official conduct, and which, in addition, deprives, or purports to deprive, courts of jurisdiction to control excess of power or jurisdiction, or to compel performance of duties, or to restrain breaches of the law, involves a potential inconsistency. A provision that defines and limits the jurisdiction of a tribunal may be difficult to reconcile with a provision that states that there is no legal sanction for excess of jurisdiction. In 1909, in *Baxter v New South Wales Clickers' Association* [6] , Griffith CJ said:

> "A grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms."

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[6] (1909) 10 CLR 114 at 131.

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11. This Court's approach to the interpretation of provisions such as s 474 has been developed over a long period. In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [7] , Mason CJ said that "they are effective to protect an award or order from challenge on the ground of a mere defect or irregularity which does not deprive the tribunal of the power to make the award or order". Some years earlier, in *Church of Scientology v Woodward* [8] , he had said of privative clauses that, "notwithstanding the wide and strong language in which these clauses have been expressed, the courts have traditionally refused to recognize that they protect manifest jurisdictional errors or ultra vires acts". In both cases, reference was made to *R v Hickman; Ex parte Fox and Clinton* [9] .

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[7] (1995) 183 CLR 168 at 180.

[8] (1982) 154 CLR 25 at 55-56 .

[9] (1945) 70 CLR 598 at 614-617 .

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12. The case of *Hickman* was decided in 1945, but even then there was a history of English and Australian decisions on the meaning and effect of privative clauses. In 1874, the Privy Council, in *Colonial Bank of Australasia v Willan* [10] , was dealing with a Victorian mining statute, which contained a provision that no proceeding under the statute should be removed or removable into the Supreme Court, subject to certain exceptions. Their Lordships said [11] :

> "It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause

in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

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[10] (1874) LR 5 PC 417 .

[11] (1874) LR 5 PC 417 at 442.

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13. **Following paragraph cited by:**

Garcia-Godos v R; MH v R (19 July 2023) (Davies, Weinstein and Sweeney JJ)
Pitman v Commissioner of Taxation (16 December 2021) (Allsop CJ; Davies and Bromwich JJ)
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19 (23 August 2021) (Allsop CJ; Kerr and Mortimer JJ)
Ballas v Department of Education (06 May 2020) (Bell P, Payne JA and Emmett AJA)
Vannini v Worldwide Demolitions Pty Ltd (17 December 2018) (Macfarlan and Gleeson JJA, Barrett AJA)

55. Mahenthirarasa v State Rail Authority of New South Wales [2008] NSWCA 101 ; (2008) 6 ADCR 61 (Mahenthirarasa v SRA) at [59] (Basten JA) referring to the comments of Gleeson CJ in Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2 at [13] .

The concept of "manifest" defect in jurisdiction, or "manifest" fraud, has entered into the taxonomy of error in this field of discourse. The idea that there are degrees of error, or that obviousness should make a difference between one kind of fraud and another, is not always easy to grasp. But it plays a significant part in other forms of judicial review. For example, the principles according to which a court of appeal may interfere with a primary judge's findings of fact, or exercise of discretion, are expressed in terms such as "palpably misused [an] advantage", "glaringly improbable", "inconsistent with facts incontrovertibly established", and "plainly unjust" [12] . Unless adjectives such as "palpable", "incontrovertible", "plain", or "manifest" are used only for rhetorical effect, then in the context of review of decision-making, whether judicial or administrative, they convey an idea that there are degrees of strictness of scrutiny to which decisions may be subjected. Such an idea is influential in ordinary appellate judicial review, and it is hardly surprising to see it engaged in the related area of judicial review of administrative action.

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[12] See, eg, *House v The King* (1936) 55 CLR 499 at 505 ; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479.

14. The reasons for judgment of Dixon J in *Hickman* have been taken up in the approach of Australian courts to privative clauses, both in State and federal jurisdiction. The decision of the Court was unanimous; and it is important to an understanding of what Dixon J said to note what he and the other members of the Court decided. Like many of the cases on privative clauses in federal jurisdiction, the proceedings concerned an exercise, or purported exercise, of award-making power by an industrial tribunal. A Local Reference Board was given, by the National Security (Coal Mining Industry Employment) Regulations 1941 (Cth) ("the Regulations"), power, by arbitral award, to settle disputes between employers and employees in the coal mining industry. Regulation 17 provided that a decision of a Board should "not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever". A Board made an award purporting to cover truck drivers employed by a transportation company which carried coal, as well as other commodities. Their employers sought a writ of prohibition in this Court, on the ground that they were not engaged in the coal mining industry. The employees argued that transportation of coal was part of the coal mining industry. That argument was rejected. Prohibition was granted, on the basis that the Board was acting beyond its powers.

15. Dixon J considered, and rejected, an argument that reg 17 excluded relief. He said: [13]

> "The presence of this provision in the Regulations makes it necessary to say whether and to what extent it is ineffectual to protect the decision of the Board from invalidation. In the first place, it is clear that such a provision cannot, under the Constitution , affect the jurisdiction of this Court to grant a writ of prohibition against officers of the Commonwealth when the legal situation requires that remedy. But a writ of prohibition is a remedy that lies only to restrain persons acting judicially from exceeding their power or authority. It is therefore necessary to ascertain before issuing a writ whether the persons or body against which it is sought are acting in excess of their powers; and that means whether their determination, when made, would be void. The Board derives its power from Regulations of which reg 17 forms a part, and that regulation must be taken into account in ascertaining what are the true limits of the authority of the Board, and whether its decision is void."

[13] (1945) 70 CLR 598 at 614.

16. Thus, this Court's jurisdiction to grant prohibition in the event that the Board exceeded its lawful authority could not be taken away by statute. However, the question was whether the

Board had exceeded its authority, and that was to be decided by reference to the whole of the Regulations, of which reg 17 formed a part. Dixon J went on to state the primary principle for which his judgment stands [14] :

> "In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them."

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[14] (1945) 70 CLR 598 at 616.

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17. **Following paragraph cited by:**

> Health Care Complaints Commission v Hill (15 December 2022) (Ward P, Mitchelmore JA and Basten AJA)
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> > 4. The King v Hickman; Ex parte Fox (1945) 70 CLR 598 at 615-616 (Dixon J); [1945] HCA 53 ; and, in the State sphere Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2 at [17] , [19] (Gleeson CJ), [71]-[73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) .

The essential problem is the inconsistency between a provision in a statute, or an instrument, conferring a limited power or authority, and a provision which appears to mean that excess of power or authority may not be prohibited. When the power or authority is conferred by a federal statute, and it is this Court's constitutional jurisdiction to prohibit acts of officers of the Commonwealth in excess of power or authority that the statute purports to take away, a possible solution is that urged by the plaintiff in the present case: accept the privative clause at face value, and declare it invalid. However, the reasons of Dixon J show that, although *Hick man* was decided in the context of federal jurisdiction, he also had unitary constitutions in mind. And his preferred solution, both in State and federal jurisdiction, was attempted reconciliation. His view as to how that could be achieved in the case before him was as follows [15] :

> "It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution … It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition. But where the legislature confers authority subject to limitations, and at the same time enacts such a clause as is contained in reg 17 , *it becomes a question of interpretation of the*

> *whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity.* In my opinion, the application of these principles to the Regulations means that any decision given by a Local Reference Board which upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid." (emphasis added)

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[15] (1945) 70 CLR 598 at 616.

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18. 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," although it may be noted that, in *Willan* , the fraud referred to was that of the party procuring the decision. The last sentence in the passage quoted is the application of the principles stated to the particular instrument in question in *Hickman*. By contrast with the complex legislative scheme presently in question, it was a relatively simple instrument. The Board had power to settle industrial disputes in a certain industry. In that regard, it had to follow certain procedures. In *Hickman*, it was claimed that a purported decision was beyond power because the dispute in question was between parties who were not in the relevant industry. It might have been thought that the view that they were in the relevant industry was at least fairly open. There was certainly a bona fide attempt by the Board to pursue its powers. Even so, the "decision" (Dixon J said he preferred to call it something else [16]), in the Court's opinion, did not on its face appear to be within power. Therefore, it was not protected by reg 17 from judicial interference.

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[16] (1945) 70 CLR 598 at 619.

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19. Giving effect to the whole of a statute which confers powers or jurisdiction, or imposes duties, or regulates conduct, and which also contains a privative provision, involves a process of statutory construction described as reconciliation. The outcome of that process may be that an impugned act is to be treated as if it were valid. Brennan J said in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [17] , in a passage quoted by Gaudron and Gummow JJ in *Darling Casino Ltd v NSW Casino Control Authority* [18] :

> "In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded."

On the other hand it may be that, as in *Hickman*, the impugned act is not to be treated as if it were valid. In the case of a purported exercise of decision-making authority, limitation on

authority is given effect, notwithstanding the privative provision. That may involve a conclusion that there was not a "decision" within the meaning of the privative clause. In a case such as the present, it may involve a conclusion that a purported decision is not a "decision ... under this Act" so as to attract the protection given by s 474 .

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[17] (1995) 183 CLR 168 at 194.

[18] (1997) 191 CLR 602 at 630.

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20. Limitations or conditions on the exercise of power or authority that are given effect, notwithstanding a privative provision, were described by Dixon J in *R v Murray; Ex parte Proctor* [19] as "indispensable". In that case, he described the process of statutory construction contemplated in *Hickman* as involving two steps [20] . The first step is to note that the protection afforded by a provision such as reg 17 will be inapplicable unless there has been "an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province". The second step is to consider "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". In explanation of the second step, Dixon J referred, by way of analogy, to the distinction between statutory provisions that are directory and those that are mandatory [21] . That distinction is now in disfavour [22] . Even so, the process of ascribing legislative purpose, which underlay the distinction, is one with which courts are familiar. The question is "whether it was a purpose of the legislation that an act done in breach of the provision should be invalid." [23]

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[19] (1949) 77 CLR 387 at 399.

[20] (1949) 77 CLR 387 at 399-400 .

[21] (1949) 77 CLR 387 at 399.

[22] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390.

[23] (1998) 194 CLR 355 at 390.

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21. Later again, in *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* [24] , Dixon J referred to "imperative duties or inviolable limitations or restraints" which may be imposed by legislation, contravention of which would not be protected by a privative provision. To describe a duty as imperative, or a restraint as

inviolable, is to express the result of a process of construction, rather than a reason for adopting a particular construction; but it explains the nature of the judgment to be made. Because what is involved is a process of statutory construction, and attempted reconciliation, the outcome will necessarily be influenced by the particular statutory context.

[24] (1951) 82 CLR 208 at 248.

22. The approach to the interpretation of statutes containing privative provisions enunciated by Dixon J in *Hickman*, and developed by him in later cases, has been accepted by this Court as authoritative [25]. Parliament has legislated in the light of that acceptance. That approach is inconsistent with the plaintiff's submission that s 474 should be read literally, treated as an attempted ouster of this Court's jurisdiction under s 75(v) of the Constitution, and, to that extent at least, declared invalid. In this respect, the argument for the Commonwealth prevails.

[25] eg *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.

23. However, the questions in the case stated deal with the operation of s 474, not in the abstract, but in its application to the proceedings for constitutional writs contemplated by the plaintiff. Those proceedings involve a challenge to a purported decision of the Tribunal on the ground of denial of procedural fairness or natural justice. Accordingly, there was argument from both parties as to the operation of the Act, including s 474, in a case of that kind.

24. In order to establish the context in which the competing arguments on statutory construction are to be considered, it is convenient to identify the issues that would arise apart from the effect of s 474. In that regard, it should be noted that, since the time relevant to this case, Parliament has enacted further legislation, which was assented to on 3 July 2002, and commenced on the following day, dealing with certain aspects of the requirements of natural justice in connection with the operation of parts of the Act [26]. That legislation is presently irrelevant.

[26] *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth).

25. **Following paragraph cited by:**

McEwan v Clark (02 June 2023) (Morrison and Flanagan JJA; Crow J)

Attorney-General v University of Tasmania (15 December 2020) (Pearce J, Geason J, Marshall AJ)

In *Australian Broadcasting Tribunal v Bond* [27] , Deane J explained that, in the past, it was customary to refer to the duty to observe common law requirements of fairness as a duty "to act judicially". In a passage from *Hickman* quoted above, Dixon J can be seen using that expression. Later, the duty came to be referred to as a duty to observe the requirements of "natural justice". Later again, it became common to speak of "procedural fairness". The precise content of the requirements so described may vary according to the statutory context; and may be governed by express statutory provision. Subject to any such statutory regulation, and relevantly for present purposes, the essential elements involved include fairness and detachment. Fairness and detachment involve "the absence of the actuality or the appearance of disqualifying bias and the according of an appropriate opportunity of being heard" [28] . A statute may regulate and govern what is required of a tribunal or other decision-maker in these respects, and prescribe the consequences, in terms of validity or invalidity, of any departure. [29] Subject to any such statutory provision, denial of natural justice or procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power, and jurisdictional error. In 1885, the consequences of such failure were described by Lord Selborne in *Spackman v Plumstead District Board of Works* [30] , a case concerning the potential for judicial review of an architect's decision as to where a building line should be. The architect's decision-making authority was conferred by statute. His Lordship said [31] that, by directing the architect to decide the building line, the statute (by implication) imposed upon him a duty to decide it to the best of his judgment, independently and impartially. His Lordship then said [32] :

> "No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice."

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[27] (1990) 170 CLR 321 at 365-367 .

[28] (1990) 170 CLR 321 at 367.

[29] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142 [166] per Hayne J.

[30] (1885) 10 App Cas 229 .

[31] (1885) 10 App Cas 229 at 239.

[32] (1885) 10 App Cas 229 at 240.

26. In the present context, there is a question whether a purported decision of the Tribunal made in breach of the assumed requirements of natural justice, as alleged, is excluded from judicial review by s 474. The issue is whether such an act on the part of the Tribunal is within the scope of the protection afforded by s 474. Consistent with authority in this country, this is a matter to be decided as an exercise in statutory construction, the determinative consideration being whether, on the true construction of the Act as a whole, including s 474, the requirement of a fair hearing is a limitation upon the decision-making authority of the Tribunal of such a nature that it is inviolable. The line of reasoning developed by Dixon J in *Hickman* and later cases identifies the nature of the task involved, and the question to be asked. By identifying the task as one of statutory construction, all relevant principles of statutory construction are engaged. It cannot be suggested that Dixon J was formulating a principle of construction which excluded all others. On the contrary, by treating the exercise as a matter of construction he was opening the way for the application of other principles as well. Those principles have been stated by this Court on many occasions, and are as well known to Parliament as *Hickman* itself.

27. In considering and applying the relevant principles of statutory construction, it is necessary to begin with an examination of the scheme of the Act. For present purposes, the central provisions of the Act are those which concern the making of decisions to grant or refuse visas, which enable a non-citizen lawfully to enter, or remain in, Australia. Unlawful entry into, or presence in, Australia, exposes a person to loss of liberty and compulsory removal. The Act, and the Regulations made under it, provide for multiple classes, and sub-classes, of visa. For each class of visa detailed criteria are provided. These must be satisfied by applicants, and are to be applied by decision-makers. The plaintiff in this case applied for a protection visa. By virtue of s 36 of the Act, a criterion for a protection visa is that the applicant for the visa is a non-citizen of Australia to whom Australia has protection obligations under the Convention relating to the Status of Refugees as amended by the 1967 Refugees Protocol. That Convention includes a definition of "refugee". It is presently unnecessary to note the detail of that definition. It suffices to say that its elements have given rise to much litigation, and have been the subject of judicial interpretation in many cases. Section 65 of the Act provides that if, after considering a valid application for a visa, the Minister is satisfied that the prescribed criteria have been met, the Minister is to grant the visa. If not so satisfied, the Minister is to refuse the visa. The Minister has power to delegate this function. Decisions of the Minister or a delegate are subject to review by the Tribunal. Such a review occurred in the present case. The essence of the plaintiff's application for a visa was that he satisfied the Convention definition of a refugee, and that, pursuant to the Convention, Australia owed him protection obligations. The relevant provisions of the Act constitute the means by which Australia gives effect to its international obligations. The interpretation of the definition of refugee in the Convention is a matter of law. Decisions as to whether a person is someone to whom Australia owes protection obligations often turn upon questions of law; sometimes complex and difficult questions of law. Although it is the provisions of the Act concerning protection visas that are directly relevant in the present case, they are only part of a wider, and more detailed, pattern of legislation which, in a variety of respects, affects fundamental human rights and involves Australia's international obligations.

28. In such a context, the following established principles are relevant to the resolution of the question of statutory construction.

29. **Following paragraph cited by:**

Arrighetti & Qodirova (12 January 2026) (Riethmuller and Kari JJ; McClelland DCJ)
Pallin & Deave (No 2) (18 October 2024) (Riethmuller J)

8. The appellant also complains that the primary judge failed to "comply with" the United Nation's *Convention on the Rights of the Child* (1989). The Convention had not been enacted into Australian law either before the amendments commenced or after the amendments commenced. At the highest, Part VII of the Act sets out that it is an object of the Act "to give effect to" the convention (s 60B(4) prior to 6 May 2024, and now s 60B (b)) . As I set out in *Inwood & Brock* [2024] FedCFamC1A 72 at [13])

> The Convention does not form part of the domestic law in Australia: the domestic law is that set out in the sections of the Family Law Act 1975 (Cth) . Whilst one of the objects of Part VII of the Act (s 60B(4)) was to give effect to the Convention, the relevance of the Convention is limited as the Convention itself has not been enacted into local law. In *Plaintiff S157 /2002 v The Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [29] , Gleeson CJ explained that "where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations." As there was no ambiguity in the legislation that the primary judge was applying, which arose from the circumstances of this case, the Convention was not relevant to the determination of the matter.

Inwood & Brock (03 May 2024) (Riethmuller J)

First, where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations [33] .

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[33] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; see also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ.

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30. **Following paragraph cited by:**

Falconer v Commissioner of Police [No 2] (01 May 2024) (Buss P; Vaughan and Hall JJA)

208. While there are many other examples of the use of the terminology of 'necessary implication', [122] that is not the only way in which the concept has been expressed. In ***Coco v The Queen*** the plurality also used the language of 'clear implication'. [123] In ***Pyneboard Pty Ltd v Trade Practices Commission*** there is reference to what 'clearly emerges' whether by express words or by necessary implication. [124] Another formulation is 'irresistible clearness'. [125] The variations in the judicial language used in the authorities are understandable when it is recalled that in ***Hamilton v Oades*** Mason CJ explained that the term 'necessary implication' required a 'high degree of certainty as to legislative intention' [126] (to be understood in the sense of giving to the statutory text the meaning the legislature is *taken* to have intended it to have). [127] Whate ver formulation is employed, so far as there is said to be statutory authorisation to abrogate or curtail a fundamental right, freedom or immunity, the curial insistence is one that there be a clear expression of an unmistakable and unambiguous intention. [128]

via

[122] See eg ***Melbourne Corporation v Barry*** [1922] HCA 56; (1922) 31 CLR 174, 206 ; ***Police Service Board v Morris*** (404), (406), (408); ***Bropho v The State of Western Australia*** (16 - 17); ***Public Service Association (SA) v Federated Clerks' Union*** [1991] HCA 33; (1991) 173 CLR 132, 160 ('necessaril y to be implied'); ***Wentworth v New South Wales Bar Association*** [1992] HCA 24; (1992) 176 CLR 239, 252 ; ***Plaintiff S157/2002 v Commonwealth of Australia*** [30] ; ***Lee v The Queen*** [2014] HCA 20; (2014) 253 CLR 455 [32] ('necessary intendment'); ***Lee v New South Wales Crime Commission*** [3], [126].

Falconer v Commissioner of Police [No 2] (01 May 2024) (Buss P; Vaughan and Hall JJA)

Migration Agents Registration Authority v Frugtniet (30 January 2018) (Siopis, Robertson and Bromwich JJ)

67. The primary judge considered a series of decisions of this Court, which her Honour accepted mostly concerned the application of penalty privilege in judicial proceedings. One exception was *Griffin v Pantzer* [20 04] FCAFC 113; 137 FCR 209, which concerned the existence of privilege against self-incrimination in a bankruptcy examination under s 81 of the *Bankruptcy Act 1966* (Cth) . Particular reliance was placed by her Honour on the following paragraphs from the judgment of Allsop J (as his Honour then was, with whom Ryan and Heerey JJ agreed) at [43]-[46] (underlining added by her Honour):

> 43 The privilege not to answer questions or produce documents which have a tendency to expose the person to a criminal charge, or a penalty or to forfeiture has been recognised by the High Court as a deeply rooted principle of the general law: *R v Associated Northern Collieries* at 748; *Sorby* at 294, 309, 311 ; *Pyneboard* at 340,

341, 347 ; and *Reid v Howard* at 11-12, which can now be expressed also in terms of a human right: *Environment Protection Authority v Caltex Refining Co Pty Ltd* at 498.

44 The consequence of the recognition by the High Court that the privilege is one deeply rooted in the law as a fundamental right is that it is not merely a rule of evidence available in judicial proceedings, it is available generally, even in a non-curial context, as the foundation of an entitlement not to answer a question or produce a document: *Pyneboard* at 340-341 ; *Sorby* at 309 ; and *Police Service Board v Morris* (1985) 156 CLR 397.

45 Prior to *Pyneboard* , it had been generally expressed that the privilege was inherently incapable of application in non-judicial proceedings. In this form, it was seen as a testimonial privilege. That was the view of Wigmore, *Wigmore on Evidence* at [2263], of the United States Supreme Court: see, for example, *Re Harris* 221 US 274 (1911), and of the Full Courts of New South Wales and Victoria: see the cases cited in *Pyneboard* at 337-338 ; and see generally *Phipson on Evidence* pp 198-203. There was, however, a contrary line of authority: see the discussion in *Pyneboard* at 337-340 .

46 It is presumed that Parliament does not intend to interfere with fundamental principles or rights including entrenched general law rights, such as the privilege against self-incrimination, without expressing its intention clearly, whether by express words or necessary implication: *Potter v Minahan* (1908) 7 CLR 277 at 304 ; *Sorby* at 294-295, 309-310 ; *Baker v Campbell* (1983) 153 CLR 52 at 96-97, 116, 123, 132 ; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Annetts v McCann* (1990) 170 CLR 596 at 598 ; *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427 at 437 ; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Daniels* at [11], [43], [88]-[94] and [132]-[134] ; and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [30] .

Kaldas v Barbour (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)
State of Queensland v Roane-Spray (20 October 2017) (Fraser and Philippides JJA and Bowskill J)

Secondly, courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment [34] . As Lord Hoffmann recently pointed out in the United Kingdom [35] , for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual" [36] .

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[34] *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

[35] *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131.

[36] See also *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

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31. Thirdly, the Australian Constitution is framed upon the assumption of the rule of law [37] . Br ennan J said [38] :

> "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."

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[37] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J.

[38] *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.

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32. **Following paragraph cited by:**

Witthahn v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Johnstone v Commissioner of Police (14 December 2021) (Sofronoff P; Morrison and McMurdo JJA)

Fourthly, and as a specific application of the second and third principles, privative clauses are construed "by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied" [39] .

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[39] *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 per Dawson and Gaudron JJ.

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33. Fifthly, a principle of relevance to *Hickman* is that what is required is a consideration of the whole Act, and an attempt to achieve a reconciliation between the privative provision and the rest of the legislation. In the case of the Act presently under consideration, that is a formidable task. There may not be a single answer to the question. But the task is not to be performed by reading the rest of the Act as subject to s 474 , or by making s 474 the central and controlling provision of the Act .

34. The Commonwealth's argument as to the effect of s 474 , in its application to the proceedings contemplated by the plaintiff, is inconsistent with the above principles. In essence, the argument is that the amendment of the Act which introduced s 474 brought about a radical transformation of the pre-existing provisions. From that time, there were no "imperative duties", and no "inviolable limitations" on the powers and jurisdiction of decision-makers under the Act . When s 474 says that constitutional writs do not lie, it means that, subject to "the *Hickman* conditions", breaches of the Act do not involve jurisdictional error. The " *Hickm an* conditions" are that a decision is a bona fide attempt to exercise power, that it relates to the subject matter of the legislation, and that is reasonably capable of reference to the power. Applying that to a decision to refuse a protection visa under s 65 of the Act , it will always necessarily relate to the subject matter of the legislation, it will always be reasonably capable of reference to power given to the decision-maker, and so long as it is a bona fide attempt to exercise the power conferred by s 65 , all the conditions necessary for legally valid decision-making will have been satisfied. Australia's international protection obligations will be fulfilled by the executive government's bona fide attempt to fulfil them.

35. The theory behind this argument appears to be that, in whatever statutory context it is found, a privative provision controls the meaning of the remainder of the statute, and, in the case of a conferral of jurisdiction upon a decision-maker, expands that jurisdiction in such a way that excess of jurisdiction will only occur in the event of a breach of one of the "conditions" mentioned. That is difficult to reconcile with the actual decision in *Hickman*. And, in the context of the Act , and decisions as to protection visas, it is impossible to reconcile with the principles of statutory construction stated above.

36. As French J observed in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [40] , the Act is "replete with official powers and discretions, tightly controlled under the Act itself and under the Regulations by conditions and criteria to be satisfied before those powers and discretions can be exercised". In that case, and a number of related cases heard at the same time, the Full Court of the Federal Court dealt with several different kinds of challenge to decisions under the Act , and the operation of s 474 in relation to each of them. Here we are concerned with only one kind of challenge, involving a claim of denial of natural justice. A rejection of the Commonwealth's global approach to the operation of s 474 does not mean that the opposite conclusion follows in relation to every possible kind of challenge to a decision.

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[40] (2002) 193 ALR 449 at 542 [399] .

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37. **Following paragraph cited by:**

DVO16 v Minister for Immigration & Border Protection (09 September 2019) (Greenwood, Flick and Stewart JJ)

The principles of statutory construction stated above lead to the conclusion that Parliament has not evinced an intention that a decision by the Tribunal to confirm a refusal of a protection visa, made unfairly, and in contravention of the requirements of natural justice, shall stand so long as it was a bona fide attempt to decide whether or not such a visa should be granted. Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. 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 not suffice to manifest such an intention.

38. It follows that, in my view, if the Tribunal's decision in relation to the plaintiff was taken in breach of the rules of natural justice, as is alleged, then it is not within the scope of protection afforded by s 474 . It is not, relevantly, a decision to which s 474 applies.

Section 486A

39. As to s 486A , three features of the section may be noted. First, it applies in relation to a "privative clause decision", which is defined in s 5 to mean a decision of the kind referred to in s 474(2) . Secondly, the time limit commences to run from notification of the decision, which may be very different from the time when a person becomes aware of the circumstances giving rise to a possible challenge to the decision. Thirdly, the time limit must not be extended. Even on the Commonwealth's submissions as to the meaning and effect of s 474 , there may be decisions which that section does not protect. A decision procured by a corrupt inducement would be an obvious instance. The inducement might not be discovered until a time later than 35 days after the notification of the decision. How does the legislation operate in such a case? That is not a question that arises in the present case.

40. The Commonwealth contends that the meaning and effect of s 486A is that decisions of the kind described in s 474(2) , unless challenged within the time limited by s 486A , are to be treated as valid and effective for all purposes, even if they are affected by error of a kind which, consistently with "the *Hickman* principles" would not be protected from judicial review by s 474 . Thus, for example, if the Regulations in question in *Hickman* had included, not merely reg 17 , but also a regulation in terms similar to s 486A , reg 17 would not defeat an application for prohibition but, if the time limit elapsed before proceedings were commenced, the additional regulation would bar the proceedings.

41. That approach involves treating "decision ... under this Act" in s 474(2) as meaning "purported decision ... under this Act"; but if that were correct, it appears to leave no textual basis for the hypothesis that s 474 does not, of its own force, protect the decision from judicial review. Whatever term is used to describe, in a summary form, the kinds of error that expose a decision to judicial review, notwithstanding a privative provision, the process of statutory construction involved cannot lead to "decision" being read as "purported decision". If a decision is not treated as a "decision ... under this Act" for the purposes of s 474 , it is not such a decision for the purposes of s 486A .

42. It is to be noted that s 474 does not apply only to decisions that have been made. It also covers a failure or refusal to make a decision, conduct preparatory to the making of a decision, and other acts or omissions which may not involve something that is a purported decision, but not a decision under the Act . The operation of s 486A in such a case does not arise for decision. In the present case, s 486A will not operate in relation to a purported decision made in breach of the requirements of natural justice.

Conclusion

43. I would answer the questions in the case stated in the manner proposed in the joint judgment.

44. **Following paragraph cited by:**

Kaldas v Barbour (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. The plaintiff commenced proceedings in this Court by writ of summons endorsed with his statement of claim. He contends that certain provisions of the *Migration Act* 1958 (Cth) ("the Act") are invalid. The provisions in question bear on his right to seek judicial review of a decision of the Refugee Review Tribunal ("the decision") affirming an earlier decision of the delegate of the Minister for Immigration and Multicultural and Indigenous Affairs refusing his application for a protection visa. By reason that he brings these proceedings in his capacity as a person who applied for a protection visa under s 36 of the Act , the plaintiff cannot be named by this Court [41] .

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[41] Section 91X of the Act relevantly provides:

"(1) This section applies to a proceeding before the High Court, the Federal Court or the Federal Magistrates Court if the proceeding relates to a person in the person's capacity as:

(a) a person who applied for a protection visa; ...

(2) The court must not publish (in electronic form or otherwise), in relation to the proceeding, the person's name."

In the absence of any direct challenge, it will be assumed that s 91X is constitutionally valid.

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45. After the defendant, the Commonwealth of Australia, filed its defence to the plaintiff's statement of claim, Gummow J stated a case for the consideration of the Full Court. At this stage, it is necessary only to note that the following is recorded in the case stated:

"The Plaintiff asserts that he would have applied and would, but for sections 474 and 486A of the *Migration Act* 1958 (Cth) , apply to the High Court for judicial review of and for relief in its original jurisdiction under section 75(v) of the Constitution of the decision."

A draft Order Nisi attached to the case stated reveals that he would have challenged, or would challenge, the decision on the ground that it was reached in breach of the requirements of natural justice and would have sought, or would seek, relief by way of prohibition, certiorari and mandamus, but not by way of injunction. Breaches of the requirements of natural justice found a complaint of jurisdictional error under s 75(v) of the Constitution [42] .

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[42] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82. It is unnecessary in these proceedings to consider any consequences that may follow from the *Migration Legislation Amendment (Procedural Fairness) Act* 2002 (Cth) which came into force, and applies to decisions made, after the decisions relevant to these proceedings.

Questions in the case stated

46. By reference to the facts and matters therein set out, which are briefly recorded above, the following questions are asked in the case stated:

"**QUESTION 1**

Is section 486A of the *Migration Act* 1958 (Cth) invalid in respect of an application by the Plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?

QUESTION 2

Is section 474 of the *Migration Act* 1958 (Cth) invalid in respect of an application by the Plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?

QUESTION 3

By whom should the costs of the proceeding in this Honourable Court be borne?"

47. As the draft Order Nisi attached to the case stated does not claim injunctive relief, Questions 1 and 2 above should be answered by reference only to the writs of mandamus, certiorari and prohibition.

Legislative provisions in issue

48. Section 474 was inserted into the Act by Sched 1 of the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth) ("the Amending Act") which came into operation on 2 October 2001. That section relevantly provides:

> "(1) A privative clause decision:
>
> (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.
>
> (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 a discretion or not), other than a decision referred to in subsection (4) or (5).
>
> (3) A reference in this section to a decision includes a reference to the following:
>
> (a) granting, making, suspending, cancelling, revoking or refusing to make an order or determination;
>
> (b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);
>
> (c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;
>
> (d) imposing, or refusing to remove, a condition or restriction;
>
> (e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article;
>
> (g) doing or refusing to do any other act or thing;
>
> (h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision."

Sub-section (4) then sets out certain decisions that, for the purposes of s 474(2), are not privative clause decisions. And sub-s (5) permits the making of regulations specifying that particular decisions are not privative clause decisions.

49. As will later appear, there may be a question whether the decision which the plaintiff wishes to challenge is a "privative clause decision" as defined in sub-ss (2) and (3) of the Act. However, if it is, it is common ground that neither sub-ss (4) nor (5) operates to take the decision outside of the definition in sub-ss (2) and (3) of s 474.

50. Section 486A of the Act was amended by the *Migration Legislation Amendment Act (No 1)* 2001 (Cth) which came into operation on 27 September 2001 and by the *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), which came into operation on 2 October 2001. It now reads as follows:

"(1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.

(2) The High Court 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.

(3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section."

51. The plaintiff was notified of the decision on 5 April 2002, more than 35 days before commencing these proceedings.

The competing arguments with respect to s 474 of the Act

52. Although it is the subject of the second question in the case stated, it is convenient to consider s 474 of the Act first. The argument advanced on behalf of the plaintiff is that par (c) of s 474(1) is directly inconsistent with s 75(v) of the Constitution which confers original jurisdiction on this Court "[i]n all matters ... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". That being so, it is said, s 474(1)(c) is invalid. Further, it is put that the other parts of s 474 are inseverable from sub-s (1)(c) and, thus, are also invalid.

53. On behalf of the Commonwealth, it was conceded that s 474 cannot oust the jurisdiction which s 75(v) of the Constitution confers on this Court. That concession was properly made. It

reflects what has been understood to be the position since the decision in *The Tramways Case [No 1]* [43] given in 1914, and what follows is to be read with that starting point in mind. However, it was submitted that, when the Act is construed as a whole, s 474 does not have that effect and, thus, is not invalid. It will later be necessary to refer in some detail to the construction which, according to the submissions for the Commonwealth, should be placed on relevant provisions of the Act and the effect which s 474 is said to have on this Court's power to review decisions pursuant to s 75(v) of the Constitution . For the moment, however, it is sufficient to note that it is necessary to engage in a process of construction before the constitutional validity of s 474 can be considered.

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[43] *R v The Commonwealth Court of Conciliation and Arbitration; Ex parte The Brisbane Tramways Company Limited* (1914) 18 CLR 54.

Section 474 of the Act ; privative clauses generally

54. The construction of legislation containing provisions such as s 474 of the Act has a particular, but not entirely satisfactory, history. For the moment, it is necessary to refer only to the decision in *R v Hickman; Ex parte Fox and Clinton* [44] . Doubtless because of that decision and, also, because of the terms of s 75(v) of the Constitution , the Commonwealth contends that s 474(1) is not to be construed as totally excluding judicial review. Moreover, it is clear that Parliament did not intend it to have that effect.

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[44] (1945) 70 CLR 598 .

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55. So far as legislative intent is concerned, it is relevant to note that, in the second reading speech for the Bill that became the Amending Act which amended the Act so to include s 474 , the Minister said:

> " The privative clause does not mean that access to the courts is denied, nor that only the High Court can hear migration matters. Both the Federal Court and the High Court can hear migration matters, but the grounds of judicial review before either court have been limited."[45]

A little later, the Minister added:

> " Members may be aware that the effect of a privative clause such as that used in Hickman's case is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently."[46]

Of course, the Minister's understanding of the decision in *Hickman* cannot give s 474 an effect that is inconsistent with the terms of the Act as a whole [47] .

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[45] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 September 2001 at 31559.

[46] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 September 2001 at 31561.

[47] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ, 547 per Gaudron J. See also *Mills v Meeking* (1990) 169 CLR 214 at 223, 226 per Mason CJ and Toohey J; *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492; *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 126 [29] per Gleeson CJ, Gummow and Hayne JJ.

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56. In *Hickman*, a question arose as to the effect of reg 17 of the National Security (Coal Mining Industry Employment) Regulations 1941 (Cth), made under the *National Security Act* 1939 (Cth) and thus supported by the defence power. Regulation 17 provided that a decision of a Local Reference Board, which had a general power to settle disputes as to any local matter likely to affect the amicable relations of employers and employees in the coal mining industry [48], "[should] not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever"[49]. Dixon J said of reg 17 :

> " The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of reg 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no 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." [50]

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[48] Regulation 14.

[49] Regulation 17.

[50] (1945) 70 CLR 598 at 614-615 .

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57. It should be noted at once that, in the passage last quoted, Dixon J was not speaking of reg 17, but of privative clauses generally. Even so, it is important to appreciate that his Honour's observations were confined to "decision[s] ... in fact given" [51]. Moreover and as later decisions of this Court have made clear, the expression "reasonably capable of reference to the power given to the body" [52], has been treated as signifying that it must "not on its face go beyond ... power" [53]. Thus, even on this general statement, a privative clause cannot protect against a failure to make a decision required by the legislation in which that clause is found or against a decision which, on its face, exceeds jurisdiction.

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[51] (1945) 70 CLR 598 at 615.

[52] (1945) 70 CLR 598 at 615.

[53] *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 per Mason ACJ and Brennan J quoting Kitto J in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 253. See also *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 287 per Deane, Gaudron and McHugh JJ.

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58. As to the effect of the privative clause actually considered in *Hickman*, Dixon J first noted that the Parliament could neither "give power to any judicial or other authority" in excess of constitutional power nor "impose limits upon the ... authority of a body ... with the intention that any excess of that authority means invalidity, and ... at the same time ... deprive this Court of authority to restrain the invalid action ... by prohibition." [54] Rather, if legislation purports to impose limits on authority and contains a privative clause, it is, so his Honour said, "a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity." [55] And in that process, according to his Honour, an attempt should be made to "reconcile" the apparently conflicting legislative provisions [56].

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[54] (1945) 70 CLR 598 at 616.

[55] (1945) 70 CLR 598 at 616.

[56] (1945) 70 CLR 598 at 616.

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59. The reconciliation of the conflicting provisions effected by Dixon J in *Hickman* was expressed in these terms:

> "the decisions of a Reference Board should not be considered invalid if they do not upon their face exceed the Board's authority and if they do amount to a bona

fide attempt to exercise the powers of the Board and relate to the subject matter of the Regulations" [57] .

In the result, prohibition issued with respect to the decision under challenge in that case as, on its face, it exceeded the Board's authority.

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[57] (1945) 70 CLR 598 at 617.

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60. It follows from *Hickman*, and it is made clear by subsequent cases [58] , that the so-called " *Hickman* principle" is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions. Once this is accepted, as it must be, it follows that there can be no general rule as to the meaning or effect of privative clauses. Rather, the meaning of a privative clause must be ascertained from its terms; and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made, its effect will depend entirely on the outcome of its reconciliation with that other provision.

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[58] See *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 193-195 per Brennan J; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.

Privative clauses and the process of reconciling legislative provisions

61. **Following paragraph cited by:**

Kaldas v Barbour (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)

103. The Attorney General submitted that a privative clause within a statute is taken into account in determining what an apparent restriction or restraint actually signifies, citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 at [61] (" *Plaintiff S157"*). He submitted that it may be that, by reference to the words of the privative provision, some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of the decision. He submitted that where a statute places limitations on the repository of the power and also contains a privative provision, an attempt must be made to reconcile conflicting legislative provisions, citing *Batterham v QSR Limited* (2006) 225 CLR 237; [2006] HCA 23 at [25] ("*Batterham v QSR*").

It was said in *R v Coldham; Ex parte Australian Workers' Union* that, where there is an inconsistency between a privative clause and other statutory provisions:

> "The inconsistency is resolved by reading the two provisions together and giving effect to each. The privative clause is taken into account in ascertaining what the apparent restriction or restraint actually signifies in order to determine whether the situation is one in which prohibition lies." [59]

As a general statement, so much may be accepted. However, it provides little guidance as to the manner in which a privative clause is taken into account or the light it sheds on the restriction or restraint in question.

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[59] (1983) 153 CLR 415 at 418 per Mason ACJ and Brennan J.

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62. On behalf of the Commonwealth, it was contended that s 474 should first be construed as meaning and intended to mean that decisions are protected so long as there has been a bona fide attempt to exercise the power in question, that they relate to the subject-matter of the legislation and are reasonably capable of reference to the power. Then it is said that, being a later provision than those by which particular powers are conferred, s 474 should be construed as impliedly repealing all limitations on those powers leaving only constitutional limitations and those which derive from s 474 . In terms, the argument was that s 474 "enlarges the powers of decision-makers so that their decisions are valid so long as they comply with the three *Hickman* provisos".

63. It might be thought that the first step of the argument for the Commonwealth finds some support in what was said by Dixon J in *R v Murray; Ex parte Proctor* [60] . In that case, his Honour said as to the reconciliation of apparently inconsistent legislative provisions:

> "The first step in such a process of interpretation is to apply to a [privative clause] provision ... the traditional or established interpretation which makes the protection it purports to afford inapplicable unless there has been an honest attempt to deal with a subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province" [61] .

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[60] (1949) 77 CLR 387 .

[61] (1949) 77 CLR 387 at 399-400 .

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64. A proper reading of what Dixon J said in *Murray* 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" [62]

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 [63]. Thus, contrary to the submissions for the Commonwealth, it is inaccurate to describe the outcome in a situation where the provisos are satisfied as an "expansion" or "extension" of the powers of the decision-makers in question.

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[62] (1949) 77 CLR 387 at 400.

[63] See *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633-635 per Gaudron and Gummow JJ.

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65. There are other difficulties with the argument for the Commonwealth. The process of construction for which it contends is not a process of construing the legislation as a whole. It is a process which places a construction on one provision, the privative clause, and asserts that all other provisions may be disregarded. That process ignores what Dixon J said in *Murray* was a "second step in [the process of] interpreting the whole legislative instrument" [64], namely:

> "to consider 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." [65]

His Honour explained that:

> "a clearly expressed specific intention of [that] kind can hardly give way to the general intention indicated by ... a [privative clause]" [66].

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[64] (1949) 77 CLR 387 at 400.

[65] (1949) 77 CLR 387 at 400.

[66] (1949) 77 CLR 387 at 400.

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66. The importance of giving effect to express legislative provisions, notwithstanding the existence of a privative clause, is to be seen in *Coldham* [67]. In that case, it was contended that the privative clause contained in s 60(1) of the *Conciliation and Arbitration Act* 1904 (Cth) protected a decision under s 142A(1) of that Act. The latter provision authorised the making of an order that an organisation of employees should have the exclusive right to represent some or all of the industrial interests of a class or group of employees who were "eligible for membership of the organization" [68]. It was said by Mason ACJ and Brennan J that s 60 "[could not] affect the operation of a provision which impose[d] inviolable

limitations or restraints upon ... jurisdiction or powers" [69] . In this regard, the requirement that persons be "eligible for membership of the organization" was said to be "quite explicit" and, thus, an inviolable jurisdictional restraint [70] .

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[67] (1983) 153 CLR 415 .

[68] *Conciliation and Arbitration Act* 1904 (Cth), s 142A(1) .

[69] (1983) 153 CLR 415 at 419.

[70] (1983) 153 CLR 415 at 419.

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67. So far as it was contended on behalf of the Commonwealth that s 474 effected an implied repeal of statutory limitations on authority or powers conferred by the Act , the argument seeks to give s 474 an effect which was denied in *Coldham* and which exceeds anything that was said in *Hickman*. And because it exceeds anything that was said in *Hickman*, by reference to which the Minister explained the effect of s 474 in the second reading speech for the Bill that became the Amending Act , it is impossible to conclude that the Parliament intended to effect a repeal of all statutory limitations or restraints upon the exercise of power or the making of a decision.

68. More fundamentally, the method of reconciliation by implied repeal of limitations or restraints in the Act on the exercise of power must be rejected because it seeks to give to s 474 a meaning which its terms cannot bear. It seeks to give to that section a meaning that is descriptive of a recognised limitation on the effectiveness of privative clauses generally and ignores the words of the section which, in terms, limit access to the courts. Accordingly, the argument that s 474 effected an implied repeal of all statutory limitations and restraints must be rejected.

69. 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 [71] . However, that is a matter that can only be determined by reference to the requirement in issue in a particular case.

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[71] See *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 180 per Mason CJ, 206-207 per Deane and Gaudron JJ. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.

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70. Of course, the process of reconciliation elaborated by Dixon J in *Murray* which may result in some procedural or other requirement being construed as not essential to the validity of an act or decision, is necessary only if there is an apparent conflict between the provisions which

impose those requirements and the privative clause in question [72] . Thus, if reliance is placed on a privative clause, the first step must be to ascertain its meaning or, as Dixon J put it in *Murray*, to ascertain "the protection it purports to afford" [73] .

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[72] See *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 631, 634 per Gaudron and Gummow JJ.

[73] (1949) 77 CLR 387 at 400.

Construction of s 474 of the Act

71. There are two basic rules of construction which apply to the interpretation of privative clauses. The first, which applies in the case of privative clauses in legislation enacted by the Parliament of the Commonwealth, is that "if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation [consistent with the Constitution if] that is fairly open." [74]

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[74] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 per Dixon J. See generally with respect to the rule that, if possible, legislative provisions should be construed conformably with the Constitution: *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 61-62 per Knox CJ, 127 per Rich J, 138 per Starke J; *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 374 per Gibbs J; *Russell v Russell* (1976) 134 CLR 495 at 542 per Mason J; *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291 ; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485-486 per Brennan and Toohey JJ; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339 per Brennan J; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 501-503 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, 26 per Gaudron J; *R v Hughes* (2000) 202 CLR 535 at 556-557 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 560-561 [53] per Kirby J; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 494-495 [310] per Kirby J; *Acts Interpretation Act* 1901 (Cth), s 15A .

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72. **Following paragraph cited by:**

Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC (18 March 2024) (Sarah C Derrington, Colvin and Jackson JJ)
Environment Protection Authority v Eastern Creek Operations Pty Limited (13 May 2022) (Macfarlan JA, Fullerton and Lonergan JJ)

Kaldas v Barbour (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)

40. (1991) 173 CLR 132 at 160; [1991] HCA 33 ; see also Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476; [2003] HCA 2 at [72] .

The second basic rule, which applies to privative clauses generally, is that it is 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 [75] . Accordingly, privative clauses are strictly construed.

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[75] *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 per Dawson and Gaudron JJ. See also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602; *Shergold v Tanner* (2002) 76 ALJR 808 at 812 [27] per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ; 188 ALR 302 at 307.

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73. Quite apart from s 75(v) , there are other constitutional requirements that are necessarily to be borne in mind in construing a provision such as s 474 of the Act . A privative clause cannot operate so as to oust the jurisdiction which other paragraphs of s 75 confer on this Court, including that conferred by s 75(iii) in matters "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party". Further, a privative clause cannot operate so as to allow a non-judicial tribunal or other non-judicial decision-making authority to exercise the judicial power of the Commonwealth [76] . Thus, it cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction. So much is clear from the observation of Mason ACJ and Brennan J in *Coldham* that they were "unable to perceive how the Commission could be given authority to determine conclusively the question [upon which its jurisdiction depended] consistently with its character as a body which does not exercise the judicial power of the Commonwealth." [77]

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[76] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529.

[77] (1983) 153 CLR 415 at 419. See also at 426-428 per Deane and Dawson JJ.

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74. As previously indicated, it was argued on behalf of the plaintiff that s 474(1)(c) of the Act is directly inconsistent with s 75(v) of the Constitution . However, s 474(1)(c) cannot be read in isolation from the definition of "privative clause decision" in s 474(2) . That definition relevantly confines "privative clause decision[s]" to decisions "made, proposed to be made, or required to be made ... under this Act".

75. When regard is had to the phrase "under this Act" in s 474(2) of the Act , the words of that sub-section are not apt to refer either to decisions purportedly made under the Act or, as some

of the submissions made on behalf of the Commonwealth might suggest, to decisions of the kind that might be made under the Act . Moreover, if the words of the sub-section were to be construed in either of those ways, s 474(1)(c) would be in direct conflict with s 75(v) of the Co nstitution and, thus, invalid. Further, they 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 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.

76. **Following paragraph cited by:**

Marmota Ltd v Commissioner of State Taxation (07 February 2025) (Livesey P; S Doyle and Bleby JJ)
AZT22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (09 June 2023) (Banks-Smith, Jackson and Feutrill JJ)

> 119. Notwithstanding the terms of s 474 of the *Act*, the section does not have the effect of excluding the original jurisdiction of the High Court to review decisions of administrative decision-makers for jurisdictional error under para 75(v) of the *Constitution*: *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [76] . Where the Tribunal has made or purported to make a privative clause decision, the High Court's jurisdiction to review such a decision for jurisdictional error is conferred on the Federal Circuit Court, except for certain decisions not presently relevant: s 476 of the *Act*. The Federal Circuit Court's power on such a review is limited to considering the extent to which the Authority exercised its powers within the limits of its statutory authority or failed to exercise powers it was bound to exercise. In other words, 'the inquiry is *not* about whether a decision which was made in the exercise of the authority was right or wrong on its merits. It is an inquiry about the boundaries of the power conferred: *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [160] . The Federal Court has jurisdiction to hear and determine appeals from judgments of the Circuit Court exercising original jurisdiction under a law of the Commonwealth: s 24(1)(d) of the *Federal Court of Australia Act 1976* (Cth) .

FKV17 v Minister for Home Affairs (25 May 2022) (Greenwood, Rangiah and Beach JJ)
EFX17 v Minister for Immigration and Border Protection (16 December 2019) (Greenwood, Rares and Logan JJ)

> 60. As earlier mentioned, s 474 sits conformably with s 75(v) of the Constituti on because the definition of a privative clause decision in s 474(2) when referring to decisions of the relevant character, made “under this Act”, must be read “so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction conferred by the Act ”: *P laintiff S157/2002* at [76] .

Maere v Minister for Home Affairs (25 July 2019) (Davies, O'Bryan and Snaden JJ)
Chetcuti v Minister for Immigration and Border Protection (02 July 2019) (Murphy, Rangiah and O'Callaghan JJ)

> 47. The Minister's decision was made under s 501(3) of the Act . The appellant's application for judicial review of that decision was made under s 476A(1)(c) of the Act . The appellant is required to demonstrate jurisdictional error on the part of the Minister: *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at [76] .

Minister for Home Affairs v Ogawa (19 June 2019) (COLLIER, REEVES, DAVIES, RANGIAH AND STEWARD JJ)
DKX17 v Federal Circuit Court of Australia (08 February 2019) (Reeves, Rangiah and Bromwich JJ)

> 57. In an application to the Federal Circuit Court under s 476 of the Act , it is necessary for the applicant to demonstrate jurisdictional error on the part of the Tribunal: *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at [76] . In considering an application for an extension of time under s 477(2) , the merits of the proposed application for review are relevant: *SZTRY v Minister for Immigration and Border Protection* [2015] FCAFC 86 at [6] . The Federal Circuit Court ordinarily considers whether the applicant has at least an arguable case that the Tribunal fell into jurisdictional error. That is because it will seldom be in the interests of the administration of justice to grant an extension of time where the proposed application has little or no prospects of success: *MZABP v Minister for Immigration and Border Protection* (2015) 242 FCR 585 at [62] .

Vokes Ltd v Laminar Air Flow Pty Ltd (16 July 2018) (Nicholas, Davies and Burley JJ)

> 4. Robertson J also rejected Vokes' argument that the amendment of the Register in August 2001 had no legal effect because an actual change of name is a jurisdictional fact for the exercise of the Registrar's power under s 216 of the Act to amend the Register on a change of name of name of the registered owner. Vokes relied on the decision of Emmett J in *Mediaquest Communications LLC v Registrar of Trade Marks* [2012] FCA 768; 205 FCR 205 in support of that argument. One of the issues in that case concerned the power of the Registrar to cancel the record of an assignment of a registered mark under s 81 of the Act . The Court held that the existence of an effective assignment or transmission was a necessary precondition to the making of a valid application under s 109 of the Act for an assignment to be registered and the subsequent exercise of power by the Registrar under s 110 of the Act to record the assignment. The Court further held that the absence of a valid assignment or transmission meant that any purported exercise by the Registrar of the power conferred by s 110 would be affected by jurisdictional error. At [53]-[54] Emmett J reasoned:

> The absence of a valid assignment or transmission means that any purported exercise by the Registrar of the power conferred by s 110 would be affected by jurisdictional error. There is no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error lacks legal foundation and is properly regarded, in law, as no decision at all (see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [76]).
>
> There was no actual assignment of the Registered Mark to Mediaquest, either from Mr Brailsford or from his executors. Accordingly, the Registrar' s decision of 8 October 2010 to record the assignment in the Register was tainted by jurisdictional error and was no decision at all. It was therefore open to the Registrar to reconsider whether the duty imposed by s 110 had been enlivened, by revisiting the question of whether there was an actual assignment or transmission of the Registered Mark to Mediaquest. Having determined that there was no actual assignment or transmission, it was open to the Registrar to take steps to cancel the earlier action. There is nothing in the Act to indicate that a decision of the Registrar under Part 10 that was affected by jurisdictional error should continue to have legal effect. Indeed the considerations outlined above suggest the contrary.

Minister for Immigration and Border Protection v CLV16 (25 May 2018) (Flick, Griffiths and Perry JJ)

> 62. In *Bhardwaj* , a review which had been sought by Mr Bhardwaj miscarried because the Immigration Review Tribunal had proceeded to reach a decision in ignorance of a letter advising the Tribunal of his inability to attend the scheduled hearing date and requesting a later hearing date. In reaching the conclusion that the Tribunal could there make a second decision, Gleeson CJ reasoned (at 603 to 604):
>
> > [5] There is nothing in the nature of an administrative decision which requires a conclusion that a power to make a decision, once purportedly exercised, is necessarily spent. In *Ridge v Baldwin* [[1964] AC 40 at 79], Lord Reid said:
> >
> > > "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid."
> >
> > [6] That general proposition must yield to the legislation under which a decision-maker is acting. And much may depend upon the nature of the power that is being exercised and of the error that has been made. …
> >
> > [8] The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. Even so, as the facts of the present case show, circumstances can arise where a rigid approach to the principle of functus officio is inconsistent with good administration and fairness. The question is whether the statute

> pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers or, to use the language of Lord Reid, reconsider the whole matter afresh?

The Chief Justice concluded, by reference to the legislative scheme, that the Tribunal could revisit its decision "*afresh*". Justices Gaudron and Gummow pursued a slightly different approach and considered whether a decision beyond jurisdiction constituted "*no decision at all*" and whether the *Migration Act* "*purports to give any legal effect to decisions of the Tribunal which involve jurisdictional error*": [2003] HCA 2 at [51] to [54], (2003) 211 CLR at 614 to 616. That approach led to the same conclusion. In doing so, their Honours set forth "*the general law*" as follows (at 614 to 615):

> *Decisions involving jurisdictional error: the general law*
>
> [51] There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.

(Footnote omitted).

Their Honours continued (at 616):

> [53] … As already pointed out, a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all. Once that is accepted, it follows that, if the duty of the decision-maker is to make a decision with respect to a person's rights but, because of jurisdictional error, he or she proceeds to make what is, in law, no decision at all, then, in law, the duty to make a decision remains unperformed. Thus, not only is there no legal impediment under the general law to a decision-maker making such a decision but, as a matter of strict legal principle, he or she is required to do so. And that is so, regardless of s 33(1) of the [*Acts Interpretation Act 1901* (Cth)].

Justice Hayne likewise concluded that "[*n*]*othing in the Act requires (or permits) the conclusion that despite the jurisdictional error, some relevant legal consequence should be attributed to the*" first decision of the Tribunal: [2002] HCA 11 at [153], (2002) 209 CLR at 647. Justice Callinan also concluded that "*the Tribunal had not exercised its*

jurisdiction … and that therefore it was open for it to do so" on the later occasion: [2002] HCA 11 at [165], (2002) 209 CLR at 649 to 650. Justice Kirby dissented. A conclusion that a decision vitiated by jurisdictional error is "*no decision at all*" was also expressed in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 at [76] , (2003) 211 CLR 476 at 506 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ . See also: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32 at [29], (2004) 78 ALJR 992 at 997 per Gummow and Hayne JJ.

Lewski v Australian Securities & Investments Commission (01 November 2017) (Greenwood, Middleton and Foster JJ)
Lewski v Australian Securities & Investments Commission (01 November 2017) (Greenwood, Middleton and Foster JJ)
Minister for Immigration and Border Protection v ARJ17 (17 August 2017)

19. With reference to s 474(2) of the *Migration Act* , the plurality held in *Plaintiff S157* (at [76]) that, in referring to "a decision … made under this Act", the Parliament did not intend to refer to a decision involving jurisdictional error. Section 474(2) is directly connected to s 474(4) . Indeed, the former provision expressly refers to the latter and the latter expressly refers back to the former. Section 474(4) uses virtually the same language as in s 474(2) , when it refers to "a decision under a provision ...". The form in which ss 5, 474, 476 and 476A stood at all times relevant to this appeal, which includes the contrast between a "privative clause decision" and a "purported privative clause decision", indicates that the expression "non-privative clause decision" is not intended to refer what purports to be a decision but is not a decision because attended by jurisdictional error.

Once it is accepted, as it must be, that s 474 is to be construed conformably with Ch III of the Constitution , specifically, s 75 , the expression "decision[s] ... made under this Act" must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act . Indeed so much is required as a matter of general principle. This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all" [78] . Thus, if there has been jurisdictional error because, for example, of a failure to discharge "imperative duties" [79] or to observe "inviolable limitations or restraints" [80] , the decision in question cannot properly be described in the terms used in s 474(2) as "a decision ... made under this Act" and is, thus, not a "privative clause decision" as defined in ss 474(2) and (3) of the Act [81] .

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

[79] See *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 per Dixon J. See also *D arling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632 per Gaudron and Gummow JJ.

[80] *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419 per Mason ACJ and Brennan J. See also *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 per Dixon J; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632 per Gaudron and Gummow JJ.

[81] See *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 6 35 per Gaudron and Gummow JJ.

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77. To say that a decision that involves jurisdictional error is not "a decision ... made under [the] Act" is not to deny that it may be necessary to engage in the reconciliation process earlier discussed to ascertain whether the failure to observe some procedural or other requirement of the Act constitutes an error which has resulted in a failure to exercise jurisdiction or in the decision-maker exceeding its jurisdiction.

78. The effect of s 474 is to require an examination of limitations and restraints found in the Act . There will follow the necessity, if s 474 is constitutionally valid and if proceedings are brought by the plaintiff in accordance with the draft Order Nisi, to determine, in those proceedings, whether, as a result of the reconciliation process, the decision of the Tribunal does or does not involve jurisdictional error and, accordingly, whether it is or is not a "privative clause decision" as defined in s 474(2) of the Act .

Constitutional validity of s 474 of the Act

79. Before turning to the constitutional validity of s 474 of the Act in its application to the proceeding which the plaintiff would commence or would have commenced in respect of the decision of the Refugee Review Tribunal, it is important to note two matters with respect to s 7 5(v) of the Constitution . The first is that that provision makes no mention of certiorari which lies to quash the decisions of inferior courts and tribunals for error of law on the face of the record [82] .

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[82] See *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 32 per Aickin J; *R v Marshall; Ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595 at 609 per Mason J; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 270 per Brennan J; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14] per Gaudron and Gummow JJ; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 76 ALJR 694 at 725 [165] per Kirby J; 188 ALR 1 at 43-44 .

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80. **Following paragraph cited by:**

FKV17 v Minister for Home Affairs (25 May 2022) (Greenwood, Rangiah and Beach JJ)
Nyoni v Bird (14 April 2022) (Mortimer, Rofe and McElwaine JJ)

Notwithstanding that s 75(v) does not refer to certiorari, it has long been accepted that certiorari may issue as ancillary to the constitutional writs of mandamus and prohibition [83]. However, following the decision in *Re McBain; Ex parte Australian Catholic Bishops Conference*, it must also be accepted that, subject to the existence of "a matter", certiorari may also issue in the exercise of jurisdiction conferred by s 75(iii) of the Constitution in "all matters ... in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party" and that conferred pursuant to s 76(i) of the Constitution "in any matter ... arising under [the] Constitution , or involving its interpretation" [84] . Thus it may be that, at least in some matters, judicial review of administrative decisions has not been and, in the absence of a privative clause having that effect, is not confined by the notion of jurisdictional error.

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[83] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14] per Gaudron and Gummow JJ; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 76 ALJR 694 at 699 [19] per Gleeson CJ, 705 [55] per Gaudron and Gummow JJ, 727 [176] per Kirby J; 188 ALR 1 at 8, 15-16, 46-47 .

[84] (2002) 76 ALJR 694; 188 ALR 1.

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81. As no constitutional provision confers jurisdiction with respect to certiorari, it is open to the Parliament to legislate so as to prevent the grant of such relief. However, because "privative clause decision" is relevantly defined in terms of a "decision ... made under [the] Act", s 474 (1)(c) does not prevent the issue of certiorari as ancillary to mandamus or prohibition, but validly does so for non-jurisdictional error of law on the face of the record.

82. **Following paragraph cited by:**

Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd (08 September 2021) (Basten, Meagher and Leeming JJA)

The other aspect of s 75(v) that should be noted is its conferral of jurisdiction in matters in which "an injunction is sought against an officer of the Commonwealth". Given that prohibition and mandamus are available only for jurisdictional error [85] , it may be that

injunctive relief is available on grounds that are wider than those that result in relief by way of prohibition and mandamus. In any event, injunctive relief would clearly be available for fraud, bribery, dishonesty or other improper purpose. The *Hickman* requirement that a decision be made bona fide presumably has the consequence that s 474 permits review in all such cases [86]. If it does not, there must, to that extent, be a real question as to the constitutional validity of s 474 . However, as the draft Order Nisi indicates that relief would be or would have been sought only by way of prohibition, certiorari and mandamus, those questions need not now be explored.

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[85] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

[86] cf *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 286-287 per Deane, Gaudron and McHugh JJ where the view was expressed that the question of bona fides is to be determined solely by reference to the record and not by reference to subjective considerations. Dawson J at 305 and Toohey J at 309 expressed the view that the question of bona fides is to be determined by reference to considerations personal to the decision-maker.

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83. **Following paragraph cited by:**

PQSM v Minister for Home Affairs (24 July 2020) (Mortimer, Banks-Smith and Jackson JJ)
Nigam v Minister for Immigration and Border Protection (16 August 2017) (Siopis, Griffiths and Charlesworth JJ)

Because, as this Court has held, the constitutional writs of prohibition and mandamus are available only for jurisdictional error and because s 474 of the Act does not protect decisions involving jurisdictional error, s 474 does not, in that regard conflict with s 75(v) of the Constitution and, thus, is valid in its application to the proceedings which the plaintiff would initiate. The plaintiff asserts jurisdictional error by reason of a denial to him of procedural fairness and thus s 474 , whilst valid, does not upon its true construction protect the decision of which the plaintiff complains. A decision flawed for reasons of a failure to comply with the principles of natural justice is not a "privative clause decision" within s 474(2) of the Act .

Section 486A of the Act : the competing arguments

84. The first contention of the plaintiff with respect to s 486A of the Act was that it was inseverable from s 474 and that, as the latter provision was wholly invalid, s 486A was also invalid. As s 474 is not wholly invalid, that argument must fail. The second argument was that the effect of s 486A is to abrogate, at least in some cases, the jurisdiction which s 75(v) of the Constitution confers on this Court and that it is therefore invalid. By way of refinement of the

latter argument, it was put that a time limit upon the commencement of proceedings under s 75 (v) of the Constitution is invalid unless provision is made for the Court to extend the time in which proceedings may be brought.

85. It was argued for the Commonwealth that s 486A merely imposes time limits upon the invocation of this Court's jurisdiction and that such a law is incidental to the legislative power conferred by ss 51(xix) [87] , (xxvii) [88] and (xxix) [89] or is within the express incidental power conferred by s 51(xxxix) of the Constitution with respect to "matters incidental to the execution of any power vested by this Constitution ... in the Federal Judicature".

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[87] ____ Section 51(xix) confers legislative power with respect to "naturalization and aliens".

[88] ____ Section 51(xxvii) confers legislative power with respect to "immigration and emigration".

[89] ____ Section 51(xxix) confers legislative power with respect to "external affairs".

Construction of s 486A of the Act

86. Before turning to the constitutional validity of s 486A , it is important to note that it applies only to a "privative clause decision", which is defined in s 5(1) of the Act , unless the contrary intention appears, to have "the meaning given by subsection 474(2) ." As already indicated, s 474(2) of the Act requires that the decision in question be "made under [the] Act", and, thus, a decision involving jurisdictional error is not a privative clause decision for the purposes of that sub-section.

87. **Following paragraph cited by:**

BWO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (29 October 2020) (Rangiah, SC Derrington and Abraham JJ)

If the expression "privative clause decision" in s 486A is given the meaning assigned by s 474 (2) of the Act , it follows from what has been said earlier that s 486A will not apply to a "decision" when there has been jurisdictional error. That "decision" would not be a decision "made under [the] Act". On that construction of s 486A , no question of constitutional validity would arise in relation to applications for prohibition, mandamus or certiorari in respect of "decisions" where there has been jurisdictional error. Those applications would not be applications "in respect of a privative clause decision". Of course, that may not be so if injunctive relief is sought on the grounds of fraud, dishonesty or other improper purpose.

88. It must be recognised that a consequence of adopting this construction would be that it would be impossible to determine whether s 486A had operation in any particular case until it had

been decided whether or not the decision in question involved jurisdictional error. Further, not only would the operation of s 486A depend upon the outcome of the application for relief, s 486A would, on this construction of its reference to privative clause decision, serve no useful purpose. If the decision did involve jurisdictional error s 486A would not apply; if it did not, s 474 would prevent the grant of relief.

89. Even so, s 486A should not be read as revealing an intention contrary to the requirement of s 5 of the Act that "privative clause decision" has the meaning given by s 474(2). In particular, s 486A should not be read as using "privative clause decision" with a meaning that extends to decisions apparently or purportedly made under the Act other than those which are the subject of ss 474(4) or (5).

90. As was said in *Project Blue Sky Inc v Australian Broadcasting Authority* [90], "the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have". Seldom will a construction that gives a provision no useful work to do achieve that end.

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[90] (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ.

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91. In the present case, however, s 486A, if valid in that regard, may still have useful work to do if injunctive relief is sought. Moreover and so far as concerns prohibition, mandamus and certiorari, it is essential to recognise and give due weight to the fact that the provisions of the Act about privative clause decisions were intended to operate by giving effect to a particular view of the effect of what was decided in *Hickman*, *Murray* and other decisions of this Court. As has been pointed out earlier in these reasons, that view of the effect of those decisions is wrong. It is wrong because it seeks to treat "the three *Hickman* provisos" as if they were the only limits upon the power of those who made privative clause decisions under the Act. But the three *Hickman* provisos qualify the "protection it [the privative clause] purports to afford" [91], not the powers of those who make privative clause decisions. The fundamental premise for the legislation being unsound it is, then, not surprising that s 486A should have no work to do in relation to the constitutional writs. No question of its validity arises in that regard. And as the plaintiff would only seek relief by way of constitutional writ, it is unnecessary to consider the issues that might arise in relation to injunctive relief, in respect of which s 486A could, if necessary, be read down to bring it within constitutional limits.

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[91] *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 400 per Dixon J.

The decision in this case

92. The result is that neither s 474 or s 486A , upon their proper construction, bars or limits the exercise of the jurisdiction of this Court which the applicant seeks to invoke in respect of his proposed Order Nisi.

93. The Amending Act introduced a new Pt 8 (ss 474-484). The legislation was further amended by the *Jurisdiction of the Federal Magistrates Service Legislation Amendment Act* 2001 (Cth) . This introduced s 483A, conferring upon the Federal Magistrates Court the same jurisdiction as the Federal Court in relation to matters arising under the Act . Section 476(1) provides:

> "Despite any other law (including section 483A, sections 39B and 44 of the *Judiciary Act 1903* ['the Judiciary Act '], section 32AB of the *Federal Court of Australia Act 1976* and section 39 of the *Federal Magistrates Act 1999*), the Federal Court and the Federal Magistrates Court do not have any jurisdiction in relation to a primary decision."

The term "primary decision" is so defined in s 476(6) as to apply to classes of the privative clause decisions identified in s 474 .

94. Section 39B of the Judiciary Act , subject to certain qualifications, confers upon the Federal Court jurisdiction of the character of that of this Court under s 75(v) of the Constitution . Section 44 provides for remitter by this Court. The other two provisions identified in s 476(1) of the Act provide for the discretionary transfer of proceedings between the Federal Court and the Federal Magistrates Court. Section 476(4) requires the High Court not to remit a matter to either of those other federal courts if it relates to a decision or matter in respect of which those courts, by reason of s 476, would not have jurisdiction.

95. The construction given in these reasons to the term "privative clause decision" in s 474 is significant, in particular for the operation of s 483A of the Act , and ss 39B and 44 of the Judiciary Act . The limitation, by the adaptation of the term "privative clause decision", of the jurisdiction otherwise enjoyed by the Federal Court and Federal Magistrates Court, and the limitation upon the power of this Court under s 44 of the Judiciary Act , will be controlled by the construction given to s 474 .

96. Decisions which are not protected by s 474 , such as that in this case, where jurisdictional error is relied upon, will not be within the terms of the jurisdictional limitations just described; jurisdiction otherwise conferred upon federal courts by the laws specified in s 476(1) in respect of such decisions will remain, to be given full effect in accordance with the terms of that conferral.

97. It also is to be noted that changes were made by the Amending Act to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act "). The Amending Act inserted par (da) in Sched 1 to the ADJR Act . Section 3(1) of the ADJR Act contains a definition of "decision to which this Act applies", which identifies decisions of an administrative character made, proposed to be made or required to be made under certain enactments, but excluding decisions included in any of the classes of decision set out in Sched 1. The par (da) of Sched 1 inserted by the Amending Act specifies:

"a privative clause decision within the meaning of subsection 474(2) of the *Migration Act 1958* ".

Questions may arise respecting the construction of the ADJR Act and its application to decisions which are not privative clause decisions and in which jurisdictional error is relied upon. No arguments were directed to any such questions and we say no more on the subject.

General principles

98. **Following paragraph cited by:**

Quinn v Commonwealth Director of Public Prosecutions (03 December 2021) (Leeming JA, Simpson AJA and Johnson J)

4. Jurisdictional error has assumed much greater prominence following *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 . Indeed, the term has been described, rightly, as "the central concept in Australian administrative law": L Burton Crawford and J Boughey, "The Centrality of Jurisdictional Error: Rationale and Consequences" (2019) 30 *Public Law Review* 18 at 23, echoing J Spigelman, "The centrality of jurisdictional error" (2010) 21 *Public Law Review* 77. However, determining what amounts to "jurisdictional error" has proven somewhat elusive. In part that is because the term has a lot of work to do. Jurisdictional error identifies a class of decisions made in the exercise of executive or judicial power in respect of which, as a matter of a constitutional limitation on Commonwealth and State legislative power, neither the Commonwealth nor the State Parliaments can remove the supervisory jurisdictions of the High Court or the State Supreme Courts: *Plaintiff S157/2002* at [98] ; *Kirk* at [100]. Jurisdictional error is thus a concept which is unique in the Australian legal system, simultaneously linking all three aspects of the tripartite division of government power at both Commonwealth and State levels.

It is important to emphasise that the difference in understanding what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble. It is real and substantive because it reflects two fundamental constitutional propositions, both of which the Commonwealth accepts. First, 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. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, 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.

99. To understand the three *Hickman* provisos as qualifying the powers of those who make privative clause decisions, rather than qualifying the protection which the privative clause affords, either assumes that the Act on its true construction provides no other jurisdictional limitation on the relevant decision making or other power or it assumes that the repository of the power can decide the limits of its own jurisdiction. For the reasons given earlier, the first assumption is wrong. The alternative assumption would contravene Ch III.

100. In submissions it was put by the Commonwealth that the reasoning in *Hickman* produced, as a matter of judicial interpretation of privative clauses, a result which might have been achieved by adoption of 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 . It has been explained earlier in these reasons that *Hickman* does not have such an operation. But something more should be said respecting the employment of a legislative device for the "reading up" of decision-making powers conferred upon the Executive branch of government.

101. In argument, the Commonwealth suggested 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. Alternatively, it was put that the Act might validly be redrawn to say, in effect, "[h]ere are some non-binding guidelines which should be applied", with the "guidelines" being the balance of the statute. Other variations were canvassed.

102. **Following paragraph cited by:**

Varnhagen v State of South Australia (No 2) (15 November 2022)

> 88. Put differently, in the appellants' submission, this phrasing allows the authorised officer to determine conclusively what the law is, by determining what the law *may have been* prior to the cessation of the last relevant emergency declaration. However, to have a jurisdictional function, the clause must have some discernible, objective content, a necessary hallmark of the exercise of legislative power. [24] The judge's approach was to imply a series of criteria (in particular, the requirement to consider the 'overall circumstances') for which there was no legislative authority.
>
> *via*
> [24] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [102] .

Hall v The Queen (08 September 2020) (Kelly, Livesey and Bleby JJ)

The inclusion in the Act of such provisions to the effect that, notwithstanding anything contained in the specific provisions of that statute, the Minister was empowered to make any decision respecting visas, provided it was with respect to aliens, might well be ineffective. It is well settled that the structure of the Constitution does not preclude the Parliament from authorising in wide and general terms subordinate legislation under any of the heads of its

legislative power. *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* [92] may be cited for that proposition. But what may be "delegated" is the power to make laws with respect to a particular head in s 51 of the Constitution . The provisions canvassed by the Commonwealth would appear to lack that hallmark of the exercise of legislative power identified by Latham CJ in *The Commonwealth v Grunseit* [93] , namely, the determination of "the content of a law as a rule of conduct or a declaration as to power, right or duty". Moreover, there would be delineated by the Parliament no factual requirements to connect any given state of affairs with the constitutional head of power [94] . Nor could it be for a court exercising the judicial power of the Commonwealth to supply this connection in deciding litigation said to arise under that law. That would involve the court in the rewriting of the statute, the function of the Parliament, not a Ch III court [95] .

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[92] (1931) 46 CLR 73 .

[93] (1943) 67 CLR 58 at 82.

[94] cf *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262 per Fullagar J.

[95] *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 164 per Latham CJ, 252 per Rich and Williams JJ, 371-372 per Dixon J; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 494 per Barwick CJ, 503-504 per Menzies J, 520 per Walsh J; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 485-486 .

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103. **Following paragraph cited by:**

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (23 November 2021) (Kenny, Besanko, Griffiths, Mortimer and Charlesworth JJ)

Finally, the issues decided in these proceedings are not merely issues of a technical kind involving the interpretation of the contested provisions of the Act . The Act must be read in the context of the operation of s 75 of the Constitution . That section, and specifically s 75(v) , introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual reinforcement for what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth* [96] . In that case, his Honour stated that the Constitution:

> "is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power

from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption." [97]

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[96] (1951) 83 CLR 1 at 193 ; cf *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 [89] per Gummow and Hayne JJ.

[97] (1951) 83 CLR 1 at 193.

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104. **Following paragraph cited by:**

Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (26 August 2022) (Mortimer, Bromwich and Thomas JJ)

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution , this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.

Answers to questions in the case stated

105. Question 1 should be answered:

"Upon its proper construction, s 486A does not apply to the proceedings the plaintiff would initiate. No question of the validity of s 486A arises in that regard."

106. Question 2 should be answered:

"Section 474 would be invalid if, on its proper construction, it attempted to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution . However, on its proper construction, it does not attempt to do so. Section 474 is valid but does not apply to the proceedings the plaintiff would initiate."

107. Although Questions 1 and 2 have been answered against the plaintiff, the submissions made on behalf of the Commonwealth have been rejected in significant measure. Accordingly, Question 3 should be answered:

> "The Commonwealth will pay 75 per cent of the costs of the plaintiff of the proceedings and otherwise there is no order as to costs."

CALLINAN J.

Introduction

108. Constitutional law in a federal system has been described as "a unique mixture of history, statutory interpretation, and some political philosophy" [98]. In resolving this case, resort to each of these is necessary: history for an understanding of the law in relation to prerogative writs at the time of Federation and the considerations which moved the founders to use the language that they did in ss 51(xxix) and (xxxvii), and Ch III of the Constitution; statutory interpretation to construe both the provisions of the enactment under challenge, and the Constitution which is both the source of the power to enact them, and the instrument which prescribes the powers conferred on this Court to examine and pronounce upon their validity; and, political philosophy for an understanding of the need for each of the arms of government, the Parliament, the Executive and the judiciary to pay due deference to, and not to intrude upon the roles of one another, in the good, that is to say the lawful and efficient government of the nation. This last-mentioned objective has as one of its sources the introductory words of s 51 of the Constitution which provide that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and *good government* of the Commonwealth with respect to" the enumerated matters. (emphasis added)

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[98] Menzies, *Afternoon Light*, (1967) at 320.

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109. The particular question that the case raises is whether ss 474 and 486A of the *Migration Act* 1958 (Cth) ("the *Migration Act*") are invalid. The matter comes before the Court after the institution of proceedings by the plaintiff in the original jurisdiction of the Court and following the statement of a case by one of its Justices in these terms:

> "**PURSUANT TO** section 18 of the *Judiciary Act 1903* (Cth), the following facts are stated and the following questions reserved for the consideration of the Full Court:
>
> **Agreed Statement of Facts**
>
> 1. The Plaintiff is a non-citizen of Australia who arrived in Australia on 7 March 1997.
>
> 2. The Defendant is the Commonwealth of Australia. …

3. On 2 April 1997, the Plaintiff applied for a Subclass 866 (Protection) visa on the asserted ground that he was a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

4. A delegate of [the Minister for Immigration and Multicultural and Indigenous Affairs] refused the Plaintiff's application and subsequently the Refugee Review Tribunal affirmed that decision. …

5. The Plaintiff filed an application for review of the Refugee Review Tribunal's decision in the Federal Court on 4 July 2000.

6. On 31 July 2000, by consent, the Federal Court set aside the decision of the Refugee Review Tribunal and remitted the matter to the Refugee Review Tribunal to be determined according to law. …

7. On 6 March 2002, a differently constituted Refugee Review Tribunal made a decision (hereinafter referred to as 'the decision') affirming the original decision of the delegate not to grant the Plaintiff a Subclass 866 (Protection) visa. …

8. The Refugee Review Tribunal handed down the decision on 28 March 2002.

9. The decision was received by the Plaintiff on 5 April 2002.

10. The Plaintiff asserts that he would have applied and would, but for sections 474 and 486A of the *Migration Act 1958* (Cth) , apply to the High Court for judicial review of and for relief in its original jurisdiction under section 75(v) of the Constitution of the decision. …

HAVING REGARD TO the facts and matters stated in the preceding paragraphs, the following questions are reserved for the consideration of the Full Court:

QUESTION 1

Is section 486A of the *Migration Act 1958* (Cth) invalid in respect of an application by the Plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?

QUESTION 2

Is section 474 of the *Migration Act 1958* (Cth) invalid in respect of an application by the Plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?

QUESTION 3

By whom should the costs of the proceeding in this Honourable Court be borne?"

110. The plaintiff has also filed a draft order nisi which sets out the grounds upon which he would challenge, if he may, the decision of the Refugee Review Tribunal: in substance that it was made in breach of the rules of natural justice, in consequence of which prohibition, certiorari and mandamus (but not an injunction) should go to render it ineffective. It is unnecessary at this stage of the proceeding to explore the merits of that ground except to say that a breach of those rules of sufficient gravity may be capable of amounting to jurisdictional error.

Early and current migration legislation and decisions made under it

111. As the expression that s 474 itself uses ("privative clause") indicates, it is such a provision and accordingly one which courts will construe "by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied" [99] . That does not mean however that courts are, or should be the only decision makers, or indeed the final decision makers in our society in all matters. The vast majority of decisions with a capacity to affect citizens' prosperity and lives are made by administrators exercising statutory powers and performing statutory duties or functions.

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[99] *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 160 per Dawson and Gaudron JJ.

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112. It will therefore be important to note that the definition of a "privative clause decision" [100] i ncludes the words "a decision of an administrative character". It also includes, it should be noted "a decision … proposed to be made" which I take to mean a decision intended to be made because that is the meaning the words apparently bear, and because "proposed" ought to be given a different meaning from "required" which is also used. The decision which the plaintiff would wish to challenge here is a decision of an administrative character. It is a decision of a kind that may properly be made by a member of the Executive. It is not a judicial decision, and, but for s 75 of the Constitution and other provisions of the *Migration Act* itself, might be able to be put beyond the reach of scrutiny by the courts. It is not necessary to examine this question in detail but it should not be overlooked that migration is fundamentally a matter for the Parliament and the Ministers and officials upon whom the Parliament chooses to confer duties and powers of administering enactments to deal with it. There is no qualification upon the legislative powers of the Parliament with respect to external affairs, immigration and aliens. This is not surprising, particularly so far as immigration and aliens are concerned, not simply because of the strong views held on these topics at the time of Federation, but also because every nation insists upon the right to determine who may enter the country, who may remain in it, who may become one of its citizens, and who may be liable to deportation [101] .

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[100] ___ s 474(2) .

[101] *Pochi v Macphee* (1982) 151 CLR 101 at 106 per Gibbs CJ speaking with respect to deportation of aliens. See also *Ferrando v Pearce* (1918) 25 CLR 241 at 253 per Barton J.

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113. The views of the founders with respect to immigration were given very early legislative voice by the 17th enactment of the first Parliament of Australia, the *Immigration Restriction Act* 1901 (Cth). Section 3 of that Act notoriously made provision for the imposition of a dictation test in any European language directed by any officer appointed under it, or any officer of customs, failure of which would result in a denial of entry to Australia, as would the formation of an opinion by the Minister that a person would be likely to become a charge upon the public or charity.

114. Little changed until the Second World War and the displacement of millions of people of many nations both during and after it. Those dreadful events led to the adoption of the Convention relating to the Status of Refugees [102] by many nations, and to which Australia was an original signatory. Australia did not, however, receive that Convention into its own law until 1994 by the insertion in that year of s 36 into the *Migration Act* [103]. Although major changes were made with respect to the laws governing immigration by the enactment of the *Migration Act*, s 6 of that Act provided that an immigrant who did not hold an entry permit on entering Australia was a prohibited entrant, and by s 7, that the Minister might "in his absolute discretion" cancel a temporary entry permit at any time. Chapter III of the Constitution apart, almost entirely, entry to, and presence in Australia were matters of unreviewable Executive discretion [104].

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[102] UNTS 2545 done at Geneva 22 April 1954. See also the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

[103] Section 36 was inserted in the *Migration Act* by the *Migration Legislation Amendment Act* 1994 (Cth).

[104] As an example of one of the minor exceptions, a person, arrested without warrant on a reasonable supposition of being a prohibited migrant might seek a review of his apparently prohibited status by a prescribed authority appointed by the Minister pursuant to ss 38 to 40 of the *Migration Act* as enacted in 1958.

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115. The first Act dealing with immigration, the *Immigration Restriction Act* contained only 19 sections. The *Migration Act* as enacted in 1958 contained 67 substantive sections and a schedule. The brevity of these enactments provides a clear indication of the fewer decisions which fell to be made under those earlier Acts, the absolute and generally final nature of those decisions, and the different understanding and policy that the community, its parliamentary representatives and the Executive had and pursued with respect to their intention and entitlement to determine effectively and conclusively who might enter and live in the

country. The reasoning and decision of the Justices of this Court (Barwick CJ, Gibbs and Aickin JJ; Stephen, Jacobs and Murphy JJ dissenting) in *Salemi v MacKellar [No 2]* also form part of the history to which I have referred. Those Justices were of the clear view that the Minister might issue a deportation order under the *Migration Act* as enacted in 1958 without first giving the person proposed to be deported an opportunity to be heard [105] .

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[105] *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 400-403 per Barwick CJ, 419-421 per Gibbs J, 460 per Aickin J.

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116. But it is not only understandings, opinions and policies with respect to human rights that have changed since Federation, particularly after 1945. Much of the post-colonial and other parts of the world are racked with internal dissension. It has become increasingly difficult to distinguish between economic refugees and refugees genuinely in fear of persecution. Equally, it is frequently difficult to determine whether people in some countries in which either there has been a breakdown in law and order, or in which law and order as we understand them have never existed, are persecuted persons, or whether they are themselves living in a traditionally aggressive and divided community unaccustomed to democracy or other forms of modern political discourse [106] . Minds will differ as to whether distinctions of the kind to which I have referred can or should be made. Some would take the view that morality and humanitarianism hold that they are irrelevant. As to this, only Parliament can, and must decide. Despite the Universal Declaration of Human Rights, itself still in many respects an aspirational rather than an effective and enforceable instrument, there is not unanimity throughout the world, and perhaps even in Australia as to what claims, practices, benefits and values are deserving of protection. And even with respect to those about which there is a large measure of agreement, views about their timing, identification and enforcement are unlikely to be unanimous. Speaking of access to human rights in the debate about the Declaration of the Rights of the Man and the Citizen of 1789, Malouet was concerned with what was realistic and practical as opposed to the unattainable [107]:

> "Why then start by taking him to a high mountain, and showing him his empire without limits, when on coming down he will find limits at every step?"

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[106] cf *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

[107] "Pourquoi donc commencer par le transporter sur une haute montagne, et lui montrer son empire sans limites, lorsqu'il doit en descendre pour trouver des bornes à chaque pas?" Malouet, *Archives Parlementaires*, viii, at 322-323.

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117. In modern times, the sorts of limits to which Malouet referred have not disappeared. Governments and parliaments are not free agents. They represent the will of the people. They are confronted by the day to day necessities of deciding how resources will be

allocated, and, relevantly, how many opportunities, and at what levels, and in what tribunals and courts, applicants for the status of refugees should have to establish that entitlement. Those responsible for these matters will also be aware that there is not uniformity of approach by nations to these questions, and that in practice it will be more difficult in some countries to enter and remain in the community as a refugee than in others [108].

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[108] In England, for example, the rights of review and appeal, the latter by leave "on a question of law material to [the] determination" for which ss 58 and 59 and Sched 4, Pt III, s 23(1) of the *Immigration and Asylum Act* 1999 (UK) make provision. The United States amendments to the *Immigration and Nationality Act of 1952* made by the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* which are designed to curtail the scope of judicial review (usually sought under the due process provisions of the United States Constitution (5th amendment)).

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118. I do not, by referring to these matters mean to suggest that they govern the meaning and operation of the Constitution and enactments under it. I refer to them for the purpose of demonstrating the essential differences between the exercise of Executive and Judicial power. Politics largely shapes the former. The Constitution recognizes, indeed gives effect to that reality by providing for elections and the consequences of them, legislation and its implementation by Executive action. This Court must find and apply the law. But in so doing it cannot, in the Constitutional sphere be blind to the fact that realities and exigencies do confront government, realities and exigencies of a kind which must have been operating on the mind of Parliament in enacting the *Migration Act* . The Court is bound to answer the question which this case raises, on the basis that the Parliament has sought to reduce, so far as it lawfully, that is to say constitutionally can, challenge to administrative decisions about matters upon which it should be better informed and the Executive better equipped to deal than this Court. If the Parliament, and the Executive which no doubt moved it are wrong about the subject matter and purposes of the *Migration Act* , then that is for the electorate to say and not the courts. Whether the confrontation of issues of those kinds is worth the political cost involved is for the politicians and not the courts. What the courts, including this one have to decide is whether the *Migration Act* can lawfully achieve either wholly or in part what the Parliament has set out to achieve, a question which has to be answered having regard to the settled principle that only clear words will suffice to defeat uncontestable human rights, and that privative clauses are therefore generally strictly construed. It remains important however to keep in mind that the challenge here at this stage of the proceeding is to the will of Parliament expressed by an enactment, and not just to an administrative or Executive decision.

The meaning and operation of s 75(v) of the Constitution

119. For reasons which will appear each of the remedies for which s 75(v) of the Constitution make s provision require some separate treatment. Section 75 provides as follows:

"**Original jurisdiction of High Court**

75. In all matters –

(i) Arising under any treaty:

(ii) Affecting consuls or other representatives of other countries:

(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv) Between States, or between residents of different States, or between a State and a resident of another State:

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction."

Certiorari unavailable as of right under s 75(v) of the Constitution

120. The passage from Mr Barton's speech during the Convention Debates on 4 March 1898 which the Chief Justice quotes in his judgment [109] shows that Mr Barton's, and, no doubt, other founders' concerns were with errors of a jurisdictional kind and not other errors of law. It can have been no accident therefore that certiorari was omitted (and injunction was included) as a remedy available to the High Court in its original jurisdiction under s 75(v) . Elsewhere in the debates about the clause, none of the founders seems even to have suggested that the former should be included, or offered any reason why, on the other hand, injunction should be [110]. Perhaps, as Quick and Garran suggest[111], and as will appear I believe to be the case, the latter was thought relevantly to be a synonym in context for either mandamus or prohibition.

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[109] Reasons of the Chief Justice at [5].

[110] See, for instance, *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne) 31 January 1898, vol 1 at 349, and *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 4 March 1898, vol 2 at 1894.

[111] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1976) at 783.

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121. The omission of any reference to certiorari in s 75(v) can, in my opinion, only be explained by the desire of the founders to confine the remedies available under it strictly to jurisdictional error. Although it is true that in the last century, in the United Kingdom and Australia, until about 1952, certiorari had tended to be granted to cure jurisdictional error only, earlier and contemporary authority with which the founders would have been familiar, made it plain that error on the face of the record, within jurisdiction, was within its reach. Denning LJ in 1951 in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*, discussed the recent

history of the writ until that time although his Lordship may have overestimated the duration of its desuetude [112] :

> "Of recent years the scope of certiorari seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law; and several judges have said as much. But the Lord Chief Justice has, in the present case, restored certiorari to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction. I have looked into the history of the matter, and find that the old cases fully support all that the Lord Chief Justice said. Until about 100 years ago, certiorari was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals, and the plain need for supervision over them, recourse must once again be had to this well-tried means of control."[113]

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[112] [1952] 1 KB 338 at 348.

[113] See also Shaw and Gwynne, "Certiorari and Error on the Face of the Record", (1997) 71 *Australian Law Journal* 356 et seq.

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122. Late 19th century jurisprudence in the United States with which the founders would also have been likely to be familiar acknowledged the greater reach of the remedy. In the United States, in 1886, Hawes wrote this of it [114]:

> "The common-law writ of *certiorari* was used for the purpose of bringing the record of an inferior court or jurisdiction after judgment before a Superior Court, to ascertain whether the inferior tribunal had acted without jurisdiction, *or having jurisdiction had proceeded illegally and contrary to the course of the common law* …" (footnotes omitted)

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[114] Hawes, *The Law Relating to the Subject of Jurisdiction of Courts*, (1886) at ¶161.

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123. It can therefore be safely assumed that the authors of the Constitution drafted it with a full consciousness of the historical reach of all of the prerogative writs. They were unlikely to have foreseen however the increasing role and importance of administrative law, and the extension of the reach of the prerogative remedies, for example, to correct "unreasonableness"

[115] on the part of decision makers as discerned by the courts granting the remedy. Each section of Ch III of the Constitution , and indeed each of its chapters generally, including that dealing with the powers of the Executive, must have been drawn with a full awareness of the reach of the prerogative writs, contemporary and historical [116] . The founders would also have been concerned to ensure that the courts not unduly encroach upon the realm of the Executive in making administrative decisions unless the Executive refused to exercise its powers, or sought to exercise powers that it did not possess, that is to say, was either failing to exercise, or was exceeding jurisdiction. A concern to exclude judicial review of error within jurisdiction explains why, in my opinion, certiorari was deliberately omitted from s 75(v) .

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[115] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[116] It is not insignificant that s 33 of the *Judiciary Act* 1903 (Cth) makes no reference to certiorari. Both it and s 32 which is concerned with the efficacious completeness of relief being enactments only may of course be repealed or amended from time to time.

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124. It is for this reason that although I joined in the grant of certiorari in *Re Wakim; Ex parte McNally* [117] , I did, on further reflection, express some reservations about its availability under s 75(v) in *Re Refugee Review Tribunal; Ex parte Aala* [118] . In my opinion the legislature may enact provisions to exclude its operation upon the decisions of officers of the Commonwealth simply because it is not included expressly or by implication in s 75(v) of the Constitution .

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[117] (1999) 198 CLR 511 .

[118] (2000) 204 CLR 82 at 156-157 [218] .

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125. I would draw attention to another matter. Although it is not one which could prevail over a clear constitutional indication to the contrary, it provides good reason not to strain to find any implication in the constitution of a right to certiorari. A compelling modern reality is that, unlike under its predecessors, the *Migration Act* requires hundreds of decisions to be made, almost certainly on a daily basis, by a multiplicity of officials and itself makes provision for review. To allow all of these decisions to be subject to exhaustive curial review by a single judge, and again on varying bases at various appellate levels, or in this Court in its original jurisdiction, may perhaps be beyond the resources of the country, or in any event of an order of importance below that of other exigencies for which the Parliament and the Executive must provide. Another reality is that parliaments can (within constitutional bounds) and frequently do legislate to decree which disputes are, and which disputes are not to be justiciable just as they determine which resources are to be devoted to them. The courts have no duty to enlarge, to the greatest extent possible, areas of contention between governments and the people. In *Craig v South Australia* [119] this Court (Brennan, Deane, Toohey, Gaudron and

McHugh JJ) stated its concern with any extensive use of certiorari to correct nonjurisdictional error of law by inferior courts. Although the Court was speaking of the jurisdiction of one, a superior State court over another, their Honours' observations are relevant to a grant of certiorari to quash a decision of a tribunal or an official of the Commonwealth:

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[119] (1995) 184 CLR 163 at 181.

> "It is far from clear that policy considerations favour such an increase in the availability of certiorari to correct non-jurisdictional error of law. In particular, a situation in which any proceeding in an inferior court which involved a disputed question of law could be transformed into superior court proceedings notwithstanding immunity from ordinary appellate procedures would represent a significant increase in the financial hazards to which those involved in even minor litigation in this country are already exposed. On balance, it appears to us that the question whether there should be such an increase in the availability of certiorari, or of orders in the nature of certiorari, is one that is best left to the responsible legislature."

An injunction under s 75(v) of the Constitution

126. This Court has by no means always given Ch III of the Constitution a literal meaning, or meanings to be readily ascertained from the language used in it. This is apparent from a number of cases of which there are four relatively recent examples.

127. The first is *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* [120] in which this Court upheld the validity of s 35(2) of the *Judiciary Act* although that provision had the effect of denying all *rights* of appeal to the Court, and despite that the proviso to s 73 of the Constitution stated that no exception or regulation prescribed by the Parliament "shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council."

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[120] (1991) 173 CLR 194.

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128. The second example is the meaning given to "officer of the Commonwealth". Section 75(v) confers original jurisdiction upon this Court in all matters in which mandamus or prohibition or an injunction is sought against an *officer* of the Commonwealth. It is almost inconceivable that in a chapter of the Constitution which is concerned with the judicature, and which necessarily therefore repeatedly refers to courts and to justices, and makes provision for the creation of other courts by the Parliament, the use of the words "an officer of the Commonwealth" could not have been deliberate and highly specific. The same can be said of the language used by the founders during the Convention debates, as again the speech of Mr

Barton to which the Chief Justice has referred, serves as an example. It seems to be with respect, highly unlikely that the term could have been intended to include the judiciary. Notwithstanding this, this Court in *R v Watson; Ex parte Armstrong* [121] , held that the prerogative writs lay against a judge of a superior federal court, the Family Court. A similar decision was made, in relation to judges of the Federal Court, in *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* [122] and *R v Federal Court of Australia; Ex parte WA National Football League* [123] .

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[121] (1976) 136 CLR 248 .

[122] (1978) 142 CLR 113 .

[123] (1979) 143 CLR 190 .

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129. The third example is the insertion by this Court, effectively, of the word "certiorari" in s 75(v) itself. I do not, with respect, myself think it a sufficient justification for the addition of certiorari to the section, that it may be granted as an aid to, or as ancillary in some way to the other writs for which provision has literally been made [124] .

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[124] s 39B of the *Judiciary Act* 1903 (Cth) can effect no constitutional change and is, like any other section, subject to later express or implied repeal. See also Meagher, Gummow and Lehane (*Equity, Doctrines and Remedies,* 3rd ed (1992) at [21 102]) who point out that "Under the general law the Court of Chancery had no jurisdiction to issue injunctions against the Crown, since the Chancery Court was itself an emanation of the Crown". It may be that specific reference to an injunction in s 75(v) was made in order to make it clear that the remedy lay in a constitutional context.

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130. The fourth example is provided by *Kable v Director of Public Prosecutions (NSW)* [125] in which three Justices of this Court (Gaudron, McHugh and Gummow JJ) found implications in Ch III of the Constitution to the effect that the application by a State Supreme Court of a State Act relating to imprisonment, was incompatible with the independence, objectivity and impartiality of the State court as a court vested with federal jurisdiction.

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[125] (1996) 189 CLR 51 .

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131. It is arguable then that even though the reference to it in s 75(v) is unqualified, an injunction there might perhaps be available in the original jurisdiction under s 75(v) as an aid to the other remedies expressly nominated by the sub-section only. The juxtaposition of the words

suggests this. It seems unlikely that the founders would have intended to confer on this Court a separate, original injunctive jurisdiction against officers of the Commonwealth in and by a section dealing with the prerogative writs but omitting other important remedies such as quo warranto and habeas corpus. The omission of certiorari points to the desire of the founders to restrict the ambit of the remedies in s 75(v) to jurisdictional errors. Quick and Garran thought that injunction was probably included because of the analogy between it and mandamus [126]. The founders may therefore have intended injunctions to be ancillary remedies in aid of either mandamus, or more particularly, prohibition to ensure that any steps consequent upon a demonstrated error of jurisdiction, and which might not perhaps be effectively restrainable by prohibition, might be enjoined by the Court. I am inclined to think therefore that there is no constitutional inhibition upon the legislature's enactment of provisions to restrict the grant of injunctions other than those that are ancillary to a grant of prohibition or mandamus. It is however unnecessary to reach a concluded view of that matter in this case.

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[126] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1976) at 783.

The defendant's submissions

132. The principal submission of the defendant here is that the power (to make a final decision) is not delineated by the grant, that is by the statutory mandate contained in s 474 of the *Migration Act* only, but by that as enlarged by the new Pt 8 Div 1 of the *Migration Act* . It might be thought that a statement by Brennan J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* [127] is capable of providing a foundation for such a submission:

> "The privative clause treats an impugned act as if it were valid. In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded."

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[127] (1995) 183 CLR 168 at 194.

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133. Perhaps the better way to characterize that statement is as a recognition of the practical effect of the process of construing an enactment as a whole and giving a privative clause some room for operation, rather than as a separate principle of statutory construction itself. In any event it could provide no basis for an expansion of any power beyond the constitutional limits within which it must be exercised.

The legislative scheme

134. It is necessary, in order to deal fully with the defendant's submissions, to place the relevant provisions in their statutory and legislative context. The particular sections with which the Court is concerned were introduced by the *Migration Legislation Amendment (Judicial*

Review) Act 2001 (Cth) ("the amendment Act of 2001") as part of the new Pt 8 Div 1 of the *Migration Act* . The revised explanatory memorandum, tabled in the House of Representatives by the Minister contained these statements [128]:

> "The amendments to the *Migration Act 1958* and the *Administrative Decisions (Judicial Review) Act 1977* , in relation to judicial review of immigration decision-making:
>
> · introduce a new judicial review scheme, in particular a privative clause, to cover decisions made under the *Migration Act 1958* relating to the ability of noncitizens to enter and remain in Australia;
>
> · apply the new judicial review scheme to both the Federal Court and the High Court; and
>
> · allow specified decisions to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* ."

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[128] Migration Legislation Amendment (Judicial Review) Bill 2001 at 2.

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135. The revised explanatory memorandum explained s 474 in this way [129]:

> "This new section [475] makes it clear that new Division 2 , by implication or otherwise, in no way limits the scope or operation of new section 474 ."

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[129] Migration Legislation Amendment (Judicial Review) Bill 2001 at 7.

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136. The revised explanatory memorandum said this [130] about *R v Hickman; Ex parte Fox & Clinton* [131] :

> "A privative clause is a provision which, although on its face purports to oust all judicial review, in operation, by altering the substantive law, limits review by the courts to certain grounds. Such a clause has been interpreted by the High Court, in a line of authority stemming from the judgment of Dixon J in *R v Hickman; ex parte Fox and Clinton* , to mean that a court can still review matters but the available grounds are confined to exceeding constitutional limits, narrow jurisdictional error or *mala fides*."

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[130] Migration Legislation Amendment (Judicial Review) Bill 2001 at 5.

[131] (1945) 70 CLR 598 .

137. Another possible insight into the Parliament's view of *Hickman* is provided by the second reading speech with respect to the Migration Legislation Amendment Bill (No 5) 1997, in which the Minister, having regard no doubt not only to *Hickman*, but also judicial observations of the kind made by Brennan J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* which I have quoted, said [132]:

> "The legal advice I received was that a privative clause would have the effect of narrowing the scope of judicial review by the High Court, and of course the Federal Court. That advice was largely based on the High Court's own interpretation of such clauses in cases such as Hickman's case, as long ago as 1945, and more recently the Richard Walter case in 1995.
>
> Members may be aware that the effect of a privative clause such as that used in Hickman's case is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.
>
> In practice, the decision is lawful provided the decision maker: was acting in good faith; had been given the authority to make the decision concerned – for example, had the authority delegated to him or her by me, or had been properly appointed as a tribunal member – and did not exceed constitutional limits."

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[132] Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 September 1997 at 7615.

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138. The first section of the *Migration Act* to be noted is s 3A which requires that the Court sever, insofar as possible, valid parts of the *Migration Act* from any which may be found to be invalid, and give effect to the extent constitutionally possible to a provision which cannot be given unlimited operation:

> "3A(1) Unless the contrary intention appears, if a provision of this Act:
>
> (a) would, apart from this section, have an invalid application; but
>
> (b) also has at least one valid application;

it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

(2) Despite subsection (1), the provision is not to have a particular valid application if:

(a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or

(b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.

(3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).

(4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.

(5) In this section:

application means an application in relation to:

(a) one or more particular persons, things, matters, places, circumstances or cases; or

(b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.

invalid application , in relation to a provision, means an application because of which the provision exceeds the Commonwealth's legislative power.

valid application , in relation to a provision, means an application that, if it were the provision's only application, would be within the Commonwealth's legislative power."

139. Section 36 of the *Migration Act* deals with protection visas and provides that a criterion for one is that the applicant be a non-citizen in Australia "to whom the Minister is satisfied Australia has protection obligations …".

140. Because of the amplitude of the constitutional power of the Parliament with respect to immigration, and also perhaps external affairs had it wished, it could, arguably in my opinion, have stopped there, or have expressly provided that the Minister's decision should be conclusive. And so it would have been, subject only to any requirements to the contrary contained in other legislation such as self-imposed obligations under international treaties and conventions enacted into Australian law, and not impliedly or expressly repealed, or the existence of justiciable constitutional facts and of course s 75(v) of the Constitution . I say this because it is not immediately apparent why, if Parliament can make laws for the deportation of aliens by the Minister it should not similarly be able to make such laws with respect to the denial of entry and residence of aliens in Australia [133] .

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[133] See *Pochi v Macphee* (1982) 151 CLR 101 at 106 per Gibbs CJ.

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141. The first provision to note of the new Div 2 of Pt 8 of the *Migration Act* is s 475 which provides that the Division is not to be taken to limit the scope or operation of s 474 .

142. Section 477 prescribes time limits for proceedings in the Federal Court.

143. Section 484 should be noted:

> "(1) The jurisdiction of the Federal Court and the Federal Magistrates Court in relation to privative clause decisions is exclusive of the jurisdiction of all other courts, other than the jurisdiction of the High Court under section 75 of the Constitution .
>
> (2) To avoid doubt, despite section 67C of the *Judiciary Act 1903* , the Supreme Court of the Northern Territory does not have jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or an officer of the Commonwealth in relation to privative clause decisions.
>
> (3) To avoid doubt, jurisdiction in relation to privative clause decisions is not conferred on any court under the *Jurisdiction of Courts (Cross-vesting) Act 1987* ."

144. Section 486A specifies a time limit on applications to this Court for judicial review of 35 days:

"(1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.

(2) The High Court 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.

(3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section."

145. If valid and unrestricted in its operation in relation to this plaintiff because he was only notified of the decision on 5 April 2002, more than 35 days before he was able to start these proceedings, s 486A would preclude him from pursuing them. (I take the reference in the section to certiorari to have been made out of caution and of an awareness of the disposition of this Court to grant certiorari in aid, or furtherance of mandamus or prohibition.)

146. That the section refers in terms to an application to this Court is a further recognition by the legislature of its inability to oust the jurisdiction of this Court under s 75(v) of the Constitution , and of an absence of any intention to do so despite the apparently absolute language of s 474 .

147. Section 474 provides as follows:

"(1) A privative clause decision:

(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.

(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 a discretion or not), other than a decision referred to in subsection (4) or (5).

(3) A reference in this section to a decision includes a reference to the following:

(a) granting, making, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

(d) imposing, or refusing to remove, a condition or restriction;

(e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

(g) doing or refusing to do any other act or thing;

(h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision.

(4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

[it is unnecessary to reproduce the table]

(5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision."

148. The new division relevantly has retrospective operation. The decision of the Tribunal was made before the enactment of the amendment Act of 2001 but, as the plaintiff concedes, the decision was a privative clause decision as defined by s 474(2) of the *Migration Act* . The plaintiff's concession was correctly made in view of cl 8(2) of Sched 1 to the amendment Act of 2001 [134] .

[134] "8(2) The *Migration Act 1958* and the *Administrative Decisions (Judicial Review) Act 1977*, as amended by this Schedule, apply in respect of judicial review of a decision under the *Migration Act 1958* if:

(a) the decision was made on or after the commencement of this Schedule; or

(b) the decision:

(i) was made before the commencement of this Schedule; and

(ii) as at that commencement, an application for judicial review of the decision had not been lodged."

The effect of s 474 of the *Migration Act*

149. For the reasons which I have already given, s 474 would be effective to deny the plaintiff any entitlement to certiorari whether under s 75(v) or otherwise and is valid to that extent at least.

150. Mandamus and prohibition fall for consideration on a different footing. The Parliament cannot deprive this Court of the jurisdiction to grant these. Indeed so much was also conceded.

151. The template for s 474(1) of the Act as appears from its text and the speeches in Parliament, is the privative clause considered by this Court in *Hickman*, in which Dixon J said [135]:

> "The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of reg 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no 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."

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[135] (1945) 70 CLR 598 at 614-615.

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152. His Honour's statement derives to some extent at least from what was held in *Colonial Bank of Australasia v Willan* [136]. There, Sir James W Colvile, speaking for the Privy Council, which had before it a Victorian Act containing a privative clause, said [137]:

"It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

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[136] (1874) LR 5 PC 417 .

[137] (1874) LR 5 PC 417 at 442.

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153. And a little later his Lordship described the minimum requirements of a due exercise of jurisdiction [138] :

"In order to determine the first it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction'. There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide."

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[138] (1874) LR 5 PC 417 at 442-443 .

154. *Willan* was frequently cited in this Court before *Hickman* and in *Hickman* itself, Dixon J referred to some of those citations [139] . *Hickman* has been applied on a number of occasions in this Court [140] .

[139] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 citing *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114 at 157 per Isaacs J and *Austr alian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd* (1942) 66 CLR 161 at 182 per Starke J. See also *Wall v The King; Ex parte King Won and Wah On [No 1]* (1927) 39 CLR 245 at 256 per Isaacs J.

[140] *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 especially at 252-254 per Kitto J and see also at 264-265 per Menzies J; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232. In a taxation setting see *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179-180 per Mason CJ, 193-195 and 198-199 per Brennan J, 210 per Deane and Gaudron JJ, 222 per Dawson J, 233 per Toohey J and 240 per McHugh J.

155. In *R v Murray; Ex parte Proctor* [141] Dixon J elaborated upon what has come to be called "the *Hickman* doctrine". His Honour said:

> "But the question must always remain whether in a given case the writ does properly lie. That depends in turn upon the authority which the law gives to the proceedings which it is sought to prohibit. If the law denies to the tribunal in question all authority over the proceedings so that they cannot result in a lawful and effective exercise of power, then the proper remedy is prohibition."

[141] (1949) 77 CLR 387 at 398. See also *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389-390 [92] per McHugh, Gummow, Kirby and Hayne JJ.

156. Later, his Honour added [142] :

> "It then becomes a question whether, upon the true interpretation of the legislative instrument as a whole, it does not sufficiently express an intention that what the Board does shall be considered an authorized exercise of its power and

accordingly valid and effectual, notwithstanding that the Board has failed strictly to pursue the procedure the instrument indicates or prescribes and that the Board has in some respects gone outside or beyond the limits within which it was intended that the actual exercise of its authority should be confined."

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[142] *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 399.

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157. His Honour then referred to the distinction between directory and mandatory provisions, forms of nomenclature which were both useful and descriptive, but which have since been criticised in this Court [143] . He said that the distinction supplies an analogy which may help to explain the effect of the relevant regulations [144] :

"For construed in the traditional manner it must be taken to mean that strict compliance with at least some of the provisions of Part III [of the relevant regulations] is not an indispensable condition to the jurisdiction of the Board and to its authority to make a valid and binding award order or determination."

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[143] *Scurr v Brisbane City Council* (1973) 133 CLR 242 at 255-256 per Stephen J. See also *Project Blue Sky v Australian Broadcasting Authority* (19 98) 194 CLR 355 at 389-390 [92] per McHugh, Gummow, Kirby and Hayne JJ.

[144] *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 399.

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158. Later, his Honour [145] stated the question to be whether the provision (with respect to the making of the relevant determination) is imperatively expressed, or may, on the contrary, yield to the general policy or intention indicated by the provision as to finality.

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[145] *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 400.

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159. The plaintiff argued in this case that the long line of authority to which I have referred, and in particular, the *Hickman* doctrine states no more than a mere rule of interpretation and has little or nothing to say about the denial of access to the remedies referred to in s 75(v) of the Constit ution . I think that this is an understatement. Dixon J in *Hickman* and *Proctor* , as well as stating a rule of construction, embraces two important concepts. The first is that there is a distinction to be made between the exercise of an Executive power and a Judicial power. A court's scrutiny of the former should be undertaken with an understanding that officials and courts operate in different ways: they have different objects to achieve, and that the Constitution

by the careful separation in it of the sections relating to Executive power from those concerning the Judicial power which reflect the underlying principle of the separation of powers is expressly indicative of this. The second concept is that because of the nature of Executive power and the way it has to be exercised, perfection will be unachievable, errors will inevitably be made, not all of which it will be the business of courts to correct, even if sufficient judicial resources were available to do so: hence the use in *Proctor* of "indispensable [requirements]" of the exercise of a power and of "manifest error" in *Willan* [146] and other cases. It is very likely that fraud or bribery also would be amenable to correction under s 75(v) , being squarely within the *Hickman* doctrine as conduct falling short of being a bona fide attempt to exercise the relevant power. It may be, for example, that to attract the remedies found in s 75(v) of the Constitution when jurisdictional error is alleged, no less than a grave, or serious breach of the rules of natural justice will suffice, a matter which it is unnecessary to decide at this stage of these proceedings. In my opinion, these matters, the unqualified amplitude of the immigration power in s 51(xxvii) and perhaps also the external affairs power in s 51(xxix) , and the careful selectivity by the founders of the remedies which would be available under the Constitution in s 75(v) , relevantly require a strict, and perhaps less ambulatory or non-ambulatory reading of s 75(v) , and a different approach to its meaning and application from the law which has developed in relation to the prerogative writs generally, and in which s 75(v) is not engaged. Indeed, in my opinion, these matters, the language and structure of the Constitution and the other matters to which I have referred give a particular relevance and vitality to the *Hickman* doctrine in Constitutional law. The doctrine does not however provide any basis for a departure from the fundamental rule of statutory construction that a provision in an enactment or instrument is to be construed in context having regard to the statute or instrument as a whole.

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[146] (1874) LR 5 PC 417 at 442.

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160. In my opinion therefore, mandamus, prohibition and an injunction may go to cure manifest error of jurisdiction whether, in a relevant sense, by a failure to exercise it, or by a clear excess of it and not otherwise, notwithstanding the apparently absolute language of s 474 of the *Migration Act* . Another way of expressing the rule is in terms of the Privy Council's advice in *Willan* , that the remedies will only lie if there has been a departure from an essential or imperative requirement on the part of the relevant officer or tribunal, or a material failure to comply with what might once have conventionally been described as a mandatory provision. Both of these approaches have much in common with the approach of Mason ACJ and Brennan J in *R v Coldham; Ex parte Australian Workers' Union* [147] in which their Honours said that the privative provision "[could not] affect the operation of a provision which impose[d] *inviolable* limitations or restraints upon the jurisdiction or powers" (emphasis added), thereby recognizing that there might be degrees of limitation upon power, some violable and therefore legally tolerable, and some more serious and therefore inviolable and legally intolerable.

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[147] (1983) 153 CLR 415 at 419. Dixon J had earlier, in *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248 referred to "inviolable limitations or restraints [by enactments]".

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161. Whether a decision made by an official or an administrative body is not within power or jurisdiction, and whether it is therefore invalid and ineffective, will only usually not be established unless and until a court of appropriate jurisdiction holds that to be so. At that point, to adopt the language of McHugh J in *Re Wakim; Ex parte McNally* [148] the decision can be seen to "have no constitutional effect. For constitutional purposes [it is] a nullity." Whether however relief under s 75(v) will be granted may involve discretionary considerations as well as proof that an error of jurisdiction of a sufficient degree of gravity has been made [149]. The "decision" may not therefore necessarily turn out to be ineffective.

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[148] (1999) 198 CLR 511 at 565 [79] .

[149] cf the suggestion to this effect by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657 [146] .

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162. I earlier noted the defendant's argument that s 474 of the Act enlarged the decision-making power of any Commonwealth officer making a decision of the kind to which the section applied, and that in that sense the jurisdiction of the officer or the tribunal was enlarged. To the extent that the submission would have it that those acting under the relevant provisions had a jurisdiction to exceed their jurisdiction, it must be rejected. Merely to state the unqualified proposition is to expose its frailty. It would also be a very unusual and indirect means of expanding a jurisdiction which, if the legislature had wanted those acting under the *Migration Act* to have, and it could constitutionally confer, it could have sought to confer directly in express terms. The submission if correct, could also produce the constitutionally unacceptable consequence that a tribunal such as the one established under the *Migration Act* could conclusively determine its own jurisdiction.

163. It follows from what I have said that s 474 of the Act is not wholly invalid. It does not however provide a shield against the discretionary remedies of prohibition, mandamus and injunction available in this Court pursuant to s 75(v) of the Constitution in respect of errors of the kind that I have discussed.

Is s 486A of the Act invalid?

164. Whether however the plaintiff can pursue his case in which he alleges jurisdictional error of a kind arguably entitling him to the constitutional remedies also depends upon the validity or otherwise of s 486A of the Act .

165. As I have observed, s 486A does not of itself, on its face, appear to seek to extinguish the right conferred by s 75(v) of the Constitution of any person to challenge in this Court a "privative clause decision". Nonetheless the questions remain: whether, notwithstanding its appearance, the section does in fact so substantially interfere with or limit access to the constitutional remedies for which s 75(v) provides, that it goes beyond regulation and renders them either nugatory or of virtually no utility; and, whether, in any event, the legislature may regulate (assuming the section to be regulatory only in effect) access to this Court under s 75 (v) .

166. In argument, the plaintiff asked the Court to infer a negative implication of absence of power of regulation with respect to the remedies under s 75(v) by reason of the express reference in s 73 , and the absence of any reference in s 75 , to regulation. This is an argument by no means lightly to be dismissed. However, as I have pointed out, s 73 itself was not literally construed in *Smith Kline & French Laboratories* [150] and what on its face appears to be a prohibition was treated there as in the nature of a mere regulation [151] .

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[150] (1991) 173 CLR 194 .

[151] See, for example, *Judiciary Act* 1903 (Cth), s 35(2) .

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167. The defendant relies on *Parisienne Basket Shoes Pty Ltd v Whyte* [152] in which Starke J said:

> "Prima facie, procedural statutes do not touch jurisdiction. The *Factories and Shops Act* 1928 merely prescribes that a party shall lay his information within a prescribed period, but that touches his right to proceed and not the jurisdiction or capacity of the tribunal to adjudicate."

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[152] (1938) 59 CLR 369 at 385.

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168. In the same case Dixon J, with whom Evatt and McTiernan JJ agreed said [153] :

> "The limitation of time for laying an information is not a limitation upon the jurisdiction of the court or tribunal before whom the charge comes for hearing. The time bar, like any other statutory limitation, makes the proceedings no longer maintainable, but it is not a restriction upon the power of the court to hear and determine them. It is not true that because an information is in fact laid out of time, the Court of Petty Sessions is powerless to deal with it. Whether or not an information was laid too late is a question committed to their decision; it is not a matter of jurisdiction. In courts possessing the power, by judicial writ, to restrain inferior tribunals from an excess of jurisdiction, there has ever been a

tendency to draw within the scope of the remedy provided by the writ complaints that the inferior court has proceeded with some gross disregard of the forms of law or the principles of justice. But this tendency has been checked again and again, and the clear distinction must be maintained between want of jurisdiction and the manner of its exercise."

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[153] (1938) 59 CLR 369 at 388-389 .

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169. Citing *Bell v Stewart* [154] , the defendant further submits that the High Court Rules, including those relating to time limits do not "limit" the right of appeal provided by s 73 of the Constitution; they "merely regulate the procedure by which the appeal is brought"; their presence and absence of challenge to them suggests that time limits of various kinds upon any proceedings in this Court are constitutionally acceptable.

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[154] (1920) 28 CLR 419 at 424 per Knox CJ, Gavan Duffy and Starke JJ.

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170. The thrust of the defendant's primary submission is that unless the regulation has the effect of prohibiting or extinguishing the right it will be valid.

171. The defendant seeks to uphold the section on yet other bases. One of these is that the section is within the constitutional power with respect to one or more of the naturalization and aliens power, the immigration power and the external affairs power. The answer to this last may readily be given, that all of these are subject to the Constitution which confers a power which cannot be extinguished, to grant the remedies to which s 75(v) refers.

172. As an additional argument, the defendant contends that s 486A is a valid law under s 51(xxxix) being a law with respect to a matter incidental to the execution of any power vested by the Constitution in the federal judicature: that the Parliament has already lawfully delegated legislative power to the High Court to make rules and that that power has been used since 1963. Order 55 r 30, which imposes a time limit of two months for an application for a writ of mandamus was given as an example of the exercise of this delegated power.

173. I accept that the Parliament may, consistently, in my opinion, with the approach of the Court to regulation and prohibition in *Smith Kline & French Laboratories* [155] regulate the procedure by which proceedings for relief under s 75(v) may be sought and obtained. But the regulation must be truly that and not in substance a prohibition.

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[155] (1991) 173 CLR 194 .

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174. I have formed the opinion that s 486A is therefore invalid to the extent that it purports to impose a time limit of 35 days within which to bring proceedings under s 75(v) in this Court. There are certain matters which cannot be ignored for the purposes of judicial notice. Those matters include that the persons seeking the remedies may be incapable of speaking English, and will often be living or detained in places remote from lawyers pursuant to, for example, ss 178, 189, 192, 250 or 253 of the *Migration Act* .

175. In those circumstances, to prescribe 35 days within which to bring properly constituted proceedings in this Court under s 75(v) of the Constitution , which can only as a practical matter be filed in one of the capital cities, 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 under O 60 r 6 of the Rules. Section 486A , although not wholly invalid, can have no operation in relation to the constitutional remedies of mandamus, prohibition and injunction.

176. I do not doubt that there is a power to prescribe time limits binding on the High Court in relation to the remedies available under s 75 of the Constitution as part of the incidental power with respect to the federal judicature. But those time limits must be truly regulatory in nature and not such as to make any constitutional right of recourse virtually illusory as s 486A in my opinion does. A substantially longer period might perhaps lawfully be prescribed, or perhaps even 35 days accompanied by a power to extend time. Finality of litigation is in all circumstances desirable. The Commonwealth has just as much interest in knowing that rights and remedies against it may no longer be pursued as do other litigants. As I earlier observed, the Commonwealth and its Executive have many departments to administer and many priorities to assess and allocations to make. These need to be able to be done upon a reasonably settled basis of the numbers involved and other demands upon the treasury of the nation. It is consonant with the exercise of both Executive and Judicial power that a finite reasonable time be fixed for the supervision by the latter over relevant decisions made by the former. It should also be kept in mind that in any event, delay may provide a discretionary bar to the grant of relief under s 75(v) .

177. I would answer the questions in the stated case as follows:

1 Is section 486A of the *Migration Act 1958* (Cth) invalid in respect of an application by the Plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?

Answer:

Upon its proper construction s 486A can have no valid operation with respect to the plaintiff's entitlement (if he can make it out) to mandamus and prohibition under s 75(v) of the Constitution .

2 Is section 474 of the *Migration Act 1958* (Cth) invalid in respect of an application by the Plaintiff to the High Court of Australia for relief under section 75(v) of the Constitution?

Answer:

Section 474 would be invalid if, on its proper construction, it attempted to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution . However, on its proper construction, it does not attempt to do so. Section 474 is valid but does not apply to proceedings for mandamus or prohibition that the plaintiff would initiate.

3 By whom should the costs of the proceeding in this Honourable Court be borne?

Answer:

The costs of the proceedings should be borne as to 25% by the plaintiff and 75% by the defendant.

BarNet publication information - Date: Thursday, 29.01.2026 - Publication number: 00002 - User: johlbrown@gmail.com

BarNet publication information - Date: Thursday, 29.01.2026 - Publication number: 00002 - User: johlbrown@gmail.com

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Fernan [2025] FedCFamC1A 220 -
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Vii v Purcell (Examiner) [2025] FCAFC 135 (07 October 2025) (Bromwich, Vandongen and Bennett JJ)

33. The centrepiece of the appellant's case for constitutional invalidity turns on seeking to apply the o

Plaintiff S157 and Graham

Vii v Purcell (Examiner) [2025] FCAFC 135 -
Vii v Purcell (Examiner) [2025] FCAFC 135 -
Ravbar v Commonwealth of Australia [2025] HCA 25 -
FBLQ v Minister for Immigration, Citizenship and Multicultural Affairs [2025] FCAFC 71 (21 May 2025) (Murp

4. At first instance the onus was on the appellant to show that the Tribunal's decision was affected by

Plaintiff M19A/2024 v Minister for Immigration and Multicultural Affairs [2025] HCA 17 (10 April 2025) (Gagel

7. That constraint on the making of orders by consent in an appeal from a judgment given in the orig

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[4] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [104] .

Deripaska v Minister for Foreign Affairs [2025] FCAFC 36 -
Deripaska v Minister for Foreign Affairs [2025] FCAFC 36 -
Marmota Ltd v Commissioner of State Taxation [2025] SASCA 11 -
Marmota Ltd v Commissioner of State Taxation [2025] SASCA 11 -
BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 44 (04 December 2024) (C

92. None of these matters of construction alter the fundamental premise on which the mandatory can the Minister gives notice and makes the invitation again at a time when the person is not subject to

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[74] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189 at 206 [52] . See also *Minister*

BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 44 -
Imad v Director-General of Security [2024] FCAFC 138 (30 October 2024) (Bromwich, Thawley and Shariff JJ)

21. Even if that provision did apply, it would not have prevented judicial review for jurisdictional erro

Pallin & Deave (No 2) [2024] FedCFamC1A 191 (18 October 2024) (Riethmuller J)

8. The appellant also complains that the primary judge failed to "comply with" the United Nation's C

The Convention does not form part of the domestic law in Australia: the domestic law is that set o

Patole v Child & Adolescent Health Service [2024] WASCA 126 -
Patole v Child & Adolescent Health Service [2024] WASCA 126 -
In the Matter Of An Application BY Valerie Peers for Leave To Issue Or File [2024] HCASJ 36 (20 September 2

7. It is necessary to deal with the three claims for relief in the proposed application separately. If ther

Prohibition

via

[6] *Re Bowen; Ex parte Federated Clerks Union of Australia* (1984) 154 CLR 207 at 211 ; *Re Refugee Review*

Indara Inbuilding Solutions Pty Ltd v Australian Communications and Media Authority [2024] FCAFC 117 -
Indara Inbuilding Solutions Pty Ltd v Australian Communications and Media Authority [2024] FCAFC 117 -
Indara Inbuilding Solutions Pty Ltd v Australian Communications and Media Authority [2024] FCAFC 117 -
Azzi v State of New South Wales [2024] NSWCA 169 -
Inwood & Brock [2024] FedCFamC1A 72 -
Falconer v Commissioner of Police [No 2] [2024] WASCA 47 (01 May 2024) (Buss P; Vaughan and Hall JJA)

208. While there are many other examples of the use of the terminology of 'necessary implication', [122

via

[122] See eg ***Melbourne Corporation v Barry*** [1922] HCA 56; (1922) 31 CLR 174, 206 ; ***Police Service Board v Mo***

Falconer v Commissioner of Police [No 2] [2024] WASCA 47 -
Falconer v Commissioner of Police [No 2] [2024] WASCA 47 -
Falconer v Commissioner of Police [No 2] [2024] WASCA 47 -
Falconer v Commissioner of Police [No 2] [2024] WASCA 47 -
Boensch v Transport for NSW [2024] NSWCA 86 (17 April 2024) (Leeming JA)

15. Ultimately I understand Transport for NSW to accept, in my view entirely properly and consisten

DXG17 v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 41 -
Minister for Immigration, Citizenship and Multicultural Affairs v MZAPC [2024] FCAFC 34 -
Redland City Council v Kozik [2024] HCA 7 -
DPP v Smith [2023] VSCA 293 -
Jones v Commonwealth [2023] HCA 34 -
Garcia-Godos v R; MH v R [2023] NSWCCA 145 -
AZT22 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 90 (

119. Notwithstanding the terms of s 474 of the *Act*, the section does not have the effect of excluding the

McEwan v Clark [2023] QCA 120 (02 June 2023) (Morrison and Flanagan JJA; Crow J)
(2003) 211 CLR 476; [2003] HCA 2 , applied

McEwan v Clark [2023] QCA 120 (02 June 2023) (Morrison and Flanagan JJA; Crow J)
(2016) 90 ALJR 447; [2016] HCA 9 , applied
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2 , applied

McEwan v Clark [2023] QCA 120 -

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 10 -
Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 10 -
Stanley v DPP (NSW) [2023] HCA 3 -
Stanley v DPP (NSW) [2023] HCA 3 -
Rahman v Director of Public Prosecutions (NSW) [2023] NSWCA 1 -
Health Care Complaints Commission v Hill [2022] NSWCA 270 (15 December 2022) (Ward P, Mitchelmore JA

4. The King v Hickman; Ex parte Fox (1945) 70 CLR 598 at 615-616 (Dixon J); [1945] HCA 53 ; and, in the Sta

Varnhagen v State of South Australia (No 2) [2022] SASCA 118 (15 November 2022)
A v Independent Commissioner against Corruption (2014) 88 NSWLR 240; *Attorney-General (NT) v Emmerson*

Varnhagen v State of South Australia (No 2) [2022] SASCA 118 (15 November 2022)

88. Put differently, in the appellants' submission, this phrasing allows the authorised officer to determ

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[24] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [102] .

SDCV v Director-General of Security [2022] HCA 32 (12 October 2022) (Kiefel CJ, Gageler, Keane, Gordon, Ede

180. In considering validity, the starting point is the proper construction of s 46(2) of the AAT Act [273]

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[273] See *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 ; *Plaintiff S157/2002 v The Comm*

SDCV v Director-General of Security [2022] HCA 32 (12 October 2022) (Kiefel CJ, Gageler, Keane, Gordon, Ede

183. There are two mechanisms available to a person to challenge a security assessment made in respe

SDCV v Director-General of Security [2022] HCA 32 -
Ogawa v Finance Minister [2022] FCAFC 145 (31 August 2022) (Charlesworth, Thawley and Goodman JJ)

20. To succeed on her application for judicial review under the Judiciary Act , the onus was on Dr Oga

Tereva v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 142
Ngata v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 139 (

5. To succeed on his application for judicial review it was necessary for the appellant to show that th

> Bearing the overall onus of proving jurisdictional error, the plaintiff in an application for judicial
>
> (original emphasis, footnote omitted)

Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] HCA

37. The 2005 amendments were made not long after *Plaintiff S157/2002 v The Commonwealth* [49] , in w

via

[54] *Plaintiff S157* (2003) 211 CLR 476 at 538 [176] .

Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] HCA

37. The 2005 amendments were made not long after *Plaintiff S157/2002 v The Commonwealth* [49] , in w

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[52] *Plaintiff S157* (2003) 211 CLR 476 at 537 [173] .

Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] HCA
Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] HCA
Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] HCA
Nathanson v Minister for Home Affairs [2022] HCA 26 -
Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] HCA
Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] HCA
Farm Transparency International Ltd v New South Wales [2022] HCA 23 -
Melton City Council v Minister for Planning [2022] VSCA 144 (26 July 2022) (Emerton P; Niall and Osborn JJA

54. The Council places some emphasis on the fact that the Minister referred to the approval as being r

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[29] *Griffith University v Tang* (2005) 221 CLR 99; [2005] HCA 7; *Plaintiff S157/2002 v Commonwealth* (2

Melton City Council v Minister for Planning [2022] VSCA 144 -
CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 124
FKV17 v Minister for Home Affairs [2022] FCAFC 93 (25 May 2022) (Greenwood, Rangiah and Beach JJ)

93. In this case, the law of the Commonwealth Parliament is s 477(2) of the Act and the matter is the wh

(1) Original jurisdiction is conferred on the Federal Court in the controversy as a supple

(2) Section 477(2) is the source of a right, duty or liability to be established by the Federal Cou

(3) A remedy granted in the exercise of the jurisdiction conferred by s 39B(1A)(c) is not g

(4) One source of a remedy is a declaration under s 21(1) of the FCA Act , that is, a bindir

(5) A declaration, by itself, will not have the effect of setting aside the order of the prima

(6) Section 23 of the FCA Act , however, confers power on the Federal Court to make orders

(7) In *Plaintiff 157/2002 v Commonwealth* (2003) 211 CLR 476 ("*Plaintiff 157/2002*"), Gaudron

(8) Were it not the case that the original supplementary jurisdiction conferred by s 39B(

(9) Finally, there is an important question of statutory construction concerning s 476A(3

Despite section 24 of the *Federal Court of Australia Act 1976* , an appeal may not be brought to

(a) a judgment of the Federal Circuit Court that makes an order or refuses

(b) a judgment of the Federal Court that makes an order or refuses to mal

(10) Section 24(1)(d) of the FCA Act provides that this Court has jurisdiction to hear and dete
jurisdiction under s 39B(1A)(c) , it ought rationally be construed so as to also exclude an exer

FKV17 v Minister for Home Affairs [2022] FCAFC 93 -
FKV17 v Minister for Home Affairs [2022] FCAFC 93 -
Environment Protection Authority v Eastern Creek Operations Pty Limited [2022] NSWCCA 97 -
Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16 (04 May 2022) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, S

20. Failure to exercise, or to observe the legislated limits of, a jurisdiction conferred on a court or a no

via

[23] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482-483 [5] .

Nyoni v Bird [2022] FCAFC 61 -
XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 6 (03

59. In my respectful opinion, the primary judge erred in characterising the scheme of ss 501(3A) and 5

XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 6 (03

46. Those indicia support a construction of s 501(3A) as imposing imperative duties and inviolable con

XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 6 -
XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 6 -
XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 6 -
Pitman v Commissioner of Taxation [2021] FCAFC 230 -
Witthahn v Chief Executive of Hospital and Health Services and Director General of Queensland Health; Joh
Quinn v Commonwealth Director of Public Prosecutions [2021] NSWCA 294 (03 December 2021) (Leeming JA

4. Jurisdictional error has assumed much greater prominence following *Plaintiff S157/2002 v Common*

Quinn v Commonwealth Director of Public Prosecutions [2021] NSWCA 294 -
Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 213 (2

167. Through s 75 , and s 75(v) in particular, the High Court has a "constitutional function of protecting

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 213 -
Palmer v Western Australia [2021] HCA 31 (13 October 2021) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Ste

24. On the other hand, this Court has rejected a broad implication of legal equality derived from Dice

via

[47] (2003) 211 CLR 476 at 513 [103] . See also *Graham v Minister for Immigration and Border Protection* (2

Palmer v Western Australia [2021] HCA 31 -
Palmer v Western Australia [2021] HCA 31 -
Palmer v Western Australia [2021] HCA 31 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 (08 S

Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105, 116; [1961] HCA 71; *Darling Island Stevedorir*

Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19 [2021] FCAFC 153
Chetcuti v The Commonwealth [2021] HCA 25 (12 August 2021) (Kiefel CJ, Gageler, Keane, Gordon, Edelman,

96. STEWARD J. Some constitutional issues require consideration of "a unique mixture of history, st

via

[183] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [108] per Callinan J , quoting Si

Ginbey v Commonwealth Bank of Australia [2021] WASCA 116 -
Ginbey v Commonwealth Bank of Australia [2021] WASCA 116 -
Commonwealth v AJL20 [2021] HCA 21 -
Commonwealth v AJL20 [2021] HCA 21 -
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft [2021] HCA 19

7. On 28 June 2018, a judge of the Federal Circuit Court of Australia made an order by consent that a

via

[4] cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614615 [51] pe

LibertyWorks Inc v The Commonwealth [2021] HCA 18 -
Egan v Minister for Home Affairs [2021] FCAFC 85 (28 May 2021) (Nicholas, Stewart and Abraham JJ)

113. The applicant's reliance on *Kable* and the "thing in fact" argument is misconceived. A similar argu

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 (19 May 2021) (Kiefel CJ, Gageler, Ke

92. Section 75(v) of the *Constitution* – which confers jurisdiction on the High Court in all matters in wh

via

[88] French, "Administrative Law in Australia: Themes and Values Revisited", in Groves (ed), *Modern*

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 (19 May 2021) (Kiefel CJ, Gageler, Ke

95. Judicial review ensures that the Executive does not exceed its powers [94] . It ensures that decision

via

[95] *Plaintiff S157* (2003) 211 CLR 476 at 514 [104] . See also Crawford and Boughey, "The Centrality of

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 (19 May 2021) (Kiefel CJ, Gageler, Ke

27. To understand materiality, it is necessary first to understand jurisdictional error. Though the conc

via

[13] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 .

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 (19 May 2021) (Kiefel CJ, Gageler, Ke

94. As Brennan J said in *Church of Scientology v Woodward* [93] :

"Judicial review is neither more nor less than the enforcement of the rule of law over executi

via

[93] (1982) 154 CLR 25 at 70. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Abel*

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 (19 May 2021) (Kiefel CJ, Gageler, Ke

92. Section 75(v) of the *Constitution* – which confers jurisdiction on the High Court in all matters in wh

via

[87] *Plaintiff S157* (2003) 211 CLR 476 at 482-483 [5] .

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 (19 May 2021) (Kiefel CJ, Gageler, Ke

95. Judicial review ensures that the Executive does not exceed its powers [94] . It ensures that decision

via

[94] *Plaintiff S157* (2003) 211 CLR 476 at 492 [31] , 513-514 [104] . See also *Smethurst v Commissioner of the*

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 (19 May 2021) (Kiefel CJ, Gageler, Ke

93. In Australia, the separation of the judicial power of the Commonwealth from executive and legisla

via

[91] *Magaming* (2013) 252 CLR 381 at 400 [64] , quoting *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 5

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 -
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata [2021] FCAFC 46 (

21. On an application for judicial review of a migration decision, the onus is upon the applicant to sho

Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2021] FCAFC 3 (01 February 2021) (Allsop CJ;

46. So construed, s 35 would appear to achieve an outcome contrary to the plain words of Art 54(2). Ar

where legislation has been enacted pursuant to, or in contemplation of, the assumption of interna

Attorney-General v University of Tasmania [2020] TASFC 12 -
BWO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 181
Private R v Cowen [2020] HCA 31 (09 September 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Ed

172. The first reason for the suggestion that the power of service tribunals was administrative relied up

"This Court has held that the judicial power of the Commonwealth can only be vested in cou

The decision from which Starke J quoted his description of judicial power in this passage was that

via

[292] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 365-366 . See also *Minister for Immig*

Hall v The Queen [2020] SASCFC 84 -
Mokhlis v Minister for Home Affairs [2020] HCA 30 -
Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 144 (

22. In the proceedings before the primary judge, the onus was on Mr Viane to show that the Minister'

(1) making factual findings concerning American Samoa for which there was no eviden

(2) making factual findings in relation to American Samoa and Samoa that were "illogic

(3) failing "to give proper, genuine and realistic consideration" to Mr Viane's submissio

(4) failing to comply with the rules of procedural fairness.

PQSM v Minister for Home Affairs [2020] FCAFC 125 -
KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 108
DVE18 v Minister for Home Affairs [2020] FCAFC 83 -
Ballas v Department of Education [2020] NSWCA 86 -
FCS17 v MHA [2020] FCAFC 68 (21 April 2020) (Allsop CJ, White and Colvin JJ)

20. It accords entirely with the humanitarian and protective purpose of the convention to place the ob
Convention as hitherto interpreted uniformly by courts in Australia and internationally. That disa

FCS17 v MHA [2020] FCAFC 68 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 (15 April 2020) (Kiefel CJ, Bell, Gag

176. Those three special classes of case are directed at different ends: prohibition goes to prohibit actio

via

[235] *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429 ; *Plaintiff S157/2002*

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 (15 April 2020) (Kiefel CJ, Bell, Gag

230. Unsurprisingly, it was common ground between the parties that s 75(v) confers jurisdiction, or aut

via

[312] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104] .

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 (15 April 2020) (Kiefel CJ, Bell, Gag

179. The question which arises is: when might an injunction issue where what has been done by an off

via

[248] *Aala* (2000) 204 CLR 82 at 141 [162] ; *Plaintiff S157/2002* (2003) 211 CLR 476 at 513-514 [104] .

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 (15 April 2020) (Kiefel CJ, Bell, Gag

97. Section 75(v) is an irremovable source of jurisdiction and power [98] . Its purposes are clear. It was

via

[98] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 .

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
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Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -
Yanunijarra Aboriginal Corporation RNTBC v State of Western Australia [2020] FCAFC 64 -
BFH16 v Minister for Immigration and Border Protection [2020] FCAFC 54 -
FSG17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 29 (

8. On 22 December 2017, the appellant filed an application for judicial review of the Authority's decis

Raibevu v Minister for Home Affairs [2020] FCAFC 35 -
Love v The Commonwealth [2020] HCA 3 -
Tulloh v Chief Executive Officer of the Department of Corrective Services [2020] WASCA 10 (30 January 202

38. The judge considered that the effect of the authorities on jurisdictional error and invalidity, includ

1. An administrative decision which involves jurisdictional error is legally invalid.

2. An administrative decision which is legally invalid does not necessarily have no legal

3. Whether a legally invalid decision has any relevant legal effect before it is set aside o

Tulloh v Chief Executive Officer of the Department of Corrective Services [2020] WASCA 10 -
Tulloh v Chief Executive Officer of the Department of Corrective Services [2020] WASCA 10 -
EFX17 v Minister for Immigration and Border Protection [2019] FCAFC 230 (16 December 2019) (Greenwood, I

60. As earlier mentioned, s 474 sits conformably with s 75(v) of the Constitution because the definition

EFX17 v Minister for Immigration and Border Protection [2019] FCAFC 230 (16 December 2019) (Greenwood, I

24. A privative clause decision is defined to mean, relevantly, "a decision of an administrative charact

EFX17 v Minister for Immigration and Border Protection [2019] FCAFC 230 -
EFX17 v Minister for Immigration and Border Protection [2019] FCAFC 230 -
CNY17 v Minister for Immigration and Border Protection [2019] HCA 50 (13 December 2019) (Kiefel CJ, Gagele

54. The rule against bias is one aspect of the requirements of procedural fairness [57] . Breach of the ru

via

[58] *Plaintiff S157/2002* (2003) 211 CLR 476 at 490 [25] .

CNY17 v Minister for Immigration and Border Protection [2019] HCA 50 -
Minister for Home Affairs v DUA16 [2019] FCAFC 221 (10 December 2019) (Griffiths, Mortimer and Wheelaha

115. With great respect, in my view the same point is made in both sets of reasons, and there is no nece

Minister for Home Affairs v DUA16 [2019] FCAFC 221 -
BQQ15 v Minister for Home Affairs [2019] FCAFC 218 (06 December 2019) (Yates, Wheelahan and O'Bryan JJ)

4. On 13 August 2015, the applicant filed an application for judicial review of the Tribunal's decision i

Deputy Commissioner of Taxation v Buzadzic [2019] VSCA 221 (11 October 2019) (Kyrou, McLeish and Niall JJ.

72. The joint reasons in *Futuris* record, twice, that the provisions of pt IVC meet the constitutional req

Deputy Commissioner of Taxation v Buzadzic [2019] VSCA 221 (11 October 2019) (Kyrou, McLeish and Niall JJ.

72. The joint reasons in *Futuris* record, twice, that the provisions of pt IVC meet the constitutional req

Deputy Commissioner of Taxation v Buzadzic [2019] VSCA 221 -
Deputy Commissioner of Taxation v Buzadzic [2019] VSCA 221 -
DVO16 v Minister for Immigration & Border Protection [2019] FCAFC 157 -
Burgess v Assistant Minister for Home Affairs [2019] FCAFC 152 (30 August 2019) (Kerr, White and Charleswo

47. Mr Burgess commenced an application for judicial review of the Cancellation Decision in the Higl

DNA17 v Minister for Immigration and Border Protection [2019] FCAFC 146 (30 August 2019) (Kerr, Davies an

4. By application filed on 3 August 2017, the appellant sought judicial review of the Authority's decisi

Maere v Minister for Home Affairs [2019] FCAFC 121 -
Chetcuti v Minister for Immigration and Border Protection [2019] FCAFC 112 (02 July 2019) (Murphy, Rangiah

47. The Minister's decision was made under s 501(3) of the Act . The appellant's application for judicia

Minister for Home Affairs v Ogawa [2019] FCAFC 98 -
Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13 -
Minister for Immigration and Border Protection v Mohammed [2019] FCAFC 49 -
Minister for Immigration and Border Protection v SZMTA [2019] HCA 3 (13 February 2019) (Bell, Gageler, Kea

87. As the plurality explained in *Plaintiff S157/2002 v The Commonwealth* [84] :

"The reservation to this Court by the Constitution of the jurisdiction in all matters in which

Minister for Immigration and Border Protection v SZMTA [2019] HCA 3 -
DKX17 v Federal Circuit Court of Australia [2019] FCAFC 10 (08 February 2019) (Reeves, Rangiah and Bromwi

57. In an application to the Federal Circuit Court under s 476 of the Act , it is necessary for the applica

Minister for Immigration and Border Protection v Gill [2019] FCAFC 9 -
Dunn v Minister for Immigration and Border Protection [2018] FCAFC 233 (21 December 2018) (Logan, Charle

38. The jurisdiction exercised by the primary judge was that conferred by s 476A(1)(c) of the Act , bein

Vannini v Worldwide Demolitions Pty Ltd [2018] NSWCA 324 (17 December 2018) (Macfarlan and Gleeson JJ

55. Mahenthirarasa v State Rail Authority of New South Wales [2008] NSWCA 101 ; (2008) 6 ADCR 61 (M

Strickland (a pseudonym) v Director of Public Prosecutions (Cth) [2018] HCA 53 -
Hossain v Minister for Immigration and Border Protection [2018] HCA 34 (15 August 2018) (Kiefel CJ, Gageler,

20. Six members of this Court picked up that language of Professor Jaffe, and more importantly gave e

via

[18] (2003) 211 CLR 476 at 482-483 [5] , 513-514 [103]-[104] ; [2003] HCA 2 .

Hossain v Minister for Immigration and Border Protection [2018] HCA 34 (15 August 2018) (Kiefel CJ, Gageler,

65. In England, where a distinction between jurisdictional error and non-jurisdictional error has been

via

[70] See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]-[77] ; *Kirk v Industrial Co*

Hossain v Minister for Immigration and Border Protection [2018] HCA 34 (15 August 2018) (Kiefel CJ, Gageler,

The only errors by the Tribunal that could be reviewed were those that were jurisdictional. The absence

via

[90] *Migration Act* 1958 (Cth), s 476 ; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506

Shrestha v Minister for Immigration and Border Protection [2018] HCA 35 -
Hossain v Minister for Immigration and Border Protection [2018] HCA 34 -
Hossain v Minister for Immigration and Border Protection [2018] HCA 34 -
Viane v Minister for Immigration and Border Protection [2018] FCAFC 116 -
Vokes Ltd v Laminar Air Flow Pty Ltd [2018] FCAFC 109 (16 July 2018) (Nicholas, Davies and Burley JJ)

4. Robertson J also rejected Vokes' argument that the amendment of the Register in August 2001 had

The absence of a valid assignment or transmission means that any purported exercise by the Regi

There was no actual assignment of the Registered Mark to Mediaquest, either from Mr Brailsford

Legal Services Commissioner v Nichols [2018] QCA 158 -
Chhua v Commissioner of Taxation [2018] FCAFC 86 (06 June 2018) (Logan, Moshinsky and Steward JJ)

11. In that respect, it is well to remember that s 350-10 of Sch 1 to the TAA (formerly s 177 of the 1936 A

It follows from what has been said respecting s 177(1) that not only is it not a privative clause, but tl

The requirements of the [1936 Act] which govern the making of an assessment do not produ

(Footnotes omitted)

Chhua v Commissioner of Taxation [2018] FCAFC 86 (06 June 2018) (Logan, Moshinsky and Steward JJ)

34. With respect, that passage does not take the applicant's argument any further. No one doubts that

Various views were expressed in *Richard Walter* respecting the construction of and relationship be

(Footnotes omitted)

Chhua v Commissioner of Taxation [2018] FCAFC 86 -
Chhua v Commissioner of Taxation [2018] FCAFC 86 -
Minister for Immigration and Border Protection v CLV16 [2018] FCAFC 80 (25 May 2018) (Flick, Griffiths and

62. In *Bhardwaj* , a review which had been sought by Mr Bhardwaj miscarried because the Immigratio

[5] There is nothing in the nature of an administrative decision which requires a conclusion that a power to m

"I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter

[6] That general proposition must yield to the legislation under which a decision-maker is acting. And much m

[8] The requirements of good administration, and the need for people affected directly or indirectly by decisio

The Chief Justice concluded, by reference to the legislative scheme, that the Tribunal could revisit

Decisions involving jurisdictional error: the general law

[51] There is, in our view, no reason in principle why the general law should treat administrative decisions invo

(Footnote omitted).

Their Honours continued (at 616):

[53] ... As already pointed out, a decision involving jurisdictional error has no legal foundation and is properly to b

Justice Hayne likewise concluded that "[*n*]*othing in the Act requires (or permits) the conclusion that des*

Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16 (18 April 2018) (Gageler, K

43. Borrowing from the language of Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth* [39] , the pla

via

[39] (2003) 211 CLR 476 at 494 [37] ; [2003] HCA 2 .

Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16 (18 April 2018) (Gageler, K

43. Borrowing from the language of Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth* [39] , the pla

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4 -
Migration Agents Registration Authority v Frugtniet [2018] FCAFC 5 (30 January 2018) (Siopis, Robertson and

67. The primary judge considered a series of decisions of this Court, which her Honour accepted mos

43 The privilege not to answer questions or produce documents which have a tendency to expose the

44 The consequence of the recognition by the High Court that the privilege is one deeply rooted in th

45 Prior to *Pyneboard* , it had been generally expressed that the privilege was inherently incapable of a

46 It is presumed that Parliament does not intend to interfere with fundamental principles or rights in

Muggeridge v Minister for Immigration and Border Protection [2017] FCAFC 200 (08 December 2017) (Flick, F

18. In order to succeed on his application for judicial review, it was necessary that Mr Muggeridge sho

Dimitrov v Supreme Court (Vic) [2017] HCA 51 (01 December 2017) (Edelman J)

36. On one view, s 500(2) , on its proper construction, is concerned only with actions or civil proceedin

via

[46] (2003) 211 CLR 476; [2003] HCA 2 .

Dimitrov v Supreme Court (Vic) [2017] HCA 51 -
Lewski v Australian Securities & Investments Commission [2017] FCAFC 171 -
Lewski v Australian Securities & Investments Commission [2017] FCAFC 171 -
Lewski v Australian Securities & Investments Commission [2017] FCAFC 171 -
BMB16 v Minister for Immigration and Border Protection [2017] FCAFC 169 (27 October 2017) (Dowsett, Besan

58. On his application for judicial review, it was necessary for the appellant to show that the Authority

Kaldas v Barbour [2017] NSWCA 275 (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)

103. The Attorney General submitted that a privative clause within a statute is taken into account in de

Kaldas v Barbour [2017] NSWCA 275 (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476; [2003] HCA 2 applied.

Kaldas v Barbour [2017] NSWCA 275 (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)

40. (1991) 173 CLR 132 at 160; [1991] HCA 33 ; see also Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 4

Kaldas v Barbour [2017] NSWCA 275 (24 October 2017) (Bathurst CJ, Basten and Macfarlan JJA)

44. (2003) 211 CLR 476; [2003] HCA 2 .

Kaldas v Barbour [2017] NSWCA 275 -
Kaldas v Barbour [2017] NSWCA 275 -
Kaldas v Barbour [2017] NSWCA 275 -
Kaldas v Barbour [2017] NSWCA 275 -
State of Queensland v Roane-Spray [2017] QCA 245 (20 October 2017) (Fraser and Philippides JJA and Bowskil
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2 , cited

State of Queensland v Roane-Spray [2017] QCA 245 -
Brown v Tasmania [2017] HCA 43 (18 October 2017) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelm

489. The first is that the Protesters Act is so uncertain, and so hopelessly vague, that it is impossible for

via

[519] *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 164 per Latham CJ, 252 per Rich and Willia

Brown v Tasmania [2017] HCA 43 -
Brown v Tasmania [2017] HCA 43 -
Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

73. The essence of the case for the plaintiff and the applicant relied upon the constitutional implicatio

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

91. The plaintiff and the applicant submitted that s 503A(2) is invalid due to a constitutional constrain

via

[74] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 .

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

106. There are strong reasons for a cautious approach to the application of this broader conception of a

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

105. However, read in their full context, the two paragraphs in *Plaintiff S157/2002* might be thought to ti

via

[97] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104] .

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

107. The difficulty, perhaps impossibility, of giving satisfactory answers to these questions may have be

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

73. The essence of the case for the plaintiff and the applicant relied upon the constitutional implicatio

via

[57] (2003) 211 CLR 476; [2003] HCA 2 .

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

[98] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 514 [104] .

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

102. The implication upon which the plaintiff and the applicant relied was first recognised in obiter dic

"The Act must be read in the context of the operation of s 75 of the Constitution . That sectio

'is an instrument framed in accordance with many traditional conceptions, to some of

The reservation to this Court by the Constitution of the jurisdiction in all matters in w

via

[84] (2003) 211 CLR 476 .

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

88. The remainder of these reasons is divided as follows:

A. Outline of the three difficulties with the submissions of the plaintiff and the applicant[89]

B. The entrenched minimum provision of judicial review [101]

Plaintiff S157/2002 v The Commonwealth [102]

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

120. However, the *Hickman* principle was later said to have been placed "in perspective" [131] by the dec

Graham v Minister for Immigration and Border Protection [2017] HCA 33 (06 September 2017) (Kiefel CJ, Bell,

120. However, the *Hickman* principle was later said to have been placed "in perspective" [131] by the dec

via

[134] *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 484-485 [12] , citing *Colonial Bank of*

Graham v Minister for Immigration and Border Protection [2017] HCA 33 -
Graham v Minister for Immigration and Border Protection [2017] HCA 33 -
Graham v Minister for Immigration and Border Protection [2017] HCA 33 -
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46. The definition of 'purported privative clause decision' in section 5E reflects the terminology used by the High Court in *Plaintif*

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19. With reference to s 474(2) of the *Migration Act* , the plurality held in *Plaintiff S157* (at [76]) that, in re

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84. However, s 474(6) cannot be construed in the abstract. It is part of a complex web of defined terms

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61. Nor can any relevant distinction be founded on the basis that the decision in *Plaintiff S157* is confin

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23. This conclusion does not, moreover, defeat the purpose of the scheme established by Pt 8 of the *M*

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Conspicuously absent from the explanation provided is any discernible legislative intent to extend the re

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