

PRIVATIVE CLAUSES: A UNIVERSAL APPROACH AND ITS UNDERPINNINGS

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*We do not have a developed system of administrative law – perhaps because until
fairly recently we did not need it
Lord Reid¹*

Introduction

The genesis of this essay lies in the wide discrepancies in reasoning between various judicial approaches toward privative clauses, especially between State and Federal levels, in Australia. The aim of this essay is to provide a set of steps in the correct approach to be taken toward a privative clause. To this end I draw from the case law on the subject of privative clauses the pertinent cases and distil from them common and logical principles. It is also a discursive essay on privative clauses in Australia generally.

The privative clause is a concept that has been well known to administrative law for several centuries.² The term privative clause is used to describe a legislative provision whereby the Parliament has sought to restrict judicial review of the decisions of a statutory authority,³ whose power to make certain decisions is usually included within the same legislative instrument as the privative clause.

The proposition seems simple enough. However, the application of a privative clause is made difficult by the inherent tension a privative clause creates within any legislative instrument. It can be seen clearly when stated in this simplified form: a statutory body is given certain authority which has limitations; the intention in imposing such limitations is that any excess by the body of these limitations in exercising its authority will lead to invalidity – how is this invalidity to be exposed if not by judicial review? The privative clause thus acts contrary to the grant of limited authority upon any statutory body and reconciliation must be achieved between these two competing factors.

In Australia there are constitutionally entrenched limits on the effectiveness of a privative clause when enacted by the federal Parliament. A privative clause is unable to oust the original jurisdiction of the High Court to review administrative actions under s 75(v) of the Australian Constitution. At State level, however, there is arguably no entrenched jurisdiction given to the Supreme Courts. This has led to the question of whether a privative clause enacted by an Australian State Parliament, lacking this and other Federal constitutional limits, could virtually immunise all actions of the statutory body from judicial review.⁴ It is my thesis that this is not a valid proposition.

My thesis is that the inherent tensions within any statutory instrument created by a privative clause must be reconciled on a case by case analysis of any instrument and relying upon

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relevant rules of statutory interpretation. The relevant rules are proposed in general terms by the decision of *Plaintiff S157/2002 v Commonwealth*⁵ which draws upon the reasoning of Dixon J, in the seminal case of *The King v Hickman; Ex parte Fox and Clinton*⁶. Once this is done, the further specifically federal considerations such as constitutional limitations should be assessed.

The structure of this essay will be as follows: I will initially analyse the case of *Hickman*, to draw from it the reasoning of Dixon J on the approach to be taken toward a privative clause. Expanding on this approach, I will analyse the more recent case of *S157*. I will then consider the decision of *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)*⁷ and argue it was flawed in its approach toward the privative clause contained in the *Industrial Relations Act 1996* (NSW). Finally, I will discuss the fundamental underpinnings of all judicial approaches to privative clauses and in doing so reveal my reasoning as to why the proposition that a privative clause at State level could protect all actions of the decision maker from judicial review is fallacious.

The case of Hickman

The concept of a privative clause is well known at law and has been among the subjects of consideration of the courts for several centuries. However, for the purposes of this essay, I shall start by considering *Hickman*, a decision of the High Court which has been applied repeatedly in the consideration of privative clauses in Australia.⁸ It is also a case which facilitates a brief survey of the history of decisions regarding privative clauses in English and early Australian jurisdictions.

A Facts

The Local (Mechanics) Reference Board (Southern District NSW) was empowered by the *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth) to settle disputes as to any local matter likely to affect the amicable relations of employers and employees in the coal mining industry. Regulation 17 provided that decisions of the Board 'shall 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.'

Fox and Clinton were haulage contractors who carted predominantly coal. Both were the subject of orders by the Board which was constituted under the regulations. Mr Hickman was the chairman of the Board. There had been an application made to the Board on behalf of an industrial union of employees for determination of a dispute.

The two orders made by the Board against Fox and Clinton were, in terms, a finding that both were engaged in the Coal Mining Industry and as such, they were required to grant their employees who drove lorries the minimum award rate of wage, under the Mechanics (Coal Mining Industry) Awards.

B The decision

Of the five High Court Justices who decided *Hickman*, it is the judgment of Dixon J which has survived to be applied in subsequent cases dealing with privative clauses. The other four Justices made their decision to grant prohibition on the basis that the regulations could not oust the jurisdiction of the High Court under s 75(v) of the Australian Constitution. For this reason I will only consider the judgment of Dixon J. However, all members of the Court agreed that the facts did not suggest that Fox or Clinton were engaged in the coal mining industry.

Dixon J initially stated that regulation 17 could not affect the jurisdiction of the High Court under s 75(v) of the Australian Constitution. His Honour went on to state that privative clauses are not interpreted as meaning to 'set at large' the courts or decision makers to whose decision they relate, but rather they restrict review of the decisions of those bodies '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.'⁹ In stating that the power of the bodies is not 'set at large', his Honour meant that the tribunal is not immune from review, in that it is not free and it is still bound to be supervised judicially. Essentially, the tribunal is not freed from its statutory limits. It is this statement perhaps that has given rise to *the expanded jurisdiction theory of privative clauses*, that is, that rather than the privative clause restricting the scope for judicial review of decisions, the privative clause expands the scope of valid decisions which can be made. I will address this issue when discussing the majority judgment in the case of *S157*. The three provisos listed by Dixon J above have become known as the three *Hickman* provisos.

His Honour stated that it is 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 Australian Constitution. Obviously this is only a Federal consideration.¹⁰

Dixon J went on to say that it is equally impossible for the Parliament to impose limits upon the quasi-judicial authority of a body which is set up with the intention that any excess of authority means invalidity, and yet at the same time deprive superior courts of the authority to restrain any invalid actions.¹¹ This conflict is another possible source of the expanded jurisdiction theory of privative clauses as an easy solution to the conflict is to characterise the privative clause as expanding the jurisdiction of the decision maker at the expense of the limitations within the statute. However, as Dixon J pointed out, where the Parliament confers authority subject to limitations and at the same time enacts a privative clause to prevent review of actions made under that authority, it becomes a question of interpretation of the whole legislative instrument. When dealing with such tension or contradiction between statutory provisions, his Honour stated that an attempt should be made to reconcile them, and then, at federal level, any opposition between the Australian Constitution and the provisions should be resolved by adopting any interpretation of the provision that is fairly open.¹²

His Honour made a clear distinction between the general interpretation of privative clauses and the specific interpretation of privative clauses at Federal level in light of constitutional limitations. He sets the *Hickman* provisos as a threshold limit which must be met before even considering whether or not a transgression of the limits of a statutory power will necessarily spell invalidity.

In this instance his Honour went on to say that the application of these principles to the Regulations in question meant that decisions given by a Local 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.'¹³ His Honour only applied the first stage of his proposed interpretation method because he did not need to go further in his analysis of the privative clause.

Dixon J considered the decision in *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd*,¹⁴ and approved the statement that if in any legislative instrument,

in one provision it is said that certain conditions shall be observed, and in a later provision of the same instrument that, notwithstanding that they are not observed, what is done is not to be challenged, there

then arises a contradiction and effect must be given to the whole legislative instrument by a process of reconciliation.¹⁵

His Honour referred to the joint judgment of Isaacs and Rich JJ in this case, where they discussed the interpretation of privative clauses generally. Isaacs and Rich JJ had agreed with the statement of principles made by the court in *Clancy v Butchers Shop Employees Union*.¹⁶ There, Griffiths CJ stated that privative clauses which

tak[e] away the right to *certiorari* and other remedies have always been construed as not extending to cases in which a Court with limited jurisdiction has exceeded its jurisdiction. It has often been held that where the legislature uses words in this well-known form they must always be taken to have intended the enactment to be subject to the rule I have mentioned. The other answer is that where different parts of a Statute are apparently contradictory, such a construction must, if possible, be put upon them as will render them all consistent with one another.¹⁷

Thus, the form of reconciliation which Dixon J proposed was not novel but one which had been used since the 19th century. Another example is *The Colonial Bank of Australasia and John Turner v Robert Willan*.¹⁸

The principles which can be drawn from the judgment of Dixon J and the cases cited by his Honour are as follows:

- Apply the threshold limit, the three '*Hickman* provisos', to any impugned decision; if they are fulfilled, then
- Consider any constitutional limitations and any construction that is fairly open in accordance with the *Australian Constitution* should be adopted; then
- In light of the conflict or tension, read the statute as a whole and determine whether any transgression of the limits of power was of such a nature as to render the decision invalid.

In the result in *Hickman*, Dixon J decided that the decision had been made by the Board without jurisdiction to do so, thus the decision was not protected by the privative clause and prohibition should issue.

This decision set the benchmark for future decisions on privative clauses. Dixon J also wrote several other judgments which were also influential in the clarification of this matter. I will make reference to these decisions in my analysis of the judgment in *S157*.

The case of S157

A Facts

The plaintiff, a citizen of Bangladesh, arrived in Australia in 1997 and applied for a protection visa which was refused by a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs. The Refugee Review Tribunal affirmed the original decision in 2000. In 2002 the Federal Court remitted the decision by consent back to the Tribunal. In the same year, the Tribunal reaffirmed the original decision. The plaintiff then wished to challenge the decision in the High Court, in its original jurisdiction under s 75(v) of the Australian Constitution, on the grounds that it had been made in breach of the rules of procedural fairness. However, the privative clause provisions, ss 474 and 486A of the *Migration Act 1958* (Cth) ostensibly prevented such a challenge.

Proceedings were thus initiated in the High Court for declarations that both ss 474 and 486A were invalid due to conflict with s 75(v) of the Australian Constitution.

Section 474 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).

Sub-section (3) then described the actions to which the term 'decision' referred. Sub-section (4) sets out certain decisions which are not privative clause decisions and ss (5) permits the making of regulations specifying that particular decisions are not privative clause decisions. For the purposes of the decision, neither ss (4) nor (5) had any application.

B The decision

There were three judgments delivered in this matter. The majority written judgment was delivered by Gaudron, McHugh, Gummow, Kirby and Hayne JJ and is the judgment of central concern to this essay.

Gleeson CJ wrote a judgment which had several points in common with the joint judgment and which reached the same conclusions. His Honour quoted Denning LJ that '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'.¹⁹ His Honour then discussed the importance of statutory construction in determining the scope of a privative clause before having regard to any specific limitations applicable at Federal level. His Honour turned to the judgments of Dixon J in several cases,²⁰ but specifically to *Hickman*. His Honour went on to say that the characterisation of the exercise as one of construction means that any principles formulated by Dixon J cannot be taken as comprehensive and that the way is open for the application of other principles as well.²¹ His Honour then listed five relevant principles of statutory interpretation.²² Using these principles Gleeson CJ considered the expanded jurisdiction theory of privative clauses which was submitted in argument by the Commonwealth. His Honour characterised it as relying on the theory that a privative clause controls the meaning of the remainder of the statute. His Honour dismissed the submission as incorrect.

It is interesting to note that while Gleeson CJ stated at the outset of his judgment '[f]or the reasons that follow, I agree with the answers proposed in the joint judgment',²³ his Honour did not base his reasoning upon the use of the *Hickman* provisos. Rather, his Honour based his reasoning upon the rules of statutory construction which he listed. In this the majority agreed to a statutory interpretation approach, but recognised the importance of the *Hickman* provisos to a greater extent.

I will not consider the final judgment, that of Callinan J. Though he did consider the question of general statutory interpretative principles to be applied to a privative clause, his reasoning in the case focussed predominantly on the constitutional question.

1 Gaudron, McHugh, Gummow, Kirby and Hayne JJ

Their Honours first considered the judgment of Dixon J in *Hickman*. The '*Hickman* principle' of reconciliation was stated by their Honours to be a simple rule of construction allowing for the reconciliation of apparently conflicting statutory provisions and that this necessarily implied that there could be no general rule as to the meaning of privative clauses.²⁴

Their Honours then addressed the proposition of the Commonwealth that the privative clause enlarges the powers of the decision-maker to the extent that their decision is valid so long as they comply with the three *Hickman* provisos. Their Honours rejected the view that a privative clause enlarges the powers of a decision maker generally: '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.'²⁵ At the end of the joint judgment their Honours considered further this expanded jurisdiction theory of privative clauses.

Their Honours found that the protection which the privative clause purports to afford will only be applicable if the three *Hickman* provisos are satisfied, but that the satisfaction of the three provisos does not then imply that the decision will then go on to be protected by the privative clause. The privative clause itself must be delineated in scope.²⁶ To determine the scope of protection of the privative clause it is necessary to have regard first to the terms of the clause in question and then to the statute as a whole.

Their Honours early in the judgment adverted to the fact that the case of *Hickman* was referred to in the second reading speech of the Bill that became the amending Act which introduced s 474. Due to this it was held that there could be no possibility of finding an intention of Parliament for the courts to interpret the privative clause outside of the bounds of the decision of *Hickman*.²⁷ The terms of the privative clause, as with other privative clauses, limit access to the courts. They do not repeal the statutory limitations or restraints imposed upon a decision maker.

Their Honours decided that if reliance is placed upon a privative clause, the first step must be to ascertain its meaning or 'the protection it purports to afford'²⁸ and that two principles of construction apply to privative clauses, as follows.

The first, only applicable at Federal level, is that if there is opposition between the Australian Constitution and any provision, it should be resolved by adopting an interpretation consistent with the Australian Constitution that is fairly open.²⁹

The second, of general application, is that it is presumed that Parliament does not intend to cut down the jurisdiction of the courts except to the extent that it is expressly stated or necessarily implied in a statute. That is, 'privative clauses are strictly construed'³⁰

As noted above, Gleeson CJ applied far more principles of construction in his consideration of the privative clause. It can reasonably be assumed that their Honours in this judgment did not look further than the two principles listed because they had no need to refer to others for their purposes of determining the constitutional validity of the clause. Their Honours then dealt with the two constitutional issues which needed to be considered for the purposes of the first principle of construction.

Their Honours found that in interpreting the privative clause in conformity with s 75(v) of the Australian Constitution 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 jurisdiction.

However, their Honours also held that it was a matter of general principle that an administrative decision which involves jurisdictional error is 'regarded, at law, as no decision at all'.³¹ Their Honours earlier had given the example that if there had been a jurisdictional error due to a failure to discharge 'imperative duties'³² or to observe 'inviolable limitations or restraints'³³ the decision in question cannot properly be described as a 'decision ... made under this Act'. Thus any decision made which is tainted by jurisdictional error is not

protected by the privative clause, such errors rendering decisions incapable of being described as 'decision[s] ... made under this Act'. However, errors such as a non-jurisdictional error on the face of the record, which obviously is not of a jurisdictional nature, are still protected by the privative clause.

The reasoning on a privative clause in any given judgment necessarily only has future application in either the strict interpretation of the privative clause itself in isolation from the rest of the statute, as was the case in *S157*, or the consideration of the exact same errors or class of errors as occurred in the matter.

Their Honours did not go on to define what would constitute a jurisdictional error other than to say that it may be necessary to engage in the reconciliation process to ascertain whether or not any given decision is tainted by jurisdictional error. Thus 'the effect of [the privative clause] is to require an examination of limitations and restraints found in the Act'.³⁴

Their Honours pointed out that the proposition that the three *Hickman* provisos qualify the power of a decision maker rather than qualify the protection which the privative clause affords cannot be correct at federal level,³⁵ because Chapter III of the Australian Constitution prevents the Parliament from giving a non-judicial body the power to decide the limits of its own jurisdiction. However their Honours also gave another reason of general application: that the proposition 'assumes that the Act on its true construction provides no other jurisdictional limitation on the relevant decision making or other power'.³⁶ It is obvious that any Act providing for an administrative decision making power always provides jurisdictional limitation on the relevant decision making power. A plenipotent administrative officer under Australian legislation is unheard of and would in any case require the delegation of something other than mere legislative power.³⁷ This seems to be an argument themed upon the rule of law argument proposed by Gleeson CJ in his third principle of statutory construction, which I shall consider in the fifth chapter.

C The proposed approach

Thus the steps in considering a privative clause which can be drawn from the majority judgment are:

1. Is there indeed an error?³⁸ (of practical significance)
2. Is the impugned decision made in accordance with the three *Hickman* provisos?³⁹
3. Determine the extent of the protection the privative clause 'purports to afford'.⁴⁰ This is done in two parts:
 - 3.1. The determination of the extent of the privative clause must be done by first analysing the text of the privative clause by itself. In *S157* it would not protect an action which was not a 'decision under the Act' thus the privative clause will only protect decisions which are within the jurisdiction of the Tribunal, that is that they conform with the imperative duties⁴¹ and inviolable limitations⁴² imposed by the Act. In considering the constitutionality of the clause their Honours did not need to venture any further through these steps.
 - 3.2. The determination of the extent of the privative clause must next be done with reference to the rest of the Act. Due to the conflicting concepts within the Act, this must be done by way of 'reconciliation' between the privative clause and the other sections of the Act which provides limits to power. This could be characterised as determining the specific requirements and inviolable limitations and restraints placed upon the decision maker,⁴³ which are essential to valid action.

The question to be asked at each step is whether the administrative action, which exhibits an error, falls within the protective scope of the privative clause?

The case of *Mitchforce*

I have chosen the case of *Mitchforce* to analyse and shall consider it in light of my analysis of *S157* and *Hickman*. The decision in *Mitchforce* is reached by reasoning which conflicts with the principles I have drawn from the case of *S157* and *Hickman*. I shall analyse *Mitchforce* in light of this.⁴⁴

A Facts

A tavern was leased by the plaintiff *Mitchforce* to Sherwood Trading Pty Ltd for a ten year term from 1989. The lease was transferred to Mr and Mrs Starkey in 1990. The lease was granted in boom conditions and as such had a high rate of increase. The Starkeys, experiencing difficulties in paying the increasing rent, commenced proceedings in the Industrial Relations Commission, claiming relief under s 106 of the *Industrial Relations Act 1996* (NSW) on the basis that their contract with the landlord was unfair.

Section 106 provides:

The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry, if the Commission finds that the contract is an unfair contract.

The Commission asserted its jurisdiction to hear the matter and held that the contract fell within s 106 and had become unfair, and orders for relief were made. Importantly, the amount of increase was reduced and orders 11 and 12 of the Commission bound the landlord to prepare a new lease for a term of 10 years. The Full Bench of the Commission refused the landlord leave to appeal and the landlord subsequently commenced proceedings for prerogative relief in the Supreme Court of New South Wales, claiming that the Commission had exceeded its jurisdiction. The contentious matter was whether such relief could be granted due to the privative clause in s 179 of the Act, which provides:

- (1) Subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law, a decision or purported decision of the Commission (however constituted):
 - (a) is final, and
 - (b) may not be appealed against, reviewed, quashed or called in question by any court or tribunal (whether on an issue of fact, law, jurisdiction or otherwise).
- (2) A judgment or order that, but for this section, might be given or made in order to grant a relief or remedy (whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise) may not be given or made in relation to a decision or purported decision of the Commission, however constituted.
- (3) To avoid doubt, this section extends to any decision or purported decision of the Commission, including an award or order of the Commission.

The decision was reached against the background of the long history of cases heard by the Commission which have been reviewed by the New South Wales Supreme Court,⁴⁵ the empowering legislation of which contains a privative clause which has been evolving for over half a century.⁴⁶

B The decision

Spigelman CJ, Mason P and Handley JA each delivered separate judgments. I will not consider the judgment of Handley JA as his Honour found that the contract was one whereby work was conducted in any industry.⁴⁷ The other two justices initially considered whether the lease agreement under consideration is a contract or arrangement 'whereby a person performs work in any industry'. Having decided that the lease agreement was not of such a character,⁴⁸ their Honours went on to consider the operation of the privative clause.

1 Spigelman CJ

His Honour first made an analysis of the relevant principles as set out in *S157*. It is necessary to note at this point that I do not take issue with the main part of his Honour's analysis at p 229 where his Honour lists several rules of statutory interpretation of relevance. However, his Honour drew attention to the proposition 'one provision, including the privative provision, cannot be construed as controlling the meaning of the remainder of the Act' which his Honour has not quite explained in its entirety. Gleeson CJ, who is cited as the source of the proposition, only raised it in rebuttal of the submission made by the Commonwealth in *S157*, the submission being that a privative clause expands the jurisdiction of the decision maker within the bounds of the *Hickman* provisos. The principle of statutory interpretation which Spigelman CJ refers to above is still relevant, despite the fact that it seems his Honour did not consider it again once it had been stated.

Spigelman CJ then considered the extension of the scope of this privative clause to 'purported decisions'. He held that this extension was intended to protect decisions of the Commission where there is jurisdictional error, to a substantial degree.⁴⁹ His Honour considered that the decisions of the Commission which had been reviewed in the past for jurisdictional error had generally been made in purported pursuance of s 106 and had concerned the jurisdictional reach of the phrase 'whereby a person performs work in any industry'. The introduction of the term 'purported decision' was intended to remedy this.

Spigelman CJ placed great weight upon the apparent motivation behind this recent insertion of the word 'purported'. The amount of weight was disproportionate to the other considerations applicable to a privative clause. His Honour thus concluded that the jurisdictional fact of whether the contract was one whereby a person performs work in any industry was one to be left to the Commission alone. In support of this conclusion his Honour cited Barwick CJ in *Stevenson v Barham*⁵⁰ who said: '[t]he legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being exploited.' Barwick CJ was not making the same point at all, but was referring to the *extensive discretion* of the old Industrial Commission, which is now replaced by the Industrial Relations Commission, *within its limited jurisdiction* under s 88F(1)(d) of the *Industrial Arbitration Act 1940* (NSW). Section 88F(1)(d) relevantly provided that the Industrial Commission had jurisdiction to alter a contract where that contract 'provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work'. Barwick CJ was referring to a completely different discretion. There is no indication that the jurisdiction of the Commission should be thus unbridled.

In the recent decision of *Batterham v QSR Limited*,⁵¹ the High Court also considered the term 'purported decision' within the same privative clause. The majority held that the term was inserted for more abundant caution only and that it makes explicit what would have otherwise been the necessary reading of the provision, thus it was of no additional effect. The decision in *Batterham v QSR Limited* is exactly *contra* the approach taken by Spigelman CJ.

Spigelman CJ went on to announce his doubt that the *Hickman* principle, as coined by the majority judgment of *S157* to refer to the strict construction of privative clauses generally as a result of the reconciliation process, is really a hard and fast concept at State level.

If their Honours [in the majority judgment of *S157*] intended the reference to the *Hickman* principle to prevent a State Parliament expressing a "clear intention" that not even that principle should be applicable, then only an implication from the Commonwealth Constitution could supply the jurisprudential basis for such a conclusion.⁵²

This assertion ignores two issues of fundamental importance: first, that the rule of law is equally as applicable at State level as at federal level; second, the process of statutory reconciliation generally. His Honour affirmed that the rule of law was given strict guarantee under the Australian Constitution,⁵³ but did not consider that it was a constitutional principle applicable at State level.

His Honour adopted the approach of Gaudron and Gummow JJ in *Darling Casino Ltd v New South Wales Casino Control Authority*⁵⁴ and held that:

Section 179 should be construed so as not to protect from review a "purported decision" which fails to satisfy the threefold *Hickman* principle or, if it be a separate proposition, which fails to observe an inviolable restriction or restraint. However, jurisdictional error that cannot be so categorised is exempt from review.⁵⁵

His Honour here is alluding to the overarching theme of statutory construction which is, as his Honour stated in his analysis of *S157*, the very root of all these approaches or steps. However, his Honour came to the conclusion that the approach to privative clauses is one which can be encapsulated in the three *Hickman* provisos.⁵⁶ After holding that the *Hickman* provisos apply, his Honour then failed to explain why they are applicable. If his Honour had done so he may have concluded that if the *Hickman* provisos are to be applicable then the rationale for their application also applies to the general reconciliation process and the other steps I have proposed to be followed thereunder.

His Honour then went on to state that the three *Hickman* provisos were satisfied and that in turn the jurisdictional fact, that is 'whereby a person performs work in any industry', was not intended to be an inviolable restriction.⁵⁷ These conclusions could be categorised as simply the result of the application of less than the required principles at this stage of my analysis. Indeed I do not agree with the reasoning of his Honour even when restricted to just that on the three *Hickman* provisos.

2 Mason P

Mason P agreed substantially with the decision of Spigelman CJ. However his Honour does seem to have adopted entirely the expanded jurisdiction theory of privative clauses.⁵⁸ He observes that 'a privative clause like s 179 is treated in the final analysis as expanding the validity of the acts of the repository of the power exercised or purportedly exercised.'⁵⁹ Mason P bases the adoption of this theory primarily on a passage by Brennan J, who wrote the minority judgment, in the case of *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd*⁶⁰ and stated that 'the validity of acts done by the repository is expanded'.⁶¹ The passage which Mason P quotes is incomplete and gives a misleading impression. The full passage is: '[i]n 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.'⁶² This conclusion relates to the privative clause contained in s 175 of the *Income Tax Assessment Act 1936* (Cth) which states: 'The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.'

An interesting point in his Honour's judgment is the invitation he extends to the Full Bench of the Industrial Relations Commission to revisit the matter, after having refused the previous appeal, in light of the reasons of the Court of Appeal.⁶³ Spigelman CJ also encouraged the Full Bench of the Commission to consider the position in the light of his reasoning.⁶⁴ These urgings were effective as the Full Bench of the Commission subsequently did reconsider its earlier refusal of the Starkeys' appeal and then allowed it in almost the same words as those of Spigelman CJ.⁶⁵ The Industrial Relations Commission noted that, although the privative clause meant it was not compelled to remediate any deficiency of jurisdiction, in the interests of comity and indeed the fact that '[c]onsistency and uniformity in decision making is a fundamental ingredient of the maintenance of the rule of law',⁶⁶ it would do so. This reversal of the original decision constitutes an effective piece of judicial review, despite the privative clause.⁶⁷

C Principal flaw

Each of their Honours held that the minimum effect of a privative clause at State level is the requirement of satisfaction of the three *Hickman* provisos. Their Honours based this reasoning variously upon the arguments submitted by both counsel for the appellant and counsel for the respondent advocating for nothing less,⁶⁸ upon the expanded jurisdiction theory of privative clauses⁶⁹ and upon the direct approach to privative clauses generally.⁷⁰

However, their Honours have avoided stating the rationale behind applying the *Hickman* provisos at all. Why should the approach to privative clauses stop here and not go further? Indeed why should the approach go this far at all? The words of the statute are plain in cutting off all judicial review. The most common reason for applying the *Hickman* provisos is that they are the result of the reconciliation which must be undertaken between the conflicting intent of the limitations on jurisdiction and the privative clause itself. However, as Spigelman CJ pointed out, the conflict or 'inconsistency requiring reconciliation is simply more acute where both provisions have to be regarded as manifesting a similarly forceful expression of parliamentary intention.'⁷¹ The logical extension of this point exposes the flaw in this approach: if Parliament were to draft an Act which provides for extremely vague and broad powers and a sufficiently strict privative clause,⁷² the conflict falls away and so does the rationale for the application of the three *Hickman* provisos.

In this instance the only remaining reason for applying the *Hickman* provisos at all is, as Handley JA pointed out, that it would simply be in the Parliament's interests to have the protection of the privative clause remain subject to the three *Hickman* provisos, due to the huge jurisdictional possibilities afforded to decision makers without such a minimum safeguard.⁷³ This is obviously not convincing in the face of such legislative drafting.

Thus the extension of this approach is that there will be instances where a privative clause has no minimum effect at State level. I argue in the next chapter that this cannot be a viable conclusion.

Fundamental underpinnings applicable at State level

In England, and in the countries which ... derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown.

Dicey⁷⁴

The correct approach to be taken toward privative clauses can be drawn from *S157* and *Hickman*. I have listed the steps which have developed out of this approach in the previous chapters. Similar approaches can be found in many decisions regarding privative clauses in Australia.⁷⁵ However, the legitimacy of the approach has not been overly analysed. There is an assumption that the courts must be able to enter into consideration of decisions made

despite a privative clause. The epitome of this approach is the conceptualisation of the *Hickman* provisos as the starting point (and possible finish point)⁷⁶ for the review of actions supposedly encompassed by a privative clause. Why should not the Parliament be able to legislate to exclude all judicial review of actions with a privative clause? At Federal level the Australian Constitution provides an entrenched minimum provision of judicial review, at State level however, the same guarantee does not apply.⁷⁷ The question at State level is thus: 'What power does a court have to even enter into consideration of these administrative actions?'⁷⁸

I begin by reiterating the fact that the addition of a privative clause to a statute is not an act whereby the jurisdiction of that decision maker is expanded, in other words the scope of valid actions to be taken by that decision maker is not increased; it is merely one whereby supervisory jurisdiction is sought to be reduced. This is mainly due to the wording of privative clauses, for example the classic Australian formulation:

Any decision is final and conclusive: and must not be challenged, appealed against, reviewed, quashed or called in question in any court; and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.⁷⁹

As I have shown above, the clause removes the possibility of review; it does not specify that all actions are to be rendered valid by the clause.

Thus the actions of a tribunal made in purported pursuance of a statutory power will still be invalid despite the privative clause. However, the ability of the courts to grant prerogative relief or declare that action invalid is reduced. It is a situation akin to that of diplomatic immunity at international law.⁸⁰ This concept removes any foreign diplomatic agent from judicial or administrative action by the host country,⁸¹ while requiring them to respect the laws of the host country.⁸² However, should that diplomatic agent commit an act which constitutes a crime, it is still a criminal act. It is simply beyond the jurisdiction of the courts to hear it or the police to act upon it. The only possible recourse to be had is held by the receiving country's government: that person may be declared *persona non grata*, following which the sending country must either recall the person concerned or terminate their function with the mission.⁸³

The proposition is thus that when a court's supervisory jurisdiction is limited by statute, the action for which review is restricted remains invalid, despite the fact that it is not declared to be so by a court.

However, unlike the analogy to the concept of diplomatic immunity, the supervisory jurisdictions of courts are inherent by reference to the principles of the rule of law and the unified system of common law, for both legal and practical reasons.⁸⁴

A The rule of law

The rule of law under the Westminster system of government mandates that administrative actions be subject to the scrutiny of the courts. To demonstrate this I draw on one of the formalistic⁸⁵ approaches to the rule of law.

The fundamental necessity for the rule of law as proposed by Dicey is the requirement that all acts be done in accordance with the law, that is 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power'.⁸⁶ This is the principle of legality and is a basic requirement of all formalistic conceptions of the rule of law. As assurance of this fundamental, all acts must be amenable to review by a Court of law. If this review process is cut off, then there can be no more rule of law. Any action taken by an

administrative decision maker must be subject to review to prevent excess or abuse of legal powers.

This requirement also prevents the grant of unlimited administrative power. As Dicey says of the supremacy of the regular law, it 'excludes the existence of arbitrariness, of prerogative, or *even of wide discretionary authority*'.⁸⁷ Dicey announces that under the English constitutional system there is no body, other than Parliament, which can invalidate an Act of Parliament,⁸⁸ the fundamental necessity for the rule of law is to be taken as of paramount concern as it predicates parliamentary supremacy generally. The requirement that the executive, even when armed with the widest authority under an Act of Parliament, be amenable to the supervision of the judiciary and subject to the limitations of the Act, as interpreted by the courts, can be seen as an absolute requirement of the rule of law.⁸⁹

As Dicey says, '[t]he constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.'⁹⁰ The destruction of the constitutional system can be equated to a destruction of the very legitimacy of the supremacy to which parliament has claim.

The separation of powers under the Westminster system, as inherited from the English legal system, requires three arms of government. It must be noted Parliamentary supremacy, at the pinnacle, must not detract from the separate roles of the legislature and the Executive. This is the ideal won almost 400 years ago by the efforts of Oliver Cromwell with the swing of the axe over Charles I's head.

The other arm, roughly, is a judiciary to try criminals, provide legal remedies, promulgate case law and interpret the Acts of Parliament. The judiciary is described as subservient to Parliamentary supremacy.⁹¹ This argument is the strongest proposed by those who claim a privative clause can completely restrict the supervisory jurisdiction of the courts.⁹² However, the very supremacy which Parliament holds is obviously contingent upon the existence of the other arm supporting and supported by the rule of law. For instance if Parliament were to legislate to destroy the judiciary or to grant unlimited power to the executive, it would be a self-invalidating act. The very authority by which the Parliament can make Acts would be eroded. The rule of law cannot be achieved through the adoption of dictatorial power, leading to the artificial result that all acts may be said to be done according to law.

Likewise, a deep inroad into the jurisdiction of the courts, such as that effected by a privative clause, is a significant act which cannot but undermine the rule of law. The jurisdiction I speak of is not just that to supervise administrative action, a role which has been enjoyed for centuries by the courts, but also the more fundamental jurisdiction of the courts to interpret the statutes of the Parliament. If a privative clause is to be read as restricting the jurisdiction of the courts to enter into consideration of the jurisdiction of an administrative body, as contained in statute, then this statute is then effectively beyond the interpretation of the court generally.

Such an act has been put in such strong terms as: '[t]o exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament, speaking constitutionally.'⁹³ Thus the courts' supervisory jurisdiction can never be completely extinguished if the rule of law is to be maintained to any degree and without fundamental change to our system of government. To this end 'judges have a duty to maintain the common law constitution'⁹⁴ and the fact that a privative clause claims by its words to prohibit review of all decisions etc., is not to be read in a vacuum. There is the competing factor of the necessary limitations placed upon the jurisdiction of the tribunal itself to be considered.

B Practical consideration

The pursuit of just decision making under the common law system cannot be allowed to end with inferior tribunals, if it is to maintain its consistency. If inferior tribunals have the power to define their own power and supervise their own decision-making, it raises serious questions as to comity, *stare decisis*, quality of decision-making and commonality generally within the common law.⁹⁵ If the tribunal may define its own jurisdiction then two branches of case law emerge, from the 'superior' courts and from the 'inferior court' immunised from review. Which shall prevail and which is to be the correct forum?

The very same problem was one of the factors that led to the unification of the English court system from 1858 to 1873.⁹⁶ No longer was there the problem of deciding jurisdiction, correct venue, forms, etc between an array of courts such as the Assizes, Ecclesiastes, Admiralty, Probate and Divorce.

Another practical concern is that any intention of Parliament to prevent review of a tribunal is to be balanced by the equal intent, if unspoken, to ensure that there are means by which to prevent this tribunal from becoming a behemoth which swallows all jurisdictions and finds itself competent to decide on criminal and constitutional matters.⁹⁷ Any intention to be manifested against this would have to be more than mere words in a privative clause. The instrument would have to emplace an entire new (yet not novel) scheme by which the tribunal may be supervised. If this is not put in place then the intention is to put the supervision of the tribunal's jurisdiction in the hands of the courts which have always exercised such jurisdiction. The privative clause is something of a stop gap which does not take into account the necessities for supervision of courts. The easy example of this need is the very strange review undertaken in *Mitchforce*, whereby it was decided by the New South Wales Court of Appeal that the decision of the tribunal was made without jurisdiction, but that the privative clause protected it. The Industrial Relations Commission then reviewed the decision to make it consonant with the judgment of the New South Wales Court of Appeal. This, in my opinion, is a rather circuitous form of supervision, potentially an unspoken form of prerogative writ. I would submit that it is merely the judicial system adapting to the rigors of a privative clause and the havoc it can play with the integrated system of common law and judicial supervision.

C The current High Court approach

Another chain of reasoning which leads to the conclusion that a privative clause cannot protect all decisions made in purported pursuance of jurisdiction granted under statutory instrument, is one which has its roots in a judgment of Lord Coke delivered while on the Kings Bench almost 400 years ago. In *The Case of The Marshalsea*⁹⁸ his Lordship found that a decision made in want of jurisdiction of the cause made the whole proceeding *coram non judice* and thus void.⁹⁹ Such a decision is treated by his Lordship as never having existed.

This was followed by Dixon J in the case of *Parisienne Basket Shoes Pty Ltd v Whyte*.¹⁰⁰ There his Honour held that a decision made in want of jurisdiction was as if the proceedings were as nothing. That is, they are void, not voidable. Thus any statute restricting the jurisdiction of a supervisory court to review decisions of administrative decision makers cannot restrict review of non-existent decisions.

The incorporation of words to the effect that even purported decisions are to be protected by a privative clause is not to be read as including within the protective purview of the privative clause decisions which are void for want of jurisdiction. This has recently been decided by the High Court in *Batterham v QSR Limited* where it was held that the term 'purported' was inserted into the *Industrial Relations Act 1996* (NSW) *ex abundanti cautela* only.¹⁰¹ The

majority in this case relied upon the decision of *O'Toole v Charles David Pty Ltd*¹⁰² where it was held by Dean, Gaudron and McHugh JJ that in the privative clause in s 60 of the *Conciliation and Arbitration Act 1904* (Cth) the term 'award' on its true construction referred at least to some purported awards, otherwise the privative clause would not have had any work to do. It was thus assumed by their Honours that the reference in a privative clause to 'decisions', 'awards' or any other action which is authorised by the relevant instrument will always include some 'purported decisions' and 'purported awards'. The use of the term 'purported' in the *Industrial Relations Act 1996* (NSW) therefore made explicit what would have otherwise been the necessary reading of the provision.¹⁰³ Correct decisions made according to law, actual 'decisions', do not need the protection of a privative clause.

D The result

For all of these reasons the process of 'reconciliation' between two provisions must still be undertaken. The granting of a limited jurisdiction which is detailed within a statutory instrument cannot be rendered unenforceable by a privative clause. The simplest enunciation of this is in the judgment of Dixon J who stated that there are three provisos which must be satisfied before a privative clause can do any work. This is taking the direct or blunt approach to privative clauses and there have been cases throughout the centuries when courts have done just this. However, the more complex the drafting employed in privative clauses, the more the need for statutory interpretation to take precedence grows. This blunt approach to privative clauses is seen as the comprehensive approach toward reconciliation whereas it is merely the product of the over-arching approach of statutory interpretation and the need to reconcile the competing legislative provisions.¹⁰⁴ The *Hickman* provisos should be considered as the beginning in the enquiry into the protection of a privative clause rather than as the closing statement. It is the simplest preliminary test to apply before having to undertake the sometimes arduous task of interpreting the entire Act with specific regard to jurisdictional limitations manifested against the tribunal and the supervising judicial body. If one accepts the rationale for the application of the three *Hickman* provisos, then the same rationale applies to the more extensive process of reconciliation.

The further reconciliation can be packaged into what has been referred to as the fourth proviso: that any imperative duties or inviolable limitations or restraints to power must be complied with. This is merely another way of phrasing the basic outcome of the application of statutory interpretation, but one which does not necessarily obviate a later need for deeper analysis of limitations on the tribunal's power. In other words, the satisfaction of the fourth proviso does not necessarily constitute a closing statement in the enquiry into the protection of a privative clause, any more than that of the three *Hickman* provisos does. The fourth proviso too is a simplified approach to the reconciliation process, which can and should be taken further if necessary. However, one should not embark upon a detailed analysis of the statutory instrument if it seems clear upon its face that a minor error which is being claimed is not enough to outweigh the privative clause.

Each appeal of a decision made in purported pursuance of an Act containing a privative clause will be different and no one judicial decision can comprehensively enumerate those acts which will lead to invalidity of a variety which is not protected by the privative clause. Once an appeal has been successful, then the path is already mapped for judicial review of any decision which exhibits the same error. In a novel case, however, the same steps in reasoning must be taken to determine whether the error complained of is such as to be within the jurisdiction of the supervisory judicial body, with regard to the privative clause.¹⁰⁵

Conclusion

It may truly now be said that we have a developed system of administrative law.

Lord Denning MR¹⁰⁶

The scope of a privative clause is clearly not something which can be determined solely by reference to the words of the clause itself. The competing factors which I have outlined above necessitate a broader consideration of the general scheme of judicial review when dealing with a privative clause. There is currently uncertainty in this area of administrative law, the best example of which is the divergence of opinion on the effect of privative clauses within Australia and indeed between most Commonwealth countries.¹⁰⁷

My above reasoning leads to the conclusion that the soundest approach is that which I have drawn from *Hickman* and *S157*. This is not just due to the well accepted nature of the *Hickman* provisos nor to the weight of authority vested in the majority High Court decision of *S157*; it is also due to the fundamental underpinnings of our administrative law system and system of government generally. These fundamental underpinnings support the universal application of one approach to privative clauses at both federal and State levels in Australia. Federal constitutional principles only arise at a later stage in the consideration of a privative clause. This approach obviously guarantees a certain minimum level of judicial review of administrative actions, as required under the rule of law and our Australian system of government.

Endnotes

- 1 *Ridge v Baldwin* [1963] 2 All ER 66, 76 (Lord Reid).
- 2 See generally: *Act for the Better Local Management of the Metropolis 1856*, 18 & 19 Vict c. 120, section 230 removed the remedy of *certiorari*; *Gold Fields Act 1865* (Vic), section 127 removed the remedy of *certiorari* from the Supreme Court of the Colony of Victoria.
- 3 It will become apparent during the course of this essay that the word "decision" is one of controversy when discussing privative clauses. Thus I shall use the word "action" wherever the word "decision" can be replaced in order to avoid confusion.
- 4 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ).
- 5 (2003) 211 CLR 476. I will refer to this case simply as "*S157*" throughout my essay.
- 6 (1945) 70 CLR 598. I will refer to this case simply as "*Hickman*" throughout my essay.
- 7 (2003) 57 NSWLR 212. I will refer to this case simply as "*Mitchforce*" throughout my essay.
- 8 Robin Creyke, John McMillan, *Control of Government Action* (2005) LexisNexis Butterworths, Australia, 774-7, Mark Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (3rd Ed, 2004) Lawbook Co, Australia, 831.
- 9 *Hickman*, 615.
- 10 *Hickman*, 616.
- 11 *Hickman*, 616. NB, his Honour did not delve into the question of why it is an impossibility; however, I address this point in my chapter on fundamental underpinnings.
- 12 *Hickman*, 616.
- 13 *Hickman*, 617.
- 14 (1924) 34 CLR 482.
- 15 *Hickman*, 617.
- 16 (1904) 1 CLR 181, *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482, 523.
- 17 *Clancy v Butchers Shop Employés Union* (1904) 1 CLR 18, 196-7.
- 18 (1874) 5 LRPC 417, 442. See also *The Queen v The Board of Works for the District of St Olave's Southwark* (1857) 8 E.& B. 529; (1857) 120 ER 198, *The Queen v Bolton* (1841) 1 Adol. & El.N.S. 66; (1841) 113 ER 1054.
- 19 *S157*, 483 referred to *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 All ER 796.
- 20 *S157*, 488-9 referred to *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248, *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399-400.

- 21 S157, 491.
- 22 S157, 492-3.
- 23 S157, 482.
- 24 S157, 501.
- 25 S157, 502.
- 26 S157, 502.
- 27 The reference to the second reading speech is in my opinion unnecessary as the *Hickman* provisos act as a first point of reference and not as solid rules in themselves, as was decided by the majority in this case. Thus this particular privative clause and privative clauses generally could not repeal statutory limitations or restraints upon the exercise of power or the making of a decision. Parliamentary intention may be necessary in the interpretation of Statutes generally, but in this instance was not necessary and clouds the issue at hand.
- 28 *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J).
- 29 S157, 504, paraphrased *Hickman*, 616.
- 30 S157, 505.
- 31 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-5.
- 32 S157, 503, quoting *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248.
- 33 S157, 503, quoting *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419.
- 34 S157, 506-7.
- 35 S157, 512.
- 36 *Ibid.*
- 37 S157, 513.
- 38 S157, 507.
- 39 S157, 502.
- 40 As it was called in *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J).
- 41 S157, 506, referred to, *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J).
- 42 S157, 506, referred to, *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Dixon J).
- 43 S157, 503 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), referred to, *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J), *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415.
- 44 There are many examples of State Supreme Courts applying privative clauses in a most literal manner and without proper regard for S157 or *Hickman*. See for example *Carey v President of the Industrial Court Queensland* [2004] 2 Qd R 359, *Re Harley White; Ex parte Hutt* [2004] WASC 46 (Unreported, Le Miere J, 22 March 2004), *Re Harley White; Ex parte Hutt* [2005] WASC 32 (Unreported, Templeman, Miller and McKechnie JJ, 4 March 2005), *Sealanes (1985) Pty Ltd v The Western Australian Industrial Relations Commission* (2005) 144 IR 52, *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100, *Craig v Workers Compensation Tribunal* (2004) 90 SASR 490, *Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd (as agent for WorkCover Corporation)* (2004) 88 SASR 311, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288.
- 45 Louise Clegg, 'Another Instalment in the Showdown between the Court of Appeal and the Industrial Relations Commission' (2004) 2 *Bar News: Journal of the NSW Bar Association* 39.
- 46 *Industrial Arbitration Act 1940* (NSW), *Industrial Relations Act 1991* (NSW), *Industrial Relations Act 1996* (NSW).
- 47 *Mitchforce*, 250. His Honour came to that conclusion by reasoning that, when the rent in arrears became such that all of the earnings from the hotel went to paying the arrears, then the Starkeys were essentially working for their landlord. Neither of the other two Justices came to the same conclusion.
- 48 *Mitchforce*, 216-227 (Spigelman CJ), 239-240 (Mason P).
- 49 *Mitchforce*, 228.
- 50 (1977) 136 CLR 190, 192.
- 51 (2006) 80 ALJR 995; (2006) 227 ALR 212.
- 52 *Mitchforce*, 230.
- 53 *Mitchforce*, 237, his Honour dealt with the question of the rule of law when later discussing whether the removal of jurisdiction from a Supreme Court could have federal constitutional implications in that it would constrict the inherent appellate jurisdiction of the High Court under s 73(ii) of the *Australian Constitution*. While this highly novel argument could prove to be of significance in addressing privative clauses at State level, it does not fall within the scope of this essay.
- 54 (1997) 191 CLR 602, 634.
- 55 *Mitchforce*, 233.
- 56 In other words the direct or blunt approach to privative clauses was adopted. I shall explain the description of this approach as 'blunt' in my next chapter.
- 57 *Mitchforce*, 233.
- 58 The expanded jurisdiction theory of privative clauses was avoided by Spigelman CJ, who neither accepted it nor rejected it.
- 59 *Mitchforce*, 241.
- 60 (1995) 183 CLR 168.

- 61 Ibid. 194.
- 62 Ibid.
- 63 *Mitchforce*, 242.
- 64 *Mitchforce*, 239.
- 65 *Mitchforce Pty Ltd v Starkey (No 2)* (2003) 130 IR 378, [24] to [25], [145] (Wright and Walton JJ).
- 66 Ibid [17].
- 67 For this reason the decision was not appealed to the High Court. However, there have been three notable cases which have proceeded to the High Court from decisions of the Industrial Commission via the New South Wales Court of Appeal which have been decided in 2006: *Fish v Solution 6 Holdings Limited* (2006) 80 ALJR 959; (2006) 227 ALR 190, *Batterham v QSR Limited* (2006) 80 ALJR 995; (2006) 227 ALR 212, *Old UGC Inc v Industrial Relations Commission of New South Wales in Court Session* (2006) 80 ALJR 1019; (2006) 227 ALR 241.
- 68 *Mitchforce*, 252 (Handley JA).
- 69 *Mitchforce*, 240 (Mason P).
- 70 *Mitchforce*, 232 (Spigelman CJ).
- 71 *Mitchforce*, 232-233.
- 72 As is progressively happening with the *Industrial Relations Act 1996* (NSW) and the *Migration Act 1958* (Cth).
- 73 *Mitchforce*, 252.
- 74 A V Dicey, *Law of the Constitution* (1885) England, 180, quoted in Stephen Gageler 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303, 304.
- 75 As indeed can there be found wildly different approaches.
- 76 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ), *Mitchforce* generally.
- 77 S157, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne). The State Constitutions, where they grant or continue the jurisdiction of the Supreme Courts from that inherited from the English courts, are not as immovable as the *Australian Constitution*. Indeed in some States the jurisdiction of the Supreme Court is granted by normal legislation, such as by the Supreme Court Acts of New South Wales, South Australia and Western Australia, in Queensland, jurisdiction to hear cases of judicial review is contained in the *Judicial Review Act 1991* (Qld) much like in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
- 78 As argued in Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303, the underpinnings of judicial review of administrative action is difficult to define. See also, Bradley Selway QC 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 218, where he argues that the foundation is to be found solely within the *Australian Constitution*.
- 79 Eg. *Industrial Relations Act 1996* (NSW), the slightly more brief *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth), the slightly more verbose *Migration Act 1958* (Cth), and *Royal Commissions Act 1917* (SA). However it is also the case in other formulations such as the *Income Tax Assessment Act 1936* (Cth).
- 80 See generally, DJ Harris, *Cases and Materials on International Law* (6th Ed 2004) Thomson Sweet & Maxwell, London, 361-71, Donald Anton, Penelope Mathew and Wayne Morgan, *International Law Cases and Materials* (2005) Oxford University Press, Hong Kong, 78-81.
- 81 *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), arts 29, 30,
- 82 Ibid art 41.
- 83 Ibid art 9.
- 84 An alternative argument, though essentially finding its legitimacy from the same source, is the rights-based approach to administrative law as is prevalent in the United Kingdom. See Denise Meyersen, 'State and Federal Privative Clauses: Not So Different After All', (2005) 16 *Public Law Review* 39.
- 85 See generally, Paul Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.
- 86 A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th Ed, 1959) The Pitman Press, Bath, 202
- 87 Ibid. (emphasis added). Indeed in the language of Coke "[a] good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law, and not to the incertain and crooked cord of discretion" 4 Inst. 41. This discussion however does not fall within the limits of this essay.
- 88 A V Dicey, above n 86, 92.
- 89 See generally, A. V. Dicey, above n 86, Chapter XIII. Gleeson CJ made two references to the rule of law in his Honour's judgment in S157, 483, 492 and the integral part of the rule of law which judicial review forms.
- 90 A V Dicey, above n 86, 202.
- 91 See generally, A V Dicey, above n 86.
- 92 Ross Anderson, 'Parliament v. Court: The Effect of Legislative Attempts to Restrict the Control of Supreme Courts over Administrative Tribunals though the Prerogative Writs' (1950) 1 *University of Queensland Law Journal* 39, 50.
- 93 William Wade, *Constitutional Fundamentals* (1980), Stevens & Sons, London, 66.

- 94 David Dyzenhaus, 'An unfortunate Outburst of Anglo-Saxon Parochialism' (2005) 68 *The Modern Law Review* 673, 676. See also David Dyzenhaus, *The Constitution of Law* (2006) Cambridge University Press, Cambridge.
- 95 As referred to in *Mitchforce Pty Ltd v Starkey* (No 2) (2003) 130 IR 378, [17]. Another argument is that the High Court insists on a uniform body of common law, Enid Campbell, Matthew Groves, 'Privative Clauses and the Australian Constitution', (2004) 4 *Oxford University Commonwealth Law Journal* 59, 74.
- 96 *Supreme Court of Judicature Act 1873*, 35 & 36 Vict, c. 77, as amended by the *Supreme Court of Judicature (Amendment) Act 1875*, 38 & 39 Vict, c. 77.
- 97 As mooted by Griffith CJ in *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 131.
- 98 (1612) 10 Co. Rep. 68b; (1612) 77 ER 1027.
- 99 *The Case of The Marshalsea* (1612) 10 Co. Rep. 68b, 76a-77b; (1612) 77 ER 1027, 1038-1041.
- 100 (1938) 59 CLR 369, 389.
- 101 *Batterham v QSR Limited* (2006) 80 ALJR 995; (2006) 227 ALR 212, [26] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).
- 102 (1991) 171 CLR, 232.
- 103 It is interesting to note that the privative clause in the *Migration Act 1958* (Cth) has been altered to include the same term 'purported decision' by the *Migration Litigation Reform Act 2005* (Cth) which was intended to make the privative clause effective, see generally, Caron Beaton-Wells: 'Judicial Review of Migration Decisions: Life After S157' (2005) 33 *Federal Law Review* 141.
- 104 Instances where it has been considered to be the only approach are *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ), and *Mitchforce*, 233, 252.
- 105 It has been argued that a privative clause addresses the question of finality or validity of the decision from the wrong end of the problem. If the instrument granting jurisdiction to the tribunal were phrased, at all stages, to stipulate that breach of specified provisions shall not result in invalidity, (as suggested in Mark Aronson, 'Nullity' 40 *AIAL Forum* 19, 25-27; see also John Basten QC, 'Revival of procedural fairness for asylum seekers' (2003) 28 *Alternative Law Journal* 114) then there would arguably be no grounds for review with regard to the principles of the Judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. However, there is the persuasive argument put forward in William Wade, *Constitutional Fundamentals* (2nd Ed 1989) Stevens & Sons, London, that the intent is the same and that the courts should treat such abuse of legislative power as attempts to deprive them of their proper function in the same way as they deal with a privative clause. This argument is developed further in William Wade, Christopher Forsyth, *Administrative Law* (9th Ed 2004) Oxford University Press, England. Another possibility, as considered by the majority in S157, is whereby a decision maker is given completely unrestrained jurisdiction. As I have pointed out, the majority did not believe that this grant of unlimited power was possible, see also, David Dyzenhaus 'Intimations of legality amid the clash of arms' 2 *International Journal of Constitutional Law* 244. This discussion, while related to the subject matter of this essay, does not fall within its compass.
- 106 *Breen v Amalgamated Engineering Union* [1971] 1 All ER 1148, 1153 (Lord Denning MR). The quotes at the start of my Introduction and Conclusion were initially quoted in editions of Garner's *Administrative Law*.
- 107 See, William Wade, Christopher Forsyth, *Administrative Law* (9th Ed 2004) Oxford University Press, England, 706-714.

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