PRIVATIVE CLAUSES AND THE COURTS

WHY AND HOW AUSTRALIAN COURTS HAVE RESISTED ATTEMPTS TO REMOVE THE CITIZEN'S RIGHT TO JUDICIAL REVIEW OF UNLAWFUL EXECUTIVE ACTION[1]

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Populist commentators often, and senior political figures sometimes, claim that judges have no business setting aside decisions made by parliaments and governments.

Because that argument is so often made, and so rarely publicly responded to, it seems worthwhile to go back to the genesis of Australian legal theory to explain the case for judicial review.

I hope to be able to demonstrate, through a brief examination of our unique constitutional legacy, that Australian public lawyers need not suffer from intellectual vertigo if they are asked to explain why appointed judges, and not our democratically elected and accountable federal parliament and government, have the final word over whether laws and administrative decisions are valid.

I will then turn to examine how the High Court of Australia has dealt with federal laws which, on their face, direct judges to not question the lawfulness of particular conduct of the executive and administrative tribunals. Such laws, designed to prevent judicial review, are commonly referred to as 'privative clauses'.

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[1] Queensland University of Technology Public Lecture Series, Old Parliament House, Brisbane, 22 March 2006.

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The discussion will finally turn to privative clauses enacted by state parliaments— and to the residual question of whether the constitutional position of state legislatures and state courts is so different as to justify a different result.

However, first it is appropriate to confront the threshold question—how and why has it come to be accepted that the High Court of Australia has the final say upon the validity of laws made by the Australian parliament?

I JUDICIAL REVIEW AND FEDERAL SYSTEMS

In a federation founded on a written constitution that divides power between a central and several state governments there must at least be some operating rule to resolve disputes when one of the partners in the federation asserts that another has exceeded its lawful bounds.

Of course it would be possible for a nation to be established around the simple operating rule that the laws of the central (or state) government on any subject must prevail—that would reduce the judicial task to one applying a settled hierarchy of laws, as we do when state laws extend to local government, but that would not be a federation as we understand the term—and certainly not the type of federation that was established in 1901 with the creation of the Commonwealth of Australia.

The Australian constitution was intended to divide power between the central and state governments—and to give the central government law making power only over certain specifically enumerated subjects. Federal laws could not be validly enacted unless connected to a constitutional 'head of power'. The drafters of the Australian constitution therefore had to decide what process to establish to determine the outcome if a State, the Commonwealth, or a citizen, contended that a law made by one of the other federation partners went beyond the power granted by the written Constitution.

Those responsible for the drafting of the Australian constitution drew from the jurisprudence of United States of America for their answer to that question.

The idea that judicial review is necessarily implicit in a federation —and brings with it not only the power, but also the duty of the supreme court of a nation to declare infringing laws or conduct to be invalid— was well known to the framers of the Australian constitution. That proposition had been famously articulated by Marshall CJ in the landmark United States' Supreme Court decision *Marbury v Madison*.[2]

Ironically that case, of such profound importance to our two nations' constitutional law, had its origin in an unedifying, even squalid, political controversy.

President Adams had nominated his Secretary of State, John Marshall, to be Chief Justice of the Supreme Court following the death of Ellsworth CJ in December 1800. Marshall's appointment was ratified by Congress but, notwithstanding his nomination, Marshall continued to serve in Adams' cabinet until he became Chief Justice of the United States on the eve of President Jefferson's, 4 March 1801, inauguration.

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2 (1803) 5 US (1 Cranch) 137.

In what we would now criticise as a blatant attempt to stack the federal judiciary with partisan appointments, during the last days of the Adams presidency Marshall was party to the rushed appointment of dozens of lesser federal judicial officers including 42 new federal justices of the peace. The legal requirements for all of these appointments were completed before President Adams left office—but in the rush the commissions of four justices of the peace, although issued and sealed, were not delivered to the appointees before the incoming administration took office.

After the new President was sworn in, his incoming Secretary of State, Madison, refused to give Marbury, one of the four justices of the peace, the document that evidenced his judicial appointment.

Without his commission Marbury could not take up his office.

Marbury then applied to the Supreme Court, now headed by Marshall CJ, for orders to compel Jefferson's Secretary of State to deliver him his instrument of appointment. The claim was opposed. Madison argued that the Supreme Court had no power to adjudicate on, or make orders in respect of, matters touching upon compliance with the law by the legislative or executive arms of government.

Marshall CJ's famous retort to those contentions remains the most cited judgment of the US Supreme Court. He stated:

> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it were law?
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> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
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> [T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that the *courts,* as well as other departments, are bound by that constitution.[3]

It is easy to forget, given how embedded this notion in US jurisprudence has become, that Marshall CJ's conclusion, that it was the Supreme Court's 'province and duty' to be the guardian of the constitution, was not, then, an inevitable one. It would have been possible, and some might still assert, more consistent with the logic of popular sovereignty, for the United States Supreme Court to have reasoned that, whilst the written constitution was, and would always remain, the nation's supreme law, it was for the other, democratically elected arms of government to determine for themselves the manner in which the constitution was to be applied, and that it was, accordingly, in that regard, necessary for the court to defer to their judgments.[4]

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3 Ibid 180.

4 The legitimacy of the authority of US federal courts to review acts of Congress remains the subject of public and some academic discussion—although it has never been seriously challenged. See for a recent example the debate between Professors M Tushnet and E Chemerinsky, *Should we get rid of Judicial Review?* (2005) Legal Affairs, Debate Club <http://www.legalaffairs.org> at 30 May 2005.

However, had that alternative judicial approach been adopted it would have avoided one problem only to open up yet further conundrums; for example, if the constitution itself was not the yardstick against which the Supreme Court was to test questions of the validity of a law, what other set of principles could that court turn to in order to solve the inherent problem of inconsistent federal and state laws; and, how might the Supreme Court square its own obligation of fidelity to the written constitution that its judges were sworn to uphold— a constitution which not only set parameters for the exercise of legislative powers, but which also conferred specific and fundamental personal rights on US citizens—with such a doctrine of deference to the legislature?

It should therefore come as no surprise that the rigour of Marshall CJ's logic not only prevailed but has continued to be a wellspring of United States jurisprudence— providing, as it did, a transparent and consistent simple[5] operating principle which permitted the court to resolve disputes whenever one of the partners in the federation (or a citizen, who claimed that his or her individual constitutional rights had been infringed) asserted that the other had exceeded its lawful bounds.

This assertion of this power for almost a century by the United States Supreme Court was well known to those who debated the possible federation of the then Australian colonies. The English system of an omnipotent cental parliament could provide them with no model to restrain the sort of central government of limited powers that they desired to create. The existing jurisprudence of the United States was more relevant. It was natural that the Australian constitution would draw on the existing model of the United States, at least as a starting point, in its design of the federal judicial elements.

Those responsible for drafting the terms of Australia's federation took as a given the logic of *Marbury v Madison.* The debate in the several pre-federation constitutional conventions proceeded on the basis that any Australian supreme federal judicature to be formed would have (with the limited, and now exhausted, capacity to appeal to the Judicial Committee of the Privy Council) a like responsibility to declare void any legislation inconsistent with the constitution.[6]

As in the United States, the drafters did not think it necessary to write in an express provision in the Australian Constitution to authorise the High Court to strike down invalid legislation. However, as Sir Owen Dixon in *Jesting Pilate*[7] observed, the words of s 76(i) of the Constitution 'impliedly acknowledge the function of the courts [to engage in judicial review]'.

Since its establishment it has never been doubted that the High Court was invested with the judicial power of the Commonwealth in order to hold the ring— and to be the final arbiter of whether or not a law enacted by a federal or state parliament was within the authority granted by the constitution.

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5 Simple at least in terms of explaining the rule—when it comes to applying the rule the process is often far from simple.

6 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1900) 725 and 791-6.

7 Sir O Dixon, *Jesting Pilate: and other papers and addresses* (LBC, 1965) 175.

Thus when the High Court famously struck down Commonwealth laws that had banned the communist party on the ground that those laws exceeded the defence power granted to the federal parliament, Fullager J, with both legal and historical accuracy, noted that 'in our system the principle of *Marbury v Madison* is accepted as axiomatic'.[8]

II THE RULE OF LAW

Although this well documented history of constitutional borrowing from the United States is sufficient to explain, and justify, the High Court's assertion of its authority to exercise judicial review, it falls well short of being enough to explain other nuances of that court's approach to its task.

The scope and character of judicial review in Australia also has been shaped by other underlying assumptions of the constitution. Primary amongst those are assumptions about the 'rule of law'; the heritage of which derive, not from the United States, but from the common law of England.

The common law arrived in Australia with the first fleet[9]—and was confirmed in its application to the colonies by s 24 of the *Australian Courts Act*[10] which provided that all laws and statutes in force in England on 25 July 1828 were to be effective within the colonies of New South Wales (which then included what is now Queensland and Victoria) and Van Diemen's Land (now Tasmania) 'so far as the same can be applied within the said colonies'.

The common law brought with it certain assumptions about the role of the judiciary.

Prior to the Act of Settlement 1701 (UK) which conferred security of tenure upon them, English judges were sometimes, in Maitland's words, 'servile creatures'[11] fearing dismissal if they failed to act as instruments of royal policy. But by the time the Australian colonies came to consider establishing a federation that had long since ceased to be the case. The culture of the English judiciary had become one of robust independence.

Developing slowly and incrementally as England travelled its evolutionary (and, occasionally revolutionary) path towards subordinating the once virtually unlimited power of the English hereditary monarchy to institutions of representative government, the common law of England gradually became imbued with notions of 'the rule of law'.

Judges of Australia's High Court have long accepted that the Australian constitution was, in the language of Dixon J 'framed in accordance with many traditional conceptions, to some of which it gives effect…others of which are simply assumed'.

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8 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262.

9 For a detailed consideration of the reception of English law in the colonies, see A Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1.

10 9 Geo IV, c 83 (1828).

11 F W Maitland, *The Constitutional History of England* (Lectures at Cambridge) 1887-8, cited in Sir C Harders, 'Parliamentary Privilege', *Parliamentary Research Service Background Paper*, 8 October 1991, 7.

Dixon J then added: 'Among these I think it may fairly be said that the rule of law forms an assumption'.[12]

Although a definition of 'the rule of law' is notoriously elusive,[13] one of its central tenets is capable of simple exposition. In the words of Brennan J:

> 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.[14]

Thus both a stream of United States' jurisprudence and a stream of English 'rule of law' thinking, flowed together to mutually reinforce the shaping of our constitution and to embed in it the duty of the courts both to adjudicate on the validity of legislation and to secure adherence by the executive government to the law.

Let us now look more closely at federal 'privative clauses' that have been enacted to try to dam or divert those streams.

III ANDREW INGLIS CLARK AND SECTION 75(V) OF THE CONSTITUTION

It is a further irony of *Marbury v Madison* that the justice of the peace who applied to the Supreme Court actually lost his case. His predicament provided the context for Marshall CJ's statements of high constitutional principle but Marbury nonetheless failed to obtain the orders he sought from the US Supreme Court—for the delivery up to him of his judicial commission.

He failed because he had applied to the Supreme Court directly, bypassing the lower courts. The United States Supreme Court, it was held, had only appellate, not original, jurisdiction.

It was to ensure that there would be no such limit on Australia's supreme tribunal's powers that s 75(v), which provides that the High Court has original jurisdiction in all cases in which constitutional writs are sought against an officer of the Commonwealth, was included in the Australian Constitution.

The moving force behind the inclusion of s 75(v) was the Tasmanian, Andrew Inglis Clark, a radical liberal lawyer, state parliamentarian, Attorney General and, later, judge. The story is told in FM and LJ Neasey's biography of Clark as follows:

> The next section of [Andrew Inglis] Clark's draft Bill, Part V, on the 'Federal Judicatory,' turned out to be the most influential and important … [It] was mainly taken from Art III of the United States Constitution, …except that he made some amendments to the wording, and one important addition. The latter arose from his familiarity with the United States Supreme Court case in 1803, *Marbury v Madison* …Clark, who wished to overcome this restriction [on the power of the court to grant relief], included in his clause conferring original jurisdiction on the Supreme Court 'all cases in which a writ of Mandamus or Prohibition shall be sought against a Minister of the Crown for the Federal Dominion of Australia.' The 1891 Convention accepted the clause, but

12 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.
13 For example see J Stone, *Social Dimensions of Law and Justice* (Maitland Publications 1966).
14 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

> modified it to read 'against an Officer of the Commonwealth'.[15]
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> But, in Melbourne in 1898, delegates voted to strike out the provision; concerned it might have a limiting effect, possibly excluding jurisdiction in other proceedings such as writs of habeas corpus.
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> Clark, monitoring proceedings from Hobart, telegraphed Barton to remind him of the United States decision in *Marbury v Madison* ... Barton wrote back … saying '… it seems to be a leading case. I have given notice to restore the words on the reconsideration of the clause'.[16]

In the debates to settle the final draft of the text in 1898 Edmund Barton,[17] true to his undertaking to Clark, proposed the reinsertion of s 75(v) on the basis that it would give a person affected by the actions of an officer of the Commonwealth 'the right to have this process of law properly exercised'.[18]

Barton's proposition was accepted, and s 75(v) thus became part of the Australian constitution.

Accordingly the High Court was invested, from the outset, not only with an implicit power to adjudicate on the validity of legislation, but also with an explicit and constitutionally entrenched power to issue writs to require officers of the Commonwealth to comply with the common law, relevant legislation and the constitution.

IV ATTEMPTS TO THWART JUDICIAL REVIEW OF EXECUTIVE ACTION

The test of whether the High Court would follow the logic underpinning Marshall CJ's reasoning in *Marbury v Madison,* that the Commonwealth cannot by an ordinary act remove or restrict the right of the High Court to supervise the lawfulness of conduct of Commonwealth officers, initially arose in the context of industrial law—an area of public administration that successive governments and parliaments, in the decades following federation, sought to exclude from the High Court's oversight.

The issue first came before the High Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow.*[19] There the issue arose as to whether the judges of the Commonwealth Court of Conciliation and Arbitration were 'officers of the Commonwealth' for the purposes of s 75(v), and if so, what effect if any should the High Court give to s 31 of the *Conciliation and Arbitration Act* 1904 which then provided: 'No award of the Court shall be challenged, appealed against, reviewed, quashed or called into question in any other Court on any account whatsoever.'

The High Court held that the words 'officer of the Commonwealth' were wide enough to cover judges of inferior courts as well as public servants and granted prohibition to prevent the industrial court from overstepping the law. Because parliament had not gone as far as to remove the High Courts' power to grant prohibition, the High Court did not have to deal with the constitutional issue directly, but the tenor of the majority's

15 FM and LJ Neasey, *Andrew Inglis Clark* (2001) 138-9.
16 Ibid 194-195.
17 Later the first Prime Minister of Australia, and, subsequently, an original justice of the High Court of Australia.
18 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne 1898, 1884.
19 (1910) 11 CLR 1.

judgments left little doubt as to how they would have decided the question had it done so.

Griffith CJ stated:

> In my opinion…this court has original jurisdiction under the Constitution itself to grant prohibition…If the meaning of the words of s 75 were even ambiguous, the necessity of such a controlling power existing somewhere is so apparent that I should think the ambiguity should be resolved in favour of the power.[20]

Barton J made similar remarks,[21] as did O'Connor J who observed:

> If that power is not vested in the High Court by the Constitution, …it will depend upon the will of the Commonwealth Parliament, whether there shall be any power in the High Court, by appeal or otherwise, to control excessive jurisdiction by the inferior Courts of the federal judicial system, for Parliament can always, as it has done in the case of the Commonwealth Arbitration Court, create a Federal Court, whose decisions are not subject to question by the High Court on appeal.[22]

Only Isaacs J dissented but on procedural grounds which he later repudiated.[23]

But, of course, that was not to be the end of the matter.

To make its intention to remove all judicial review of the industrial court unmistakeable, in 1911 parliament inserted the words, 'or be subject to prohibition or mandamus' after the words 'called into question' in s 31 of the *Conciliation and Arbitration Act* 1904.

In the aftermath, the question of whether an ordinary act of parliament could remove the right of the High Court to supervise the lawfulness of the conduct of Commonwealth officers came squarely and unavoidably before the High Court in *The Tramways Case [No1]*.[24]

The High Court's decision in that case, delivered in 1914, unanimously affirmed that its power to review executive action could not be removed by ordinary legislation.

Griffith CJ stated:

> [T]he case is within sec 75(v). The jurisdiction conferred by that section cannot, of course, be taken away by the Commonwealth Parliament.[25]

Barton J, hardly surprisingly given the role he had played, at Inglis Clark's urging, to reinstate the clause during the Melbourne Constitutional Convention in 1898, held:

> If this Court is given both the jurisdiction and the writ, as I am clear that it is, then sec 31 of the Arbitration Act can by no means impede the issue of the writ.[26]

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20 Ibid 22.
21 Ibid 33.
22 Ibid 42.
23 In *The Tramways Case [No1]* (1914) 18 CLR 54.
24 Ibid.
25 Ibid 59.
26 Ibid 68.

Isaacs J repudiated the views he had expressed in *Whybrow,* and added:

> If there were no power of mandamus or prohibition to federal courts, either under appellate or the original jurisdiction,…a legal wrong would easily exist without a legal remedy…. On the whole I am therefore of the opinion that, notwithstanding s 31 of the Commonwealth *Conciliation and Arbitration Act* it is within the competence of this Court to grant prohibition.[27]

Gavan Duffy and Rich JJ said:

> The Commonwealth Parliament cannot take away a right granted by the Constitution. The preliminary objection [based on s 31] must therefore fail.[28]

Powers J concluded likewise:

> The power directly conferred on the High Court by the Court as *original jurisdiction* cannot be taken away by the Commonwealth Parliament.[29]

The result could not have been clearer.

Despite both continuing parliamentary hostility towards judicial intervention in industrial proceedings and changes in the personnel of the High Court, it thus became settled law[30] for the following three decades, that no ordinary act of parliament could restrict or remove the power of that court to review unlawful executive action.

As late as 1942 a unanimous bench[31] in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd*[32] rejected the proposition that a privative clause could have any effect on the jurisdiction of the High Court.

V A DETOUR TO DEFERENCE — THE *HICKMAN* MYTH

War time, and the rapidly emerging intellectual dominance of the High Court by its then newest justice, Dixon J, provided the context for the emergence of the next challenge to this approach. The result of that challenge ushered in a period of complex jurisprudence which lasted for almost 50 years and undermined the robust guarantee of s 75(v).

The case which triggered this complex jurisprudence arose after a Local Reference Board acted beyond its jurisdiction to make orders affecting a transport company, on the mistaken view that those transport operations fell within the Local Reference Board's powers to make war time orders in respect of the 'coal mining industry'.

The privative clause in question, Regulation 17, provided that the decision of a Local Reference 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'.

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27 Ibid 81.
28 Ibid 83.
29 Ibid 86.
30 Although Issacs and Rich JJ dissented in *Waterside Workers Federation of Australia v Gilchrist Watt and Sanderson* (1924) 34 CLR 482.
31 Latham CJ, McTiernan, Rich, Starke and Williams JJ.
32 (1942) 66 CLR 161.

In *R v Hickman; Ex parte Fox and Clinton (Hickman)*[33] a Full Court of the High Court of Australia held, notwithstanding Regulation 17, that prohibition under s 75(v) of the constitution was available in respect of the erroneous finding of the Local Reference Board.

The ratio decidendi of *Hickman* was thus consistent with the previous line of authority. Three of the five justices were unambiguous in concluding that where an act purports to take away from the High Court its jurisdiction to review the lawful ambit of power conferred on an officer of the Commonwealth the Act is invalid to that extent.

Latham CJ expressed what had become the orthodox position:

> Such a provision, it is settled cannot exclude the jurisdiction conferred on this Court by s 75(v) of the Constitution [references omitted]. That provision [s 75(v)] is not limited to the grant of prohibition on constitutional grounds. It extends also to the grant of prohibition on grounds independent of the Constitution and relating only to the statutory powers of a Commonwealth officer.[34]

Rich J held:

> The jurisdiction of this Court derives from s 75(v) of the Constitution—the members of the Board being officers of the Commonwealth. The exercise of this jurisdiction is not affected by the provisions of reg. 17 of the Regulations—provisions similar to those contained in s 31(1) of the Commonwealth Conciliation and Arbitration Act 1904-1934.[35]

Starke J did not even refer to the purported ousting of the High Court's jurisdiction. He held:

> The rules are founded on s 75 of the Constitution [reference omitted] and prohibition goes wherever officers of the Commonwealth, having legal authority to determine questions affecting the right of subjects and having the duty to act judicially, act in excess of their legal authority.[36]

Dixon J by contrast, while joining with the majority as to the outcome, proposed a different 'well established' approach to the interpretation of privative clauses. He advanced a general rule of statutory interpretation to apply both under Commonwealth law, and unitary systems.

> They are not to be 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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> It is … 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

33 (1945) 70 CLR 598.
34 Ibid 606-7.
35 Ibid 610.
36 Ibid 611.

> 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.[37]

This obiter dicta of Dixon J in *Hickman* was designed to reconcile 'the prima facie inconsistency between one statutory provision which seems to limit the powers of the [decision maker] and another provision, the privative clause, which seems to contemplate that the [decision] shall operate free from any restriction'.[38]

Dixon J's reasoning is open to criticism for lack of rigour in its analysis of the cases he cited to support his conclusion. His Honour relied upon, but without acknowledging them as such, the dissenting opinions expressed by Isaacs and Rich JJ in *Waterside Workers Federation of Australia v Gilchrist Watt and Sanderson*[39] and upon out of context citations of Latham CJ and Starke J in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd*.[40]

Far from being a 'well settled' doctrine, it might be better seen as having had a virgin birth.

Yet whatever criticism may be made of it, Dixon J's reasoning immediately became immensely influential—offering, perhaps, a legally respectable basis for some limit to the conflict between the courts and the legislature[41]—whilst retaining the capacity in the courts to set aside the most egregious excesses of executive overreach.[42]

Some twenty years later Menzies J described Dixon J's statements of principle in *Hickman* as 'classical'.[43]

But his language was as Delphic as it was classical.

The jurisprudence following *Hickman* and attempts to apply what became known as the *Hickman* provisos quickly became elaborate and convoluted. Nearly half a century later, Sir Anthony Mason suggested extra-judicially that the dictum had 'enable[d] the judges to generate a result by following an intricate path through a maze'. He also asked 'whether such a complex and artificial principle contributes to the integrity of the legislative and political process'.[44]

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37 Ibid 614-6.

38 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 631 (Gaudron and Gummow JJ quoting *R v Coldham*: *Ex parte Australian Workers' Union* (1983) 153 CLR 415, 418).

39 (1924) 34 CLR 482, 616-7.

40 (1942) 66 CLR 161, 614.

41 An objective, although unspoken, likely to have influenced judicial thinking during war time and its aftermath.

42 However, it is important to note that there is no instance, throughout the period when Dixon J's statement in *Hickman* was understood to be authoritative, in which the High Court came to the conclusion that an officer of the Commonwealth had exceeded the powers actually conferred on him or her yet allowed that officer's decision to stand because of the presence in an act or regulation of a clause expressed in similar terms.

43 *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 455.

44 'Judicial Review: The Contribution of Sir Gerard Brennan', in Creyke and Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) 38, 59-60.

VI *PLAINTIFF S157/2002 V COMMONWEALTH* — A REASSERTION OF THE PRIMACY OF THE CONSTITUTION AND THE RULE OF LAW[45]

Despite, or perhaps even because of its opacity, *Hickman* may have helped to blur the lines of conflict between the judiciary and the legislature over industrial relations, which ushered in a long period of relative legal calm in respect of judicial review of executive decision making.

That calm was shattered by the parliament's decision to remove all but the most limited rights of judicial review of administrative decisions in migration matters. The consequential litigation compelled the High Court to yet again confront the fundamental question of whether s 75(v) of the Constitution could be, in practical reality, rendered meaningless.

The trigger for these events was bills passed by the parliament in September 2001. The *Migration Act 1958* was amended to provide that all decisions of an administrative character[46] were to be 'privative clause decisions' and protected from judicial review.

Part 8 – Judicial Review, s 474(1) was inserted into the legislation. It provided:

> 474 Decisions under Act are final
> (1) A privative clause decision:[47]
> (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.

The clear legislative intention of this clause was to provide blanket immunity from review of these privative clause decisions.

The Minister's second reading speech[48] anticipated that if the amendments were passed, the application of *Hickman* by the High Court would, as a practical matter, leave proven bad faith as the only ground of judicial review available.

Other amendments to the *Migration Act 1958* introduced strict and unrealistic time limits intended to apply to such applications even for this limited relief.[49]

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45 The discussion that follows draws heavily on a paper delivered to the Australian Institute of Administrative Law on 13 March 2003—see D Kerr, 'Deflating the *Hickman* Myth; Judicial Review after *Plaintiff S157/2002 v The Commonwealth*' (2003) 37 *AIAL Forum* 1.

46 Save a narrow class specifically exempted—see s 474 ss (2)-(5).

47 Subsections (2)-(5) defined the term 'privative clause decision'. It can be summarised as encompassing every decision of an administrative character made under the *Migration Act*, except for a very limited class explicitly excluded by subsection (4) or specified by regulations under subsection (5).

48 *Hansard*, House of Representatives, 26 September 2001, 31561. See also the Revised Explanatory Memorandum to the *Migration Legislation Amendment (Judicial Review) Bill 2001*, paragraph 15.

49 Section 486A.

A challenge to these amendments soon arose. *Plaintiff S157/2002 v Commonwealth (Plaintiff S157/2002)*[50] was commenced by writ of summons.

The statement of claim that was filed by the plaintiff alleged that an administrative decision of the Refugee Review Tribunal that had refused him the visa he sought was void in law because the decision maker had breached the rules of natural justice—a standard ground which, if established, ordinarily would result in such a decision being set aside after judicial review. The proceedings in *Plaintiff S157/2002* were commenced out of the time prescribed by s 486A.

The plaintiff sought declarations that both s 474 and s 486A were invalid—because they were inconsistent with s 75(v) of the Constitution. The matter came before the Full Court of the High Court of Australia by way of a case stated, in its original jurisdiction and not by way of an appeal.

However, coincidentally, a number of other applications for review of refugee decisions were also listed before the Federal Court of Australia—and, of course, s 474 was also at issue in those matters.

A group of those cases came before a Full Court of the Federal Court shortly before *Plaintiff S157/2002* was listed for hearing. The decisions in those cases, reported as *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (*NAAV*), [51] was handed down after initial written submissions had been filed in *Plaintiff S157/2002.*

Although there is no reference to *NAAV* in any of the judgments delivered in *Plaintiff S157/2002,* the decisions were the subject of extensive written and oral submissions from counsel for the plaintiff in that case and may have played a crucial role in undermining a key submission of the Commonwealth.

The nub of the Commonwealth's case, as put to the High Court, was that Dixon J's statement of principles in *Hickman* had become settled law. The Commonwealth argued that elaboration of these principles had never been marked by any major differences between judges of the High Court.

In *NAAV* the five judges who constituted the Full Court of the Federal Court of Australia were of a common view that *Hickman* bound them and that s 474 was not invalid. Yet despite this superficial unanimity three very divergent and inconsistent strands of reasoning emerged—all claiming reliance on binding High Court authority. Ironically the Commonwealth's success in the Federal Court undermined its key argument in the High Court.

VII THE 'EXPANSION OF JURISDICTION' THEORY

The understanding of the law that the Minister in Parliament, and the Solicitor General in the High Court, claimed had been settled by *Hickman* was that:

50 (2003) 211 CLR 476.
51 (2002) 193 ALR 449.

> the effect of a privative clause [is] not to limit the jurisdiction of the court but to expand the power of the decision maker whose decision was affected by the privative clause.[52]

This can be described as the '*expansion of jurisdiction*' theory of *Hickman.*

While a majority of the Full Court in *NAAV* applied the 'expansion of jurisdiction' theory, other explanations for *Hickman* were contained in the reasonings of two of the Federal Court justices.

Thus, as a result of the contrasting judgments in *NAAV,* it became impossible to assert that there were not other, very differently and inconsistently premised, theories of *Hickman.*

VIII THE 'VALIDATION' THEORY

In his reasons Black CJ relied upon what can be termed a '*validation*' theory of *Hickman.* His Honour held:

> The Parliament must however be taken, by enacting s 474(1), to have implicitly changed the substantive law governing the Minister's power and jurisdiction under the Act, so that decisions that may otherwise have been invalid may, by reason of the intention implicitly expressed in s 474(1) (interpreted according to the *Hickman* principle), now be 'validated'.[53]

This '*validation*' theory depends on giving attention and effect to Dixon J's words in *Hickman* that 'such a clause is interpreted as meaning that no decision *which is in fact* given by the body concerned shall be invalidated.'[54]
This idea was given its clearest prior expression in the joint judgment of Mason ACJ and Brennan J in *R v Coldham; Ex parte Australian Workers Union* where their Honours stated:

> Consequently, *the making of the award or order* is the occasion for taking the privative clause into account in interpreting the Tribunal's authority or power more liberally. Before the award or order is made the Tribunal will be held to a strict construction of its powers uninfluenced by the clause, thereby enabling the grant of prohibition, notwithstanding that had the proceedings reached the stage where an award or order was made prohibition could not have been obtained (italics added).[55]

However in their underlying logic, the '*expansion of jurisdiction*' theory and the '*validation*' theory of *Hickman* are mutually inconsistent.

The '*expansion of jurisdiction*' theory posits that no invalid decision was ever made; the '*validation'* theory accepts that an otherwise invalid decision had been made but, by the operation of the privative clause, it was instantly validated upon being made.

Moreover, the '*validation'* theory also radically affects the traditional role of the courts by permitting an administrator to determine questions of law conclusively and finally. This had long been considered to be an aspect exclusively of judicial power. Despite

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52 Written submissions of the first respondent on the construction and validity of s 474(1) of the *Migration Act 1958* para 8: citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 [166] Hayne J.

53 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR, 82 [29] 460.

54 70 CLR 518, 615 (italics added).

55 (1983) 153 CLR 415, 418-9.

that, in *NAAV,* Black CJ, adopted a submission advanced on behalf of the Minister and stated:

> It must also be accepted that there is no constitutional reason why s 474(1) should not have the effect that the substantive law of the Act is altered so that the Minister has the power to determine questions of law (other than matters going to constitutional limits) conclusively and finally.[56]

IX THE 'DARLING CASINO' THEORY

French J, by contrast, in what amounted to a dissenting judgment in respect of many of the issues argued in *NAAV,* held that a privative clause, expressed to apply to decisions under an enactment, could apply only to valid decisions.

In doing so His Honour drew on a distinction that had been made by Gaudron and Gummow JJ in *Darling Casino v New South Wales Casino Control Authority* [57] between a 'decision under the Act' and a decision 'under or purporting to be under the Act'. In *Darling Casino* their Honours stated:

> There is one point we should add, because the Court of Appeal appears to have proceeded on a contrary view. It concerns the content of the phrase in s 155(1), [the relevant privative clause] 'a decision of the Authority under this Act'. The phrase is not 'under or purporting to be under this Act'. Section 11 obliges the Authority to have regard to certain matters. Section 12 forbids the Authority to grant an application unless satisfied of the matters there specified and for that purpose the Authority is to consider the items specified in s12 (2)(a)-(h). Section 13 contains a definition of 'close associate', a term used in s 12. Sections 11, 12 and 13 are central to the legislative scheme. Section 155 cannot fairly be construed as declaring an intention of the legislature that the Authority is empowered and protected in respect of determinations under s18 reached other than upon satisfaction of the conditions which enliven its power. Those decisions would not have been made 'under this Act'.[58]

The '*Darling Casino*' theory of *Hickman* therefore neither expands the decision maker's jurisdiction, nor validates error. On this approach all *Hickman* does is to permit the court to have regard to any privative clause (together with all other indications contained within the Act) as a factor amongst others, assisting it to determine whether another provision in the Act was intended to be mandatory or directory—or in the more recent language of the High Court, essential, or not essential, to validity.[59]

This, of course, was not an entirely new doctrine. Very early traces of the '*Darling Casino*' theory of the *Hickman* obiter can be identified in the joint judgment of Latham CJ and Dixon J in *R v Commonwealth Rent Controller*[60] and, more clearly, in the decision of Latham CJ in *R v Murray; Ex parte Proctor*.[61]

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56 [29] 460.

57 (1997) 191 CLR 602.

58 Ibid 635.

59 It is commonplace for courts faced with the interpretation of statutes to have to determine whether or not compliance with a particular provision should be mandatory (that is essential to validity) or directory, such that a failure to comply with the strict letter is not fatal—a distinction illustrated by the High Court's decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 77 ALJR 1829.

60 (1947) 75 CLR 36.

61 'But reg. 17 does prevent an order of the Board from being held to be invalid by reason of irregularities not going to jurisdiction. It is a statement of the intention of the legislature that not

Thus French J held that the reference in s 474 to a 'decision of an administrative character made…under this Act' could refer only to a valid decision; one made in substantive compliance with the decision maker's statutory and common-law obligations under the Act.[62]

X THE DECISION IN *PLAINTIFF S157/2002*: THE CONSTITUTION ENTRENCHES JUDICIAL REVIEW

The High Court in *Plaintiff S157/2002* unanimously[63] applied the '*Darling Casino*' theory to the construction of s 474. The privative clause, whilst not constitutionally invalid on the construction applied to it by their Honours, was held neither to expand a decision maker's jurisdiction, nor to validate error.

Section 75(v) was reaffirmed to have introduced into the constitution 'an entrenched minimum provision of judicial review'[64] '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'.[65]

The High Court affirmed that a privative clause, so understood, does not affect judicial review for jurisdictional error. It merely requires a judge to consider any such clause (and the terms in which it is expressed) as one factor, alongside other indications contained within the Act, to assist the reviewing court to decide whether compliance with any express or implied provision of an Act is essential to a decision's validity.[66]

Each of the judgments in *Plaintiff S157/2002* expressly rejected the Commonwealth's submission that a privative clause took effect by expanding the jurisdiction of a decision maker. Instead the High Court reaffirmed that jurisdictional error results in a decision being a legal nullity.[67]

The fundamental premise of the legislation was held to have been unsound[68] and founded on an incorrect understanding of *Hickman*.[69]

Further the court held that if s 474 had been drafted so as to give effect to the intention that the Solicitor General had contended it had had (that is to prevent review of a *purported* decision) such a privative clause would then come into direct conflict with s 75(v) of the Constitution, and thus would be invalid.[70]

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every direction prescribed for the conduct of the tribunal should be regarded as mandatory' (1949) 77 CLR 387, 394-95.

62 [515-18] 581-2; [542] 590.

63 By a joint judgment of five justices, Gaudron, McHugh, Gummow, Kirby and Hayne JJ; the Chief Justice delivering a concurring but separate, and Callinan J a substantially concurring, but differently nuanced, judgment.

64 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [103].

65 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [104].

66 Or in the older language more recently disapproved of by the High Court (see the cases cited by Callinan J at fn 143 of His Honour's judgment), whether the provision is mandatory or directory.

67 That is an outcome having no legal effect.

68 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [91].

69 Gleeson CJ [35] 35; Gaudron, McHugh, Gummow, Kirby and Hayne JJ [91] ; Callinan J [162].

70 Gaudron, McHugh, Gummow, Kirby and Hayne JJ [75].

The practical outcome of the case differed little from that achieved in *The Tramways Case [No1]*[71]—but the outcome in *Plaintiff S157/2002* was reached by a process of statutory interpretation, the unravelling of which must remain confusing to a reader unversed in the subtleties of that case.

A privative clause cannot expand the jurisdiction of a decision maker such that it would apply to decisions purportedly, rather than lawfully, made or validate what would otherwise be an invalid decision. Only if construed in this way, as the High Court held it must be—a way quite alien to both the actual words used by and the intention of the parliament—is a privative clause not in conflict with the constitution.

In effect, in *Plaintiff S157/2002* the High Court upheld the validity of s 474 only on the basis that a privative clause does not, and cannot, mean what it says.[72]

The outcome of the case was a win for the plaintiff. He was granted the right to seek judicial review. Applying the already well settled law that a breach of the rules of natural justice by an administrative tribunal constitutes jurisdictional error, the High Court held that the Refugee Review Tribunal's decision, if so defective, would be an invalid, merely purported, decision and thus not protected by the privative clause.

Similarly premised robust[73] findings were made with respect to the time limits imposed by s 486A. It too was held to apply only to valid decisions and not to decisions flawed by jurisdictional error.

XI JUDICIAL REVIEW ENTRENCHED

The structure of the constitution, its literal text and rule of law principles provided three mutually reinforcing underpinnings that sustained their Honours' conclusions. A more detailed exploration of the theoretical foundations of the decision in *Plaintiff S157/2002* can be found in Kerr and Williams 'Review of executive action and the rule of law under the Australian Constitution'.[74] For those more interested in an account of the case from a practitioner's perspective, see Kerr, 'Deflating the *Hickman* Myth; Judicial Review after *Plaintiff S157/2002 v The Commonwealth'*.[75]

Immediately following *Plaintiff S157/2002* the Commonwealth Solicitor General contended that the decision had settled little because it had merely opened up a new debate about the scope of jurisdictional error.[76]

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71 (1914) 18 CLR 54.

72 It is only stating the obvious to observe that if the federal parliament continues to enact such clauses, and even build on them, statutes will become impossible to read on their face.

73 Callinan J approached this aspect of the case slightly differently and held that s 486A was 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' [174]. That was because it went beyond regulation and was, in substance, a prohibition.

74 (2003) 14 PLR 219.

75 (2003) 37 *AIAL Forum* 1.

76 D Bennett, 'Privative Clauses—an Update on the Latest Developments' (2003) 37 *AIAL Forum* 20.

Any such hopes the Commonwealth harboured in that regard were given short shrift when the High Court of Australia refused leave from decisions of the Full Court of the Federal Court of Australia in *MIMIA v Scargill, MIMIA v Lobo & Ors.*[77]

Nothing in subsequent cases appears to have affected the statements made by the High Court in *Craig v South Australia*[78] that, in respect of administrative tribunals, when such a tribunal:

> falls into an error of law which causes it to identify a wrong issue, to ask itself the wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.[79]

As when a tribunal fails to accord a party procedural fairness in breach of the rules of natural justice, 'such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it'[80].

XII THE STATE COURTS AND STATE PRIVATIVE CLAUSES: WILL THE OTHER SHOE DROP?

In a riposte to the Commonwealth's submissions during the special leave hearing referred to above, Gummow J commented; 'It [*Plaintiff S157/*2002] is a neat Bauhaus construction and you want to start building a Gothic cathedral'.[81]

When one turns to state jurisprudence it is difficult not to be struck by the sense that the architecture remains caught between the gothic and the modern.

Of course at the state level s 75(v) of the federal constitution has no application.

It has been argued that in Victoria the plenary jurisdiction of the Supreme Court is similarly protected by s 85(1) of the Victorian Constitution which encompasses the same matters in s 75(v).[82] If so that would seem to require the same outcome, at least in Victoria, as applies federally. However, as the paper also notes, this protection is not quite as robust because the Victorian Parliament could, if it wished, amend the Victorian Constitution.[83]

However, such exceptions as s 85(1) of the Victorian Constitution may require aside, it has been assumed[84] that the differing constitutional position of the states, in the absence

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77 [2004] HCATrans 21 (13 February 2004).

78 (1995) 184 CLR 163.

79 Ibid 179.

80 Ibid 179.

81 *MIMIA v Scargill, MIMIA v Lobo & Ors* [2004] HCATrans 21 (13 February 2004).

82 See Research Paper prepared by the Court of Appeal Researchers (Chan, Konstantopoulos and Kenneally) for the Law Institute of Victoria Seminar on '*How and when Parliament can shut out the courts—The scope and operation of privative clauses*' presented by Justice Chris Maxwell, President, Court of Appeal, Supreme Court of Victoria, 15 August 2005.

83 Ibid 18.

84 The cryptic obiter comments of Gummow and Gaudron JJ in *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602—'provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle'—assume there is a

of both the equivalent of s 75(v) and the strict separation of judicial power required by Ch III of the federal constitution, necessarily brings about 'a bifurcation of the legal principles governing the validity of privative clauses in the federal and state spheres'.[85]

Writing extra-judicially the Honourable James Spigelman, Chief Justice of New South Wales, has grappled with what *Plaintiff S157/2004* may mean for state courts and state privative clauses.[86] Without repudiating the bifurcation premise his Honour's address is an illuminating speech strongly emphasising rule of law principles.

The recent decisions of the New South Wales Court of Appeal in *Mitchforce v Industrial Relations Commission and Ors*[87] and *Woolworths Ltd v Pallas Newco Pty Ltd & Anor* [88] also accepted as their starting point the bifurcation of legal principles between state and federal jurisdictions and, perhaps as an inevitable result, are almost impenetrably complex. They blend references to *Plaintiff 157/2002* with references to earlier High Court cases that encapsulate prior and differently premised conceptions of *Hickman*.

Of both these Court of Appeal decisions it may be said—fully acknowledging the very real difficulties of the subject matter and genuinely intending no disrespect, as it was of the decisions of the High Court before *Plaintiff S157/2002*—that they appear to 'generate a result by following an intricate path through a maze'.[89]

No case involving the interpretation of a state privative clause has yet to come before the High Court since *Plaintiff S157/2002*.

XIII SOME SPECULATIONS ABOUT THE FUTURE

Is there any alternative to the maze? Can state supreme courts, or the High Court, if and when such a matter comes before it in its appellate jurisdiction, fashion a more elegant 'Bauhaus' solution?

How should a state court deal with a state privative clause expressed to prevent judicial review of 'purported decisions'[90] or a state law which otherwise clearly expresses an intention to exclude all judicial review of administrative decisions otherwise tainted with jurisdictional error?

Such clauses would be invalid if enacted by the federal parliament.[91]

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difference. But it was puzzling what to make of the *Hickman* qualification they appended to the statement before *Plaintiff S157* and quite inscrutable after their Honours' decision *Plaintiff S157/2002*.

85 GL Peiris, 'Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law' [1982] *Public Law* 451, 463.

86 J Spigelman, 'Integrity and Privative Clauses', The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004.

87 [2003] NSWCA 151.

88 [2004] NSWCA 422.

89 Adopting the words used by Sir Anthony Mason to describe the *Hickman* jurisprudence prior to *Plaintiff S157/2002* in 'Judicial Review: The Contribution of Sir Gerard Brennan', in Creyke and Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002) 38, 59-60.

90 It may be expected that state courts will generally follow the reasoning of *Plaintiff S157/2002* to construe state privative clauses which do not extend to 'purported' decisions.

91 *Plaintiff S157/2002* [75] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

It must be conceded, provisions such as s 85(1) of the Victorian Constitution aside, that two of the three underpinnings upon which the High Court's decision in *Plaintiff S157/2002* was based— the structure and text of the federal constitution—are unavailable to state courts.

However, rule of law principles are not.

One possibility is that the common law of Australia might yet be developed to embed the rule of law in state jurisprudence in an analogous way to the result achieved in *Plaintiff S157/2002*.

Could the common law of Australia ultimately come to recognise that respect for the rule of law requires not only the High Court but also state supreme courts, to not give effect to a privative clause which directs them to treat as valid, purported, and otherwise void, administrative decisions?[92]

There could be no doctrinal objection that such a conclusion is alien to the common law.

Exactly that position has now been reached by the courts in England. This result was achieved notwithstanding the common law's respect for the doctrine of parliamentary sovereignty.

The decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*[93] confirmed that English courts, applying the common law, will treat privative clauses as ineffective.[94] As Lord Wilberforce put the matter in that case:

> What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed? [95]

The High Court rejected *Anisminic's* abolition of the distinction between jurisdictional and non-jurisdictional error in *Craig v South Australia*[96] but the 'rule of law' principle *Anisminic* enshrines has never been formally overruled—and has strong resonance with the underlying logic of *Plaintiff S157/2002.* Were such an approach to the common law of Australia to be adopted it would fit neatly with the values given prominence by New South Wales Chief Justice, James Spigelman in the address[97] referred to above.

Finally I want to offer something of a speculative argument that, were it to be accepted, might also root state judicial review in otherwise foreign federal constitutional soil. It is manifestly true that the Australian constitution does not require a strict separation of powers doctrine to apply to state courts, but *Kable v Director of Public Prosecutions*

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92 An argument to this effect is made by D Meyerson, 'State and federal privative clauses: Not so different after all' (2005) 16 *PLR* 39, 39-54.

93 (1969) 2 AC 147.

94 This autochthonous result was reached before the United Kingdom's integration with European institutions.

95 (1969) 2 AC 147, 208.

96 (1995) 184 CLR 163.

97 J Spigelman, 'Integrity and Privative Clauses' The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004.

(NSW)[98] is authority for the proposition that state supreme courts cannot be abolished or granted functions repugnant to their judicial role. They must remain available as a repository for the investment of federal judicial power.

State (formerly colonial) Supreme Courts have always possessed a plenary and inherent jurisdiction to grant relief in the nature of certiorari and the other prerogative writs.[99]

In *Tasman Quest Pty Ltd v Evans; Tasman Quest Pty Ltd v Nolan*,[100] Blow J, with whom Crawford and Slicer JJ concurred, held[101] that the Tasmanian Supreme Court's powers, originally conferred on colonial superior courts by the *Australian Courts Act 1828* (Imp) ss 3 and 11, to grant orders in the nature of certiorari had survived the purported removal, by the *Judicial Review Act (Tas) 2000* of that Court's power to issue prerogative writs.

The decision in *Tasman Quest* is intriguing and invites consideration of what are the essential indicia of a state Supreme Court.

On one reading the decision may mean little because, it might be reasoned, the Tasmanian Parliament could, if it wished, go further and in reliance on the *Australia Act* 1986 (Cth and Imp) specifically revoke the powers conferred on the Tasmanian Supreme Court by the pre-federation Imperial legislature.

However, would such a court, shorn of its former powers, remain a superior court of the state of Tasmania of the kind whose continued existence is mandated by the federal constitution? Would such a law trench too far on what is essential to the judicial role—and the rule of law?

We may never know, because it may never happen.

But should a state parliament attempt to remove that jurisdiction it could present the opportunity for the High Court to disprove the cynical suggestion I recently heard fall from a senior member of the bar, that *Kable* is a 'dog that will only bark once'.

98 189 CLR 51.
99 *Australian Courts Act 1828* (Imp) ss 3 and 11.
100 [2003] TASSC 110.
101 Ibid [8],[9].