

15. Judicial Review

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Summary

15.1 Access to the courts to challenge administrative action is an important common law right. Judicial review of administrative action is about setting the boundaries of government power.¹ It is about ensuring government officials obey the law and act within their prescribed powers.²

15.2 This chapter discusses access to the courts to challenge administrative action or decision making.³ It is about judicial review, rather than merits review by administrators or tribunals. It does not focus on judicial review of primary legislation

1 'The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which government power might be exercised and upon that the whole system was constructed': *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

2 'The reservation to this Court by the *Constitution* of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them': *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

3 Not every administrative decision is subject to judicial review. Administrative action which does not affect an individual's liberties, vested rights or legitimate expectations is not subject to judicial review. Similarly, policy decisions of government are not subject to judicial review.

on constitutional grounds or judicial review of lower court decisions by way of appeal or prerogative writ.

15.3 At common law, superior courts of record have an inherent jurisdiction to conduct judicial review. In the 1970s, the government introduced the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) as part of wide-ranging reforms to federal administrative law in Australia. The Act seeks to simplify, codify, and in some cases, expand common law judicial review. However, limitations imposed on the *ADJR Act* have affected its capacity to operate as a simpler, more streamlined avenue for judicial review.

15.4 A number of stakeholders submitted that limits on access to the *ADJR Act* in the form of the list of decisions exempted from review under the Act should be considered as part of this Inquiry. While consideration has been given to this issue, it is important to note that under s 39B(1A)(c) of the *Judiciary Act 1901* (Cth) (*Judiciary Act*) a person still has access to the courts to review a decision exempted under sch 1 of the *ADJR Act*. Accordingly, this chapter does not focus on decisions exempted from review under the *ADJR Act*.

15.5 This chapter is focused on privative clauses, which are ‘essentially a legislative attempt to limit or exclude judicial intervention in a certain field’.⁴ However, statutory attempts to oust the jurisdiction of the court have largely failed. Section 75(v) of the *Constitution* protects access to the courts, as it includes an ‘entrenched minimum provision of judicial review’.⁵ Further, the principle of legality operates to protect access to the courts by construing privative clauses so narrowly that they have little to no effect.

15.6 The Australian Government should consider a review of privative clauses in Commonwealth laws. Where the underlying policy rationale is considered warranted, the Australian Government should explore whether alternative solutions, which do not restrict access to the courts, and are more targeted and effective in addressing the underlying policy issue, may be implemented.

A common law principle

15.7 Access to the courts for the purpose of judicial review is an important common law right. Sir William Wade stated that ‘to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power’.⁶

15.8 In *Church of Scientology v Woodward*, Brennan J said:

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

4 Simon Young, ‘Privative Clauses: Politics, Legality and the Constitutional Dimension’, in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 277.

5 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103].

6 Sir William Wade, above n 3.

exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.⁷

15.9 In his *Introduction to Australian Public Law*, Professor David Clark gives a brief history of judicial review of administrative action:

Judicial review in the administrative law sense originated in the 17th century when various prerogative writs, so called because they issued in the name of the Crown, began to be issued against administrative bodies. These writs, such as certiorari, prohibition and mandamus originated in the 13th century, but were originally confined to review of the decisions of inferior courts ... By the late 17th century the writs began to be used against administrative agencies such as the Commissioners of Sewers, and the Commissioners for Bridges and Highways. With the dramatic expansion of State functions in the 19th century and the emergence of innumerable statutory bodies, committees, commissions, and other administrative agencies, the way was open for the expansion of judicial review in this sense.

The power to judicially review what were once called inferior jurisdictions (lower courts and administrative agencies) arrived in Australia with the opening of the first Supreme Courts in Van Diemen's Land and New South Wales in 1824 ... The power to review by certiorari, prohibition and mandamus was, in origin, a common law power and was, therefore, a power of jurisdiction created by the courts through their judicial decisions.⁸

15.10 It is widely recognised that the right to judicial review is not absolute. Judicial review is available to test the legality of a decision, and not its merits—the courts are not authorised to ask whether a decision was a 'good' decision. It asks only whether the decision has been properly made, in accordance with the law.

15.11 At common law, the availability and scope of judicial review is a consequence of the judicial remedy sought. These remedies are the prerogative writs of habeas corpus,⁹ quo warranto,¹⁰ mandamus,¹¹ certiorari,¹² and prohibition,¹³ as well as the equitable remedies of injunction and declaration. The standing rules relating to the availability of common law remedies and time limits which apply in relation to each of these differ.¹⁴ While some of these requirements have relaxed over time,¹⁵ access to

7 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

8 David Clark, *Introduction to Australian Public Law* (Lexis Nexis Butterworths, 4th ed, 2013) 247.

9 The writ of habeas corpus demands that a person incarcerated be brought before the court to determine whether there is lawful authority to detain the person.

10 The writ of quo warranto requires the decision maker to show by what authority they exercise a power.

11 Mandamus is an order compelling or directing a lower court or administrative decision maker to perform mandatory duties correctly. A writ of procedendo sends a case to a lower court with an order to proceed to judgment.

12 A writ of certiorari sets aside a decision made contrary to the law.

13 A writ of prohibition forbids a decision maker from commencing or continuing to perform an unlawful act.

14 Matthew Groves and Janina Boughey, 'Administrative Law in the Australian Environment' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 3, 6.

15 The tests for standing to sue at common law are converging: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters Australia, 2013) 723.

judicial review at common law remains technical and complex. The Kerr Committee¹⁶ recognised that the rules that apply to judicial review at common law were ‘both unwieldy and unnecessary’.¹⁷ It noted that ‘a case can be lost or won on the basis of choice of remedy’.¹⁸

15.12 At common law, the following are subject to judicial review: a rule-maker’s power to make delegated legislation;¹⁹ decisions of the Governor-General; recommendations and findings contained in coronial reports; Royal Commission reports; and the reports of other formal advisory bodies. Judicial review is also available in relation to decisions made in exercise of a prerogative or executive power, intermediate decisions, and some contractual decisions.²⁰

Judicial review in Australia

15.13 In addition to the common law, s 75(v) of the *Constitution* provides for an ‘entrenched minimum provision’ of judicial review.²¹ Section 39B(1) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*) extends the original jurisdiction of the High Court of Australia (High Court) to the Federal Court of Australia (Federal Court).²² Section 39B(1A)(c) vests the Federal Court with jurisdiction over ‘any matter arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter’.

15.14 In 1977, the *ADJR Act* was introduced as part of wide-ranging reforms to federal administrative law in Australia.²³ The Act seeks to simplify, codify and, in some cases,

16 In 1968, the Commonwealth Administrative Review Committee, chaired by Sir John Kerr was established to consider reform of administrative law in Australia. This committee is referred to in this chapter as the ‘Kerr Committee’.

17 Commonwealth, *Report of the Administrative Review Committee*, Parliamentary Paper No 133 (1971) [58]. This report is referred to in this chapter as the *Kerr Committee Report*.

18 Ibid.

19 It is rare that an application for judicial review of delegated legislation will be successful. The courts tend to adopt a presumption of validity, and ‘a reluctance to substitute judicial opinion for that of the legislation-maker’: Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3rd ed, 2005) [14.1]. However, the principles of ultra vires that apply to administrative decision making also apply to delegated legislation: Stephen Argument, ‘Delegated Legislation’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 141. For an example of a successful challenge to delegated legislation, see: *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314, 321. For a more in-depth discussion of inappropriate delegations of legislative power, see Chapter 17.

20 For an example of review at common law of a decision to enter a contract, see *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656 (26 July 2002). Further, the High Court has held that injunctive and declaratory relief were available for legal errors made by contractors in written advice to the Minister, even where the Minister had no obligation to consider the advice: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, [51]–[53], [99]–[104].

21 This is discussed further below. The ‘entrenched minimum provision’ of judicial review extends to State Supreme Courts, and thus, the decisions of state administrative bodies: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531. Section 75(iii) of the *Constitution* also protects access to the courts. It states that the High Court shall have original jurisdiction in any matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

22 This jurisdiction is modified to exclude the justiciability of certain criminal justice process decisions before the High Court.

23 In addition to introducing the *Administrative Decisions (Judicial Review) Act 1977*, the government established the Administrative Appeals Tribunal as a general merits review body, introduced freedom of

expand common law judicial review. It established: a single, simple procedure for review, which applies regardless of the grounds argued, or the remedy sought; codified the grounds for review; and established a right to reasons for a decision where a person has standing to seek review, with certain exceptions. However, limitations imposed on the *ADJR Act* have affected its capacity to operate as a simpler, more streamlined avenue for judicial review.²⁴

15.15 This chapter discusses how access to the courts is protected from statutory encroachment; laws which restrict access to the courts; and when laws that restrict access to the courts may be justified. It is about judicial review, rather than merits review.²⁵ However, judicial review has been characterised as ‘inevitably sporadic and peripheral’.²⁶ The availability of merits review has been described as ‘in a way more important than judicial review because it can offer a complete answer, not available through the courts, to a person affected by a decision’.²⁷

Protections from statutory encroachment

Australian Constitution

15.16 The *Constitution* has an ‘entrenched minimum provision of judicial review’,²⁸ which cannot be removed by statute, even where it may purport to do so. Section 75(v) of the *Constitution* provides that the High Court shall have original jurisdiction in all

information legislation, and established the Commonwealth Ombudsman: John McMillan, ‘Parliament and Administrative Law’ (Research Paper 13 2000-01, 7 November 2000).

24 Decisions of the *Governor-General*, and findings and recommendations in official reports are excluded from review under the *ADJR Act*. Reviews under the *ADJR Act* are only available for decisions made under an enactment, thus, excluding challenges to delegated legislation, decisions made in exercise of executive or prerogative power and contractual decisions. The courts have interpreted the term “decision” in the *ADJR Act* to generally mean a ‘final, or operative and determinative’ decision. An intermediate step does not ordinarily constitute a decision. Intermediate decisions were considered to be a decision in their own right if a statute made separate provision for it, and it was substantive: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

25 Merits review is concerned with a person or body—other than the primary decision maker—considering the facts, law and policy underlying the original decision, and substituting a fresh decision where the new decision is correct or preferable. By contrast, judicial review is concerned with the lawfulness of a decision, whether by reference to whether the decision maker had the power to make the decision, a legal error has occurred in making the decision or, where necessary, whether the rules of procedural fairness were complied with. However, where the tribunal conducting merits review makes a legal or procedural error, that decision may be subject to judicial review.

26 *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, [471]–[472]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [522]–[523].

27 Justice Robert French, ‘Administrative Law in Australia: Themes and Values’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 22. See also Justice Janine Pritchard, ‘The Rise and Rise of Merits Review: Implications for Judicial Review and for Administrative Law’ (2015) 79 *Australian Institute of Administrative Law Forum* 14; Commonwealth, *Report of the Administrative Review Committee*, Parliamentary Paper No 133 (1971) [58].

28 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103]. This was extended to review by state Supreme Courts, and thus, in relation to decisions by State administrative bodies in *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531. The High Court has long held that the original jurisdiction granted under s 75(v) of the *Constitution* is unalienable. See: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd (No 1) (Tramways Case No 1)* (1914) 18 CLR 54.

matters ‘in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. Gleeson CJ said that this provision ‘secures a basic element of the rule of law’:

The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.²⁹

15.17 The High Court defined its entrenched minimum provision of judicial review in the following terms:

First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer a non-judicial body the power to conclusively determine the limits of its own jurisdiction.³⁰

15.18 What constitutes jurisdictional error is uncertain. It depends on the statutory context.³¹ Drawing from the leading cases, Professors Mark Aronson and Matthew Groves list some examples of instances of jurisdictional error:

- a mistaken assertion or denial of the existence of jurisdiction;
- a misapprehension or disregard of the nature or limits of the functions and powers of a decision maker;
- entertaining issues or making the types of decisions or orders which are forbidden under any circumstances (for example, a civil court trying a criminal charge);
- mistakes as to the existence of a jurisdictional fact or other requirement—that is, the relevant Act treats the fact or requirement as a condition precedent to the validity of the challenged decision.

29 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [5] (Gleeson CJ).

30 *Ibid* [98]. However, it is important to note that the government retains, in large part, the power to define what constitutes jurisdictional error. A key example is the statutory removal of procedural fairness obligations (discussed in Ch 14). No invalidity clauses are another example, as are provisions which provide that there are no irrelevant considerations.

31 What is jurisdictional error in one statutory context may not be so in another: Mark Aronson, ‘Jurisdictional Error and Beyond’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 248, 250.

- disregarding relevant considerations;
- taking into account irrelevant considerations;
- some, but not all errors of law;
- acting in bad faith;
- acting extremely unreasonably.³²

15.19 Helen Robertson provides a useful survey of Federal Court cases that identified additional examples of jurisdictional error. These include a failure to:

- ask the correct question;
- consider all elements of a claim;
- properly undertake the jurisdictional task of review;
- correctly address the prescribed criteria for a decision;
- afford procedural fairness.³³

15.20 In *Plaintiff S157*, the High Court made it clear that where there is a jurisdictional error, a privative clause is ineffective to oust judicial review. In light of this constitutional jurisdiction, courts may construe privative clauses much more narrowly than the text of the provision suggests, to the point that such clauses may sometimes be largely or even entirely deprived of effect.³⁴ A number of commentators have therefore expressed the view that such clauses are of little value. Professor Mary Crock and Edward Santow state that jurisdictional error is ‘fatal to the effectiveness of most privative clauses’.³⁵ Aronson and Groves comment that courts ‘have long responded to legislative attempts to limit or completely exclude the scope of judicial review of administrative action with a mixture of incredulity, hostility, and thinly disguised disobedience’.³⁶

32 Ibid 256. The High Court has said that ‘it is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error’: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 573.

33 Helen Robertson, ‘Truth, Justice and the Australian Way—*Plaintiff S157 of 2002 v Commonwealth*’ (2003) 31 *Federal Law Review* 373, 390.

34 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. Section 474 of the *Migration Act 1958* (Cth) purports to exclude challenging, appealing, reviewing, quashing or any calling into question a ‘privative clause decision’. It also purports to exclude prohibition, mandamus, injunction, declaration or certiorari as a remedy in any court. In *Plaintiff S157/2002* the High Court unanimously rejected the literal interpretation, and held that the writs of mandamus and prohibition were available for decisions involving jurisdictional error.

35 Mary Crock and Edward Santow, ‘Privative Clauses and the Limits of the Law’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 347.

36 Aronson and Groves, above n 15, 940.

15.21 The courts have justified such interpretive approaches by reference to the assumption that legislation should, as far as reasonably possible, be interpreted in a way that favours constitutional validity.³⁷

15.22 Additionally, a separate constitutional mechanism which protects access to the courts is s 75(iii) of the *Constitution*. It vests original jurisdiction in the High Court in all matters ‘in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’.

Principle of legality

15.23 The principle of legality provides some protection to judicial review.³⁸ When interpreting a statute, courts will presume that Parliament did not intend to restrict access to the courts, unless this intention was made unambiguously clear.³⁹ For example, in *Magrath v Goldsbrough Mort & Co Ltd*, Dixon J said:

The general rule is that statutes are not to be interpreted as depriving superior Courts of power to prevent an unauthorized assumption of jurisdiction unless an intention to do so appears clearly and unmistakably.⁴⁰

15.24 The usual mechanism for restricting access to the courts is a ‘privative clause’—‘essentially a legislative attempt to limit or exclude judicial intervention in a certain field’.⁴¹ Some examples include clauses that make orders, awards or other determinations final, clauses forbidding courts from granting remedies traditionally used in judicial review, ‘no invalidity’ or ‘conclusive evidence’ provisions, and clauses prescribing time limits.⁴² Another, blunter technique is stipulates that anything a body does shall have effect as if enacted by Parliament, and vests exclusive jurisdiction in that body. However, privative clauses are read narrowly by the courts.

15.25 In *Public Service Association (SA) v Federated Clerks’ Union*, Dawson and Gaudron JJ said:

Privative clauses ... are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied.⁴³

37 The long history of authority to this effect was noted in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). While this approach may lead the courts to interpret privative clauses in a manner that gives them very limited scope, alternative approaches may be more likely to require courts to find that a privative clause was invalid on constitutional grounds. Once this possibility is recognised, the value of interpretive approaches that enable some effect to be given to privative clauses can be understood.

38 The principle of statutory interpretation known as the ‘principle of legality’ is discussed more generally in Ch 2.

39 *Momcilovic v The Queen* (2011) 245 CLR 1, [43]–[44] (French CJ).

40 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134.

41 Young, above n 6, 277.

42 Administrative Review Council, *The Scope of Judicial Review* (Report 47, Australian Government, 2006), Appendix 2.

43 *Public Service Association (SA) v Federated Clerks’ Union of Australia* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ). Quoted with approval in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30]–[32] (Gleeson CJ).

15.26 Dawson and Gaudron JJ went on to say:

Thus, a clause which is expressed only in general terms may be construed so as to preserve the ordinary jurisdiction of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted by failure to exercise jurisdiction or by an act in excess of jurisdiction.⁴⁴

15.27 Using this approach, the courts have held that a privative clause has no impact on remedies not named in that clause.⁴⁵ This includes constructions that, for instance, conclusions that protecting a tribunal's orders or directions did not protect a tribunal's rejection of a submission that there was insufficient evidence of a certain fact.⁴⁶ Similarly, the courts have held that protecting a decision did not extend to protecting unstated assumptions.⁴⁷

15.28 A 'no appeal' clause modifies or repeals an earlier statutory grant of appeal rights, and has no effect on the availability of judicial review.⁴⁸ For example, in *Hockey v Yelland*, the High Court held that a Queensland statute that provided that determinations by a medical board 'shall be final and conclusive' and the claimant 'shall have no right to have any of those matters heard and determined by an Industrial Magistrate, or, by way of appeal or otherwise, by any Court or judicial tribunal whatsoever'⁴⁹ did not 'oust the jurisdiction of the Supreme Court to issue writs of certiorari'. Gibbs CJ said:

It is a well recognized principle that the subject's right of recourse to the courts is not to be taken away except by clear words ... The provision that the board's determination shall be final and conclusive is not enough to exclude certiorari ... The words of the further provision ... are in my opinion quite inapt to take away from the Court its power to issue certiorari for error of law on the face of the record.⁵⁰

15.29 Provisions which prescribe time limits for bringing an action, or include alternative processes for bringing an appeal or challenging a decision have generally been accepted by courts, as they still provide for judicial oversight.⁵¹ In *Commissioner*

44 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132, [18] (Dawson and Gaudron JJ).

45 See, eg, *Palmer Tube Mills (Aust) Pty v Ltd v Semi* [1998] 4 VR 439, 459; *Barnard v National Dock Labour Board* [1953] 2 QB 18; *Woodward v Loadman (No 2)* 216 FLR 114. For example it was held that a clause ousting 'jurisdiction to grant relief or a remedy in the nature of certiorari, mandamus, prohibition or *quo warranto*' did not oust declaratory relief: *Woodward v Loadman (No 2)* 216 FLR 114.

46 *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119.

47 *R v Commonwealth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313, 321. A similar decision is *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531.

48 *R v McMillan; Ex Parte Metropolitan Milk Board* (1939) 41 WALR 110, 116; *R v Industrial Appeals Court; Ex Parte Henry Berry & Co (Australasia) Ltd* [1955] VLR 156, 163-4; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 271; *Bignell v Casino Control Authority (NSW)* (2000) 48 NSWLR 462, 480.

49 *Workers' Compensation Act 1916* (Qld) (repealed), quoted in *Hockey v Yelland* (1984) 157 CLR 124, 128 (Gibbs CJ).

50 *Ibid.*

51 Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (Lexis Nexis Butterworths, 3rd ed, 2012), [15.3.6]. However, given the constitutionally entrenched minimum provision of judicial review, (discussed below), it is unclear whether any time limits can set an absolute deadline for access to judicial review: *Hoxton Park Residents Action Group Inc v*

of *Taxation v Futuris Corporation Ltd*, the High Court held that conclusive evidence and no invalidity clauses do not constitute privative clauses where full appeal rights are available.⁵²

International law

15.30 Article 14.1 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that in the determination of a person's 'rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.⁵³ The phrase 'suit at law' has been taken to include some administrative law matters, and this right extends to all individuals, including non-citizens.⁵⁴

Bills of rights

15.31 In some countries, bills of rights or human rights statutes provide some protection of procedural fairness.

15.32 In the United States, persons enjoy a constitutional guarantee of due process in the administration of the law.⁵⁵ Any person who alleges a deprivation of due process or equal protection, may bring an application for review of the constitutionality of the action (or failure to act). In New Zealand, art 27(2) of the *New Zealand Bill of Rights Act 1990* (NZ) grants a right to judicial review to a person affected by a decision by a public authority or tribunal.

Justifications for limits on judicial review

15.33 Limits on judicial review have been justified on a number of grounds, including the need for certainty and efficiency. Professor Simon Young has written that privative clauses

have been employed by parliaments over many years for many reasons—a desire for finality or certainty, a concern about sensitivity or controversy, a wish to avoid delay and expense, or a perception that a matter requires specialist expertise and/or awareness of executive context.⁵⁶

15.34 However, stakeholders expressed concerns about current restrictions on access to the courts. They emphasised that restrictions should only be imposed in exceptional circumstances.

Liverpool City Council [2010] NSWLEC 242 (26 November 2010) [53]. A deadline cannot exclude access to judicial review by way of the constitutional writs set out in s 75(v) of the *Constitution: Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 672.

52 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 167.

53 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.1.

54 United Nations Human Rights Committee, *General Comment No 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial* 90th Sess, UN Doc CCPR/C/GC/32 (23 August 2007) [16]–[17].

55 *United States Constitution* amend V.

56 Young, above n 6, 277.

15.35 The Refugee Advice and Casework Service submitted that restrictions on access to judicial review should require ‘a heavy burden of proof to justify encroachment upon a principle so central to the rule of law’.⁵⁷ The Public Interest Advocacy Centre suggested that any limits on judicial review should be ‘strict, limited and exceptional, closely tied to legitimate purpose and justifiable on public interest grounds’.⁵⁸ The Human Rights Law Centre submitted that where ‘powers are invasive or infringe upon rights and freedoms, there should be a proportionate availability of judicial review’.⁵⁹

Laws that restrict access to the courts

15.36 Set out below is a short discussion of three areas of Commonwealth law which have sought to exclude judicial review by way of privative clauses, some of which have already been considered by the courts.

Migration Act 1958 (Cth)

15.37 Restrictions on access to the courts under the *Migration Act 1958* (Cth) (*Migration Act*) were introduced in 1992, with limits imposed on grounds for review, and stricter time limits to bring an application for review.⁶⁰ A mandatory requirement to seek merits review before accessing judicial review was also introduced.⁶¹ Following that, additional attempts were made to impose absolute time limits,⁶² include a no invalidity clause, and most controversially, to exclude judicial review for any administrative decisions under the *Migration Act*.

Time limits

15.38 The *Migration Act* stipulates a 35-day time limit for an application in the Federal Circuit Court for judicial review.⁶³ The Federal Circuit Court has the power to extend that time limit, upon application, if it considers that it is necessary in the interests of the administration of justice to make the order.⁶⁴ However, the High Court has held that the time limit, relating as it does to ‘migration decisions’, does not apply to an application for review before a decision is made.⁶⁵

No invalidity clauses

15.39 Section 69(1) of the *Migration Act* provides that

non-compliance by the Minister with Subdivision AA or AB or section 494D in relation to a visa application does not mean that a decision to grant or refuse to grant

57 Refugee Advice and Casework Service, *Submission 30*.

58 Public Interest Advocacy Centre, *Submission 55*.

59 Human Rights Law Centre, *Submission 39*.

60 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.11].

61 *Ibid*.

62 The High Court held that an attempt to impose a maximum 84-day limit on the time to bring an application for judicial review was constitutionally invalid: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

63 *Migration Act 1958* (Cth) s 477(1).

64 *Ibid* s 477(2).

65 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

the visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed.

15.40 The High Court held that this provision does not affect the ability to test the validity of the decision in court. It provides temporary efficacy to visa decisions unless and until they are reviewed.⁶⁶

15.41 Under s 501G, a failure to provide reasons for a decision to cancel a visa does not affect the validity of the decision. However, the High Court held that mandamus could compel the decision maker to provide reasons. If the reasons demonstrate that a reviewable error was made, the applicant may bring an application for judicial review of that decision. The provision simply operates to ensure that a failure to give reasons, in and of itself, does not give rise to invalidity.⁶⁷

Ouster clause

15.42 In 2001, s 474 of the *Migration Act* was inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), seeking to oust the judicial review jurisdiction of the courts in migration decision. It states that 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.⁶⁸

15.43 As discussed above, in *Plaintiff S157 v Commonwealth*, the High Court read down this provision, stating that it does not apply to any decision involving jurisdictional error.⁶⁹ In *Re Refugee Tribunal; Ex parte Aala*, the High Court held that a jurisdictional error arises when a decision maker 'makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do'.⁷⁰ The High Court gave an expansive interpretation to the notion of jurisdictional error in this and later decisions, which means that the scope of decisions that may be affected by jurisdictional error—and thus not protected by a privative clause—is now very wide; so wide that it may be that an ouster clause offers no real protection against any legal error. It appears that there is little value in including such a clause in legislation.⁷¹

66 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 88, 98; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212, 223, 228.

67 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212.

68 *Migration Act 1958* (Cth) s 474(1).

69 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

70 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, [163].

71 See, eg, Aronson and Groves, above n 15, 940; Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne University Law Review* 870, 883; Crock and Santow, above n 35, 347.

15.44 One of the key rationales advanced for seeking to restrict access to the courts is that the volume and cost of litigation in the migration context is too high, and litigants seek to abuse the system to delay their removal from Australia.⁷²

15.45 The Legal and Constitutional Affairs Committee considered this issue during its Inquiry into the Migration Legislation (Judicial Review) Bill 1998. Submissions to that Inquiry stated that the large volume of litigation may also be due to the limited availability of lawyers to assist applicants and the complexity of migration litigation.⁷³ Further, high rates of withdrawal are the norm in all areas of litigation,⁷⁴ and ‘mischief is not indicated by leaving at the door of the court’.⁷⁵

15.46 Based on evidence given by the Federal Court in 1999, that 72.3% of migration cases were disposed of within nine months,⁷⁶ the Legal and Constitutional Affairs Committee stated that ‘it also appears that the amount of time to be gained from drawing out appeals to the courts may not always be extended’.⁷⁷

15.47 While the Legal and Constitutional Affairs Committee ultimately supported the use of a privative clause,⁷⁸ it also recommended that the Government consider, as a matter of high priority, other avenues to address issues raised during hearings, including relating to the availability of assistance, and abuse of process.⁷⁹ It also concluded that case management measures were the solution to dealing with abuse of process issues.⁸⁰

15.48 The Administrative Review Council (ARC), in its 2012 consideration of the separate statutory scheme for review of migration decisions, concluded that case management measures and assistance to applicants are more appropriate than excluding judicial review to reduce the volume and cost of litigation in the context of migration proceedings.⁸¹

15.49 Under s 494AA, judicial review is excluded (except under the *Constitution*) of matters relating to the entry, processing and detention of asylum seekers arriving by boat, who landed at an ‘excised offshore place’. The Explanatory Memorandum noted

72 Commonwealth, *Parliamentary Debates*, House of Representatives, Migration Legislation Amendment Bill (No. 4) 1997 Second Reading Speech, 25 July 2007 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

73 For a summary of these submissions, see Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.52]–[1.56].

74 Australian Law Reform Commission, Submission No 14 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

75 Australian Law Reform Commission, Transcript of Evidence to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

76 Federal Court of Australia, Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999.

77 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), [1.70].

78 *Ibid* rec 4.

79 *Ibid* rec 1.

80 *Ibid* [3.40].

81 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [6.16]; Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Judicial Review) Bill 1998* (April 1999), rec 2, [3.40].

that this bar on proceedings sought to ‘limit the potential for future abuse of legal proceedings’.⁸² The Senate Standing Committee for the Scrutiny of Bills did not accept this justification, stating that ‘such provisions are contrary to the principles and traditions of our judicial system which see judicial review and due process as fundamental rights’.⁸³

15.50 In 2013, the bar on legal proceedings under s 494AA was extended to any asylum seeker who arrived by boat at any place on or after 1 June 2013. This was a response to the *Report of the Expert Panel on Asylum Seekers*,⁸⁴ and sought to ensure that ‘all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive’.⁸⁵

15.51 Similar restrictions apply in relation to transitory persons.⁸⁶ Additionally, such a person cannot challenge, other than under the *Constitution*, any actions taken to bring them to Australia,⁸⁷ including for example the safety of vessels used for such transportation, or the use of reasonable and necessary force.⁸⁸

15.52 While these provisions explicitly do not seek to affect the constitutionally entrenched judicial review, they are drafted in a manner that appear to exclude a wide range of decisions under the *Migration Act* from review.

General corporate regulation

15.53 The Australian Securities and Investments Commission (ASIC) submitted that ss 1274(7A) and 659B of the *Corporations Act 2001* (Cth) are examples of provisions which restrict access to the courts.⁸⁹

15.54 Section 1274(7A) provides that a certificate of registration is conclusive evidence that the company is duly registered on the specified date, without recourse to judicial review which might invalidate the registration. ASIC submitted that this restriction was justified because the potential harm from setting aside the decision as a result of a review outweighs the public interest in the proper exercise of the power.⁹⁰

15.55 Section 659B precludes persons other than ASIC or certain officers or government agencies from seeking judicial review, other than under s 75(v) of the *Constitution*, in relation to a takeover bid until the bid is complete. However, the Takeovers Panel may decide whether there has been unacceptable conduct, and undertake merits review of ASIC decisions while the bid is ongoing. ASIC submitted

82 Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.

83 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2002* (February 2002), 46.

84 Angus Houston, Paris Aristotle, Michael L’Estrange, ‘Report of the Expert Panel on Asylum Seekers’ (August 2012).

85 Revised Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012.

86 *Migration Act 1958* (Cth) s 494AB.

87 *Ibid.*

88 *Ibid* s 198B(2).

89 Australian Securities and Investments Commission, *Submission 74*.

90 *Ibid.*

that the potential harm from delays arising from a review process outweigh the public interest in the proper exercise of the power.⁹¹

Taxation

15.56 The Tax Institute submitted that ss 175 and 177 of the *Income Tax Assessment Act 1936* (Cth) (*ITAA*)—as conclusive evidence provisions—restrict access to the courts.⁹² Under s 175, the validity of an assessment by the Commissioner of Taxation is not affected by non-compliance with provisions with the *ITAA*. Under s 177, the production of a notice of assessment is conclusive evidence of the due making of the assessment, and reviews of the assessment are only available under pt IVC of the *Taxation Administration Act 1953* (Cth). The High Court in *Commissioner of Taxation v Futuris Corporation Limited* held that the effect of s 175 of the *ITAA* is that relief under s 75(v) of the *Constitution* is available only if the assessment did not amount to a true assessment, because it is provisional, or not in good faith.⁹³

15.57 This reflects a general approach by the courts that, where adequate provision is made by statute for review by a court or tribunal, the court should, in its discretion, decline to exercise its judicial review jurisdiction.⁹⁴

15.58 The different approaches to no invalidity clauses⁹⁵ in the migration and taxation contexts emphasise that, in considering a privative clause, the question for the court is whether the applicant has access to the courts for redress, whether by way of appeal rights or judicial review.

Other issues

Decisions exempt from review under the ADJR Act

15.59 The Law Council of Australia submitted that decisions excluded from review under sch 1 of the *ADJR Act* should be examined, and the justification for their exclusion critically considered.⁹⁶ The Institute of Public Affairs noted that a large number of Acts are excluded from review under the *ADJR Act*.⁹⁷

15.60 The *ADJR Act* is a statutory expansion of the common law right to access to the courts. It is subject to a number of limits, some of which result in review under the *ADJR Act* being narrower than available at common law. However, the *ADJR Act* does not preclude judicial review in the areas it does not cover.

15.61 This is because, in addition to extending the High Court's original jurisdiction to the Federal Court, s 39B(1A)(c) vests the Federal Court with jurisdiction over 'any matter arising under any laws made by the Parliament, other than a matter in respect of

91 Ibid.

92 The Tax Institute, *Submission 68*.

93 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 [25].

94 See, eg, *Vanmeld Pty Limited v Fairfield City Council* (1999) 46 NSWLR 78, 106, 114; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 722–4.

95 Compare the treatment of: *Income Tax Assessment Act 1997* (Cth) s 175; *Migration Act 1958* (Cth) s 69(1).

96 Law Council of Australia, *Submission 75*.

97 Institute of Public Affairs, *Submission 49*.

which a criminal prosecution is instituted or any other criminal matter'. This has the effect—where other legislation does not override it—of allowing the Federal Court to undertake judicial review, even where the *ADJR Act* does not apply. The Administrative Review Council noted that 'there are fewer apparent limitations on the right to commence proceedings under s 39B(1) than under the *ADJR Act*'.⁹⁸

Standing

15.62 Standing refers to 'the set of rules that determine whether a person is entitled to commence proceedings'.⁹⁹ A number of stakeholders submitted that narrow standing provisions are not justified, noting that it may be difficult for representative organisations to demonstrate that they have standing to bring a claim.¹⁰⁰

15.63 The ALRC, in its 1996 report into standing in public interest litigation, recommended the adoption of open standing, allowing any person to commence and maintain public law proceedings, unless:

- the relevant legislation clearly excludes the class of persons of which the applicant is one; or
- it would not be in the public interest in all the circumstances, because it unreasonably interferes with a person with a private interest's ability to act differently.¹⁰¹

Conclusion

15.64 In light of the High Court's approach to privative clauses in *Plaintiff S157*, it appears that such clauses have little to no effect in limiting access to the courts. The ARC, in its 2012 consideration of the scope of judicial review, stated that privative clauses which attempt to 'restrict or exclude judicial review entirely will not be successful'.¹⁰²

15.65 The Australian Government should consider a review of privative clauses in Commonwealth laws. Where the underlying policy rationale is considered warranted, consideration should be given to whether alternative solutions which do not restrict access to the courts, and are more targeted and effective in addressing the underlying policy issue, may be implemented.

98 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [4.9].

99 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [1.1].

100 Public Interest Advocacy Centre, *Submission 55*; Law Council of Australia, *Submission 75*.

101 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) Rec 2.

102 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012), [6.15].