CASE NOTE AND COMMENT

TRUTH, JUSTICE AND THE AUSTRALIAN WAY – *PLAINTIFF S157 OF 2002 V COMMONWEALTH*

Helen Robertson[*]

INTRODUCTION

> In any written constitution, where there are disputes over [the lawfulness of ministerial or official action], there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is [the High Court]. The court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the parliament or of the executive to avoid, or confine, judicial review.[1]

In *Plaintiff S157 of 2002 v Commonwealth*[2] *('S157')* the High Court undermined the Commonwealth Parliament's attempt to strictly confine judicial review of migration decisions. Although the Court upheld the constitutional validity of s 474 of the *Migration Act 1958* (Cth) ('the *Migration Act*'), their Honours construed it in such a way that it has limited effect. The Court held that the privative clause set out in that section did not prevent the High Court, the Federal Court or the Federal Magistrates Court from examining whether the decision in question was tainted by jurisdictional error, nor from granting relief should such an error be found. The Court also held that the 35-day time limit on bringing proceedings in the High Court, set out in s 486A of the *Migration Act*, is ineffective. This case note considers the reasoning of the High Court and the implications of this decision for migration litigation.

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1 *Plaintiff S157 of 2002 v Commonwealth* (2003) 195 ALR 24, 52 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). As the plaintiff had applied for a protection visa under s 36 of the *Migration Act 1958* (Cth), s 91X of the Act prevented the High Court publishing his name.

2 (2003) 195 ALR 24; [2003] HCA 2.

Privative clauses present difficulties to courts because, on their face, they exclude all judicial review of certain decisions. This appears to contradict the rule of law, an assumption lying behind the *Constitution*,[3] which seeks to ensure that decision-makers are accountable for their actions, and act within the limits imposed by the *Constitution* and statutes.[4] There is an inherent difficulty in dealing with legislation setting out the rules by which officials must act, yet also containing a provision excluding all review of such actions. In the Commonwealth context, there is a struggle between the stated intention of Parliament and the entrenched jurisdiction of the High Court to review actions of Commonwealth officers, given in s 75(v) of the *Constitution*. This section provides that the High Court shall have original jurisdiction in all matters '[i]n which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.

In construing privative clauses, the courts have attempted to reconcile these tensions, although Aronson and Dyer note that 'courts usually respond to legislative attempts to limit or completely exclude the scope of judicial review of administrative action with a mixture of incredulity, disingenuous disobedience and downright hostility.'[5]

Over the last 50 years, the leading decision on privative clauses was *R v Hickman; Ex parte Fox and Clinton*.[6] This case established the 'classical'[7] principles of statutory construction which have guided the interpretation of privative clauses in both State and Commonwealth legislation.[8] Sir Anthony Mason has described the *Hickman* principle as 'an Australian home-grown expedient' which does not feature in the administrative law jurisprudence of any other common law jurisdiction and which is to be discouraged because it limits access to the courts through eliminating or curtailing rights.[9]

THE INTENTION OF PARLIAMENT – WHAT THE PRIVATIVE CLAUSE WAS MEANT TO DO

Section 474 ('the privative clause') was inserted into the *Migration Act* by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) ('the *MLAJR Act*'). This legislation

3 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 93 (Dixon J) (cited by Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *S157* (2003) 195 ALR 24, 52 [103]).

4 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502, 519 [72] (McHugh and Gummow JJ); Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279.

5 Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) 675.

6 (1945) 70 CLR 598 ('*Hickman*').

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

8 *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 ('*Coldham*'); *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.

9 Sir Anthony Mason, '*The Foundations and Limitations of Judicial Review*' (2001) 31 *AIAL Forum* 1, 20.

was originally introduced into Parliament as the Migration Legislation Amendment (Judicial Review) Bill 1998 ('the MLAJR Bill') but was not passed until 2001, in the wake of 'the Tampa crisis'. On 26 September 2001 the government introduced a package of seven bills which were described by Mr Ruddock, the Minister for Immigration and Multicultural Affairs, as legislation which would 'significantly boost the fight against people smugglers and strengthen the integrity of Australia's borders.'[10] In his second reading speech for the MLAJR Bill, the Minister indicated that the new judicial review scheme would 'restrict access to judicial review in all but exceptional circumstances.'[11] This was a response to the rapid escalation of migration litigation[12] which the government saw as evidence of 'a substantial number [of people] who are using the legal process primarily in order to extend their stay in Australia, especially given that one-third to one-half of all applicants withdraw from legal proceedings before hearing.'[13] The Minister noted that, of the cases which went to substantive court hearings, the merits-based decision was upheld in around 90 percent of cases.[14]

The Minister explained that the amendments to the *Migration Act* would apply to litigation in the Federal Court and the High Court. He was concerned that any restriction of access only to the Federal Court would inspire applicants to bring proceedings in the original jurisdiction of the High Court under s 75(v). Such a flow of migration cases 'has the potential to erode the proper role and purpose of the High Court.'[15]

A 'Hickman clause'

The government's proposal was to adopt a privative clause based on the clause considered by the High Court in *Hickman*. This case set out a rule of construction which assists in reconciling the conflict in legislation regulating official conduct but containing a privative clause. In *Hickman*, the Court considered reg 17 of the *National Security (Coalmining Industry Employment) Regulations 1941* (Cth), which provided that a 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.' Dixon J explained the effect of such a provision in the following way:

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

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10 Philip Ruddock, 'Australia's Border Integrity Strengthened by New Legislation' (Press Release, 26 September 2001, MPS 164/2001).

11 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31559.

12 In 1994–95, there had been nearly 400 applications before the Federal Court and the High Court; by 2000–01 there were around 1640 cases. In 1997, the cost of litigation for the Department of Immigration and Multicultural Affairs was nearly $9.5 million, excluding the cost of running the courts and by 2000–01 the cost to the Department exceeded $15 million (ibid 31560).

13 Ibid.

14 Ibid.

15 Ibid.

> 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.[16]

The privative clause in that case was ineffective to protect the orders made by the Local Reference Board because the Board attempted to decide a matter which was completely outside its authority.[17]

In *R v Murray; Ex parte Proctor*,[18] the High Court again considered reg 17. In his judgment, Dixon J added what is sometimes described as the fourth proviso, namely that the legislation under question must be construed as a whole to consider whether particular limitations on power or specific requirements

> are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action. For a clearly expressed specific intention of this kind can hardly give way to the general intention indicated by such a provision as reg. 17.[19]

This is referred to in a shorthand manner as a requirement to determine whether there are 'inviolable limitations' upon the jurisdiction or powers of the decision-maker.[20] There has been a debate about whether this requirement is additional to or is in fact inherent in the other provisos.[21]

The importance of the *Hickman* rule of construction in Commonwealth legislation is that it provides a mechanism for Parliament to avoid conflict with s 75(v) of the *Constitution*. The constitutional writs of prohibition and mandamus are available when jurisdictional error has been found in an administrative decision. If such jurisdictional error is made out, the decision is invalid. The High Court's jurisdiction to grant relief in such circumstances cannot be removed by Parliament. However, an interpretation of privative clauses based on *Hickman* is that they change the substantive law upon which the remedies depend.[22] They are a statutory indication that, despite what else the legislation may say, a decision is valid as long as the decision-maker complies with the four provisos. Therefore, there is no invalid decision and no basis for the grant of relief. In this way, privative clauses have been said to expand the jurisdiction of the decision-maker so that there is no error which can be remedied.[23]

Prior to the decision in *S157*, there was some debate about whether a privative clause could protect against jurisdictional error. It was fairly clear that a *Hickman* clause would not protect against a decision which displayed jurisdictional error on its

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16 (1945) 70 CLR 598, 614–15.
17 Ibid 618.
18 (1949) 77 CLR 387 ('*Murray*').
19 Ibid 400.
20 *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J); *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 274–5 (Brennan J).
21 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 274 (Brennan J); see also Aronson and Dyer, above n 5, 695.
22 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 205 (Deane and Gaudron JJ), 219 (Dawson J).
23 Ibid 194 (Brennan J).

face.[24] However, it was not clear whether such a clause would protect a decision which, although seemingly valid on its face, was tainted by jurisdictional error, for example because the decision-maker asked the wrong question, took into account irrelevant considerations or did not accord procedural fairness. It was clear there would be a real question as to whether s 474 would achieve its goals if it could not protect against these types of jurisdictional error.[25]

It is worth setting out the Minister's understanding of the effect of 'a *Hickman* clause' before turning to consider the terms of the section and the High Court's construction of the clause in *S157*. In his second reading speech, the Minister stated:

> Members may be aware that the effect of a privative clause such as that used in *Hickman's* case is to expand the legal validity of the acts done and the decisions made by decision-makers. The result is to give decision-makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Court are narrower than currently.
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> In practice, the decision is lawful provided:
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> - the decision-maker is acting in good faith;
> - the decision is reasonably capable of reference to the power given to the decision-maker—that is, the decision maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member;
> - the decision relates to the subject matter of the legislation—it is highly unlikely that this ground would be transgressed when making decisions about visas since the major purpose of the *Migration Act* is dealing with visa decisions; and
> - constitutional limits are not exceeded—given the clear constitutional basis for visa decision making in the *Migration Act*, this is highly unlikely to arise.[26]

Terms of sections 474 and 486A

Section 474 provides that:

> (1) A privative clause decision:
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> (a) is final and conclusive; and
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> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
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> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
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> (2) In this section:

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24 Mason, above n 9; Aronson and Dyer, above n 5, 691, citing *R v Commonwealth Rent Controller; Ex Parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361; *R v Central Reference Board; Ex Parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123; *Murray* (1949) 77 CLR 387 and *Hickman* (1945) 70 CLR 598, 618 (Dixon J).

25 Nicole Abadee, 'Commentary on Sir Anthony Mason's Paper—The Hickman Principle and Part 8 of the *Migration Act*' (Paper presented at the Gilbert and Tobin Centre of Public Law Constitutional Law Conference, Sydney, 15 February 2002). See also Leslie Zines 'Constitutional Aspects of Judicial Review of Administrative Action' (1998) 1 *Constitutional Law and Policy Review* 50.

26 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31561.

> ***privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

Section 474(3) sets out a large range of decisions included in the definition of 'privative clause decision'. These include granting, suspending or cancelling a visa; imposing a condition or restriction; revoking a declaration or 'doing or refusing to do any other act or thing'. The failure or refusal to make a decision, and conduct preparatory to the making of a decision, are also included in the definition.

It is clear from the structure of the legislation, the second reading speech and the explanatory memoranda that the privative clause was not intended to be taken literally. Indeed, the legislation also imposed time limits on the initiation of applications to the High Court, Federal Court and Federal Magistrates Court. The provision considered in *S157* concerned the 35-day time limit on bringing High Court proceedings, set out in s 486A:[27]

> (1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.
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> (2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.
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> (3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

Immediate impact on litigation

It was always clear that the privative clause was destined for High Court consideration, and that any lasting effect of the clause would not be seen until delivery of the High Court's judgment. However, it is interesting to note that on 3 February 2003, the day before the High Court was due to deliver judgment in *S157*, Mr Ruddock issued a press release stating that immigration litigation was at record levels.[28] As at 24 January 2003, there were 2250 cases before the courts or the Administrative Appeals Tribunal ('AAT'), compared with 1000 active cases in April 2001. There had been a 400% increase in the number of applications lodged with the courts and the AAT over the seven years between 1994–95 and 2001–02.

Despite the stated intention to avoid a flow of cases into the original jurisdiction of the High Court, a very large number of migration cases were brought in that

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27 This section was originally inserted by the *Migration Legislation Amendment Act (No 1) 2001* (Cth), which came into operation on 27 September 2001, five days before the commencement of the privative clause. The section was amended by the *MLAJR Act* to refer to 'a privative clause decision'.

28 Philip Ruddock, 'Immigration Litigation at Record Levels' (Press Release, 3 February 2003, MPS 6/2003).

jurisdiction. In the days following the decision in *S157*, single Justices of the High Court remitted approximately 696 migration matters to the Federal Court.[29]

DECISION OF THE HIGH COURT

Background

Plaintiff S157's application for a protection visa was refused by a delegate of the Minister. The refusal was affirmed by the Refugee Review Tribunal ('RRT') but set aside by the Federal Court. A differently constituted RRT again affirmed the delegate's decision and it was this affirmation which the plaintiff sought to challenge by way of judicial review. The plaintiff commenced proceedings, outside the 35-day time limit, against the Commonwealth in the original jurisdiction of the High Court by filing a writ of summons endorsed with a statement of claim. He also filed a draft order nisi which indicated that, in the absence of ss 474 and 486A, he would have challenged the RRT's decision on the ground that it breached the requirements of natural justice.[30]

Gummow J stated a case for consideration by the Full Court. The questions stated were:

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

(b) Is s 474 of the *Migration Act* invalid in respect of an application by the plaintiff to the High Court of Australia for relief under s 75(v) of the *Constitution*?[31]

Arguments of the parties regarding section 474

The plaintiff argued that s 474 should be read literally and that it is therefore invalid because it is directly inconsistent with s 75(v) of the *Constitution*.[32]

The Commonwealth conceded that s 474 cannot validly oust the jurisdiction conferred by s 75(v). It argued that the section was intended to expand the jurisdiction of the decision-maker so that the decision is valid as long as it complies with the three '*Hickman* provisos', being:

(a) that the decision was a bona fide attempt to exercise the power in question;

(b) that the decision related to the subject matter of the legislation; and

(c) that it was reasonably capable of reference to the power given to the body.

A decision made in accordance with these principles does not involve jurisdictional error and therefore the grounds for relief by way of constitutional writs are not made out. The Commonwealth also argued that the *Migration Act* should be construed such

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29 See the transcripts of callovers of 198 Immigration Matters (High Court of Australia, Gaudron J, 6 February 2003) and of 494 Immigration Matters (High Court of Australia, Hayne J, 7 February 2003).

30 Facts taken from *S157* (2003) 195 ALR 24, 37 [44]-[45] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

31 See ibid 38 [46].

32 Ibid 39 [52].

that s 474 sets out the only requirements for valid decision-making and there are no other 'inviolable limitations'.[33]

Judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ on section 474

Justices Gaudron, McHugh, Gummow, Kirby and Hayne ('the majority') wrote a joint judgment.[34] Chief Justice Gleeson and Callinan J wrote separate judgments but agreed with the orders set out in the joint judgment.

Construction of privative clauses generally

The majority commenced their consideration of the issues with a discussion of privative clauses generally. Early in their discussion, their Honours established that privative clauses cannot protect against a decision which exhibits jurisdictional error on its face.[35]

Looking back at statements of Dixon J in *Hickman* itself and at subsequent cases, their Honours held that

> the so-called '*Hickman* principle' is simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions. Once this is accepted, as it must be, it follows that there can be no general rule as to the meaning or effect of privative clauses. Rather, the meaning of a privative clause must be ascertained from its terms; and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made, its effect will depend entirely on the outcome of its reconciliation with the other provision.[36]

The majority then moved to set out some principles for this process of reconciliation, before construing s 474 itself. Contrary to the Commonwealth's submission, their Honours held that 'a proper reading' of Dixon J's statements in *Murray* is **not** that decisions are protected as long as they conform with the *Hickman* provisos. Rather, their Honours held that the privative clause will only give the protection it 'purports to afford' if the provisos are satisfied. One must ascertain what this level of protection is by considering the terms of the clause in question.[37] The majority described the Commonwealth's argument that the decision-maker's powers are expanded as 'inaccurate',[38] without acknowledging that this argument was based on existing case law.[39]

Inviolable limitations?

Their Honours rejected the Commonwealth's argument that s 474 should be construed as impliedly repealing any statutory limitations. Although this argument was based on an application of Dixon J's comments in *Murray*, the majority stated that the Commonwealth was not attempting to construe the legislation as a whole but was

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33 Ibid 39 [53], 42 [62].

34 For convenience, the judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ will be referred to as the 'majority judgment'.

35 *S157* (2003) 195 ALR 24, 41 [57].

36 Ibid 41–2 [60].

37 Ibid 42 [64].

38 Ibid.

39 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 194 (Brennan J). In *S157*, Callinan J also rejected this argument but did acknowledge that it was based on Brennan J's statement (see (2003) 195 ALR 24, 68–9 [160]).

placing a construction on one provision and then asserting that all other provisions may be disregarded.[40] This was said to 'ignore' Dixon J's test. Their Honours supported this conclusion by reference to *Coldham*, where Mason ACJ and Brennan J held that the privative clause in s 60(1) of the *Conciliation and Arbitration Act 1904* (Cth) could not affect the operation of an inviolable limitation which they identified in the legislation.[41]

Critically to their decision, the majority held that the Commonwealth's argument about inviolable limitations went beyond anything which was said in *Hickman*. They therefore held that, because the Minister relied on *Hickman* to explain s 474 in his second reading speech, Parliament could not have intended the legislation to have a meaning which went beyond *Hickman*. Therefore, Parliament did not intend s 474 to be construed as impliedly repealing all statutory limitations on power conferred by the *Migration Act*.[42] Their Honours also held that s 474 on its face did not contain any implied repeal of limitations in the *Migration Act* because it was expressed in terms of limitations on access to courts.[43]

The argument about parliamentary intention is disingenuous. The second reading speech is very clear in expressing Parliament's view that the only requirement for a valid decision was compliance with the provisos identified by the Minister. In addition, although there was reliance upon *Hickman*, this does not indicate that Parliament intended the legislation to be constrained by whatever interpretation the High Court might put upon *Hickman*.

Although there is no implied repeal of statutory limitations, the majority did indicate that the effect of s 474 may be that:

> some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of a decision. However, that is a matter that can only be determined by reference to the requirement in issue in a particular case.[44]

This process of reconciliation is not explained clearly by the majority. However, Gaudron and Kirby JJ attempted to grapple with the construction exercise in their dissenting judgment in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002*,[45] which was delivered on the same day as *S157*.

Construction and validity of section 474

The majority then turned to the construction of s 474, noting that there are two basic rules of construction which apply to the interpretation of privative clauses:

(a) Commonwealth privative clauses should be construed consistently with the Constitution if such an interpretation is fairly open; and

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40 (2003) 195 ALR 24, 43 [65].
41 (1983) 153 CLR 415, 419.
42 (2003) 195 ALR 24, 44 [67].
43 Ibid [68].
44 Ibid [69].
45 (2003) 195 ALR 1; see further below, text accompanying nn 95–98.

(b) it is presumed that Parliament does not intend to cut down the jurisdiction of courts except to the extent that the legislation in question expressly so states or necessarily implies.[46]

Their Honours noted that there are constitutional requirements which must be considered in construing privative clauses. First, they cannot oust the jurisdiction given by s 75(v). Second, they cannot infringe Ch III by impermissibly conferring power on a non-judicial decision making body to conclusively determine the limits of its own jurisdiction.[47] The majority also noted that a privative clause cannot oust the jurisdiction conferred on the High Court by other paragraphs of s 75, including s 75(iii) concerning matters in which the Commonwealth is a party.

The majority then reached the ratio decidendi of their decision. Their Honours held that s 474(1)(c) could not be read in isolation from the definition of 'privative clause decision' in s 474(2). That definition referred to decisions 'made, proposed to be made, or required to be made ... under this Act'. Their Honours held that:

> [o]nce it is accepted, as it must be, that s 474 is to be construed conformably with Ch III of the Constitution, specifically, s 75, the expression 'decision[s]... made under this Act' must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act.[48]

This finding was inevitable once the majority had decided that s 474 did not expand the powers of the decision-maker so as to prevent the existence of jurisdictional error in the first place. This interpretation of 'privative clause decision' had also been foreshadowed in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[49] where the High Court held that an administrative decision infected by jurisdictional error is not, in law, 'a decision'. The majority applied this reasoning and held that, in relation to the *Migration Act*, a decision involving jurisdictional error is not 'a decision ... made under this Act' and therefore is not 'a privative clause decision' protected by the privative clause.

Although this seems to open the floodgates to any argument that a decision is infected by jurisdictional error, the majority said that it 'may [still] be necessary to engage in the reconciliation process earlier discussed to ascertain whether the failure to observe some procedural or other requirement of the Act constitutes an error which has resulted in a failure to exercise jurisdiction or in the decision-maker exceeding its jurisdiction.'[50] Therefore, there must be an examination of the limitations or restraints found in the Act.[51]

Availability of the constitutional writs

The plaintiff indicated in his draft order nisi that he would seek relief by way of prohibition, certiorari and mandamus. As noted above, prohibition and mandamus are only available in relation to jurisdictional error. As s 474 does not protect decisions

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46 (2003) 195 ALR 24, 44 [71]–[72]. As noted in text accompanying note above, it could be argued that Parliament's intention to cut down the jurisdiction of courts was quite clear in relation to s 474.

47 Ibid 45 [74]–[75].

48 Ibid 45 [76].

49 (2002) 187 ALR 1.

50 *S157* (2003) 195 ALR 24, 46 [77].

51 Ibid 46 [78].

involving jurisdictional error, it was held to be constitutionally valid in its application to the proceedings which the plaintiff would initiate.

The majority made two significant comments regarding certiorari and injunctions, and in so doing reinforced the Australian distinction between jurisdictional and non-jurisdictional errors.[52] Their Honours noted that it has long been accepted that certiorari may be issued as ancillary to the constitutional writs of mandamus and prohibition,[53] and may therefore be issued if jurisdictional error is found. However, certiorari is also available to quash a decision on the basis of non-jurisdictional error. Following the decision in *Re McBain; Ex parte Australian Catholic Bishops Conference*,[54] certiorari may also issue in the exercise of jurisdiction conferred by ss 75(iii) and 76(i) of the *Constitution*, respectively matters in which the Commonwealth is a party or which arise under the *Constitution* or involve its interpretation. These provisions are not dependent upon the existence of jurisdictional error, indicating that in some matters, judicial review of administrative actions may not be confined by the notion of jurisdictional error. As certiorari is not entrenched, Parliament may legislate to prevent the grant of relief for non-jurisdictional error. Due to the majority's construction of 'privative clause decision', they held that s 474 does not prevent the issue of certiorari as ancillary to mandamus or prohibition, but validly does prevent its issue for non-jurisdictional error of law on the face of the record.[55]

In relation to injunctive relief, the majority held that such relief may be available on wider grounds than those which found relief by way of prohibition and mandamus. They stated that, in any event, injunctive relief would clearly be available for 'fraud, bribery, dishonesty or other improper purposes' and noted that the *Hickman* bona fide proviso 'presumably has the consequence that s 474 permits review in all such cases.'[56] If it did not, their Honours considered that there would be a real question as to the constitutional validity of s 474. However, the draft order nisi did not seek relief by way of injunction, so the question did not need to be explored in this judgment.

The rule of law

Lest it be thought that the majority had engaged in unduly narrow reasoning in their construction of a privative clause decision, they went out of their way to 'emphasise that the difference in understanding what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble.'[57]

After considering, and rejecting, alternative legislative schemes which the Commonwealth had suggested in argument would achieve the same result as a privative clause,[58] the majority returned to the central significance of s 75(v) of the *Constitution*. Their Honours considered that the provision of the constitutional writs and the conferral upon the High Court of the irremovable jurisdiction to issue them to

52 Compare with the English and New Zealand position where this distinction has been discarded; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Hull University Visitor; Ex parte Page* [1993] AC 682; *Peters v Davison* [1999] 2 NZLR 164.

53 *S157* (2003) 195 ALR 24, 46 [80].

54 (2002) 188 ALR 1.

55 *S157* (2003) 195 ALR 24, 46–7 [80]–[81].

56 Ibid 46 [82].

57 Ibid, 47 [98].

58 See further discussion commencing below, text accompanying nn 118–27.

an officer of the Commonwealth reinforced the significance of the rule of law in the *Constitution*. In ringing tones, the majority reaffirmed the effect of s 75(v) as follows:

> The reservation to this court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this court. The court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the parliament or of the executive to avoid, or confine, judicial review.[59]

Judgment of Gleeson CJ

Chief Justice Gleeson also dismissed the plaintiff's argument that s 474 should be read literally, noting the Commonwealth's concession that such a reading would be invalid, at least to the extent that it ousted the jurisdiction of the High Court.[60] The question then is how to reconcile the potential inconsistency within legislation, which confers duties, power or jurisdiction on officials or tribunals whilst also purporting to deprive courts of jurisdiction to compel the performances of such duties or to control excesses of power.[61]

The Chief Justice noted that the High Court's interpretation of privative clauses had been developed over a long time and that Parliament had legislated in light of the High Court's acceptance of principles laid down by Dixon J in *Hickman*.[62] However, his Honour rejected the suggestion that Dixon J was formulating a principle of construction which excluded all others, and rather held that 'by treating the exercise as a matter of construction he was opening the way for the application of other principles as well'.[63] Significantly, Gleeson CJ considered that these other principles would be as well known to Parliament as *Hickman* itself.

The Chief Justice considered the detailed visa regime set out in the *Migration Act* and held that, in such a context, the relevant principles of statutory construction are:[64]

(a) where legislation has been enacted in relation to international obligations (such as those relating to refugees), in cases of ambiguity the Court should favour a construction which accords with Australia's obligations;

(b) courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly shown by

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59 *S157* (2003) 195 ALR 24, 52 [104].
60 Ibid 26–27 [3]-[9]; 32 [22].
61 Ibid 27 [10].
62 Ibid 28–32 [11]–[22].
63 Ibid 33 [26].
64 See ibid 33–5 [27]–[33].

unmistakable language and there is an indication that the legislature consciously decided to curtail such rights or freedoms;

(c) the Australian *Constitution* is framed upon the assumption of the rule of law, of which judicial review of administrative action is an expression;

(d) 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';[65]

(e) (e) the relevant task is to reconcile the privative provision and the rest of the *Migration Act*, rather than reading the rest of the legislation as subject to s 474.

The consequence of the final principle of construction set out above is that Gleeson CJ rejected the Commonwealth's argument that s 474 had 'brought about a radical transformation of the pre-existing provisions' in the *Migration Act* with the result that there were no inviolable limitations in the Act.[66]

His Honour considered that these principles of statutory construction led to the conclusion that Parliament did not display an intention that decisions made unfairly and through a denial of natural justice should stand as long as there was a bona fide attempt to make a decision, stating that '[p]eople whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness'.[67] He noted that decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in doubt.

A significant difference between the judgments of the Chief Justice and the majority is that the Chief Justice considered that concepts such as 'manifest defect in jurisdiction' or 'manifest fraud' were relevant in determining whether there was jurisdictional error which would not be protected by the privative clause.[68] This appears to give a privative clause a wider scope of operation than that envisaged by the majority. As the Chief Justice noted, the concept of degrees of error is not always easy to grasp but it is one which plays a part in other forms of judicial review, such as appellate review.[69]

Judgment of Callinan J

Although the result reached by Callinan J is the same as the other members of the Court, his reasons for judgment are markedly different. His Honour considered that the three requirements set out in *Hickman* and the discussion of inviolable limitations in *Murray* establish two important concepts:

(a) there is distinction between the exercise of executive power and judicial power and the court's scrutiny of executive power should be undertaken with an understanding that officials and courts operate in different ways and have different objects to achieve; and

(b) the very nature of executive power means that perfection will be unachievable, that errors will inevitably be made and that it is not the role

65 Quoting *Public Service Association (SA) v Federated Clerks Union* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ).
66 *S157* (2003) 195 ALR 24, 35 [34].
67 Ibid [37].
68 Ibid 28–30 [13]–[18].
69 Ibid 28 [13].

> of courts to correct all of them, even if sufficient judicial resources would be available.[70]

His Honour looked to history, statutory interpretation and political philosophy in resolving the issues raised in the case.[71] Alone of all the judges, Callinan J considered the need for the judiciary to pay deference to, and to refrain from intruding upon, the roles of the Parliament and the executive.[72] Migration is fundamentally a matter for the Parliament, ministers and the officials who administer the *Migration Act*.[73] His Honour noted that governments and parliaments are not free agents. They represent the will of the people and they must decide on a day to day basis how resources should be allocated, for example, how many opportunities for review should be given to migration applicants. This is not a simple question, as evidenced by the fact that there are different approaches taken by different countries in the world.[74]

Whilst his Honour recognised that such political considerations cannot govern the meaning of the *Constitution* or the *Migration Act*, he emphasised that there are essential differences between the exercise of judicial and executive power. These differences are reflected in the separation of powers in the *Constitution* and although the High Court must find and apply the law, it should not be blind to the realities which confront governments and which would have been influential in the Parliament's enactment of provisions of the *Migration Act*. In a significant recognition of the role of Parliament, his Honour stated that:

> If the parliament, and the executive which no doubt moved it are wrong about the subject matter and purposes of the *Migration Act*, then that is for the electorate to say and not the courts. Whether the confrontation of issues of those kinds is worth the political cost involved is for the politicians and not the courts. What the courts, including this one have to decide is whether the *Migration Act* can lawfully achieve either wholly or in part what the parliament has set out to achieve, a question which has to be answered having regard to the settled principle that only clear words will suffice to defeat uncontestable human rights, and that privative clauses are therefore generally strictly construed. It remains important however to keep in mind that the challenge here at this stage of the proceeding is to the will of parliament expressed by an enactment, and not just to an administrative or executive decision.[75]

Justice Callinan concluded that a privative clause could not protect against a manifest defect in jurisdiction or a departure from an essential or imperative requirement on the part of the relevant officer or tribunal, or material failure to comply with mandatory provisions.[76] His Honour noted comments by Mason ACJ and Brennan J in *R v Coldham; Ex parte Australian Workers Union*[77] and concluded that 'there might be degrees of limitation upon power, some violable and therefore legally tolerable, and some more serious and therefore inviolable and legally intolerable.'[78]

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70 Ibid 67 [159].
71 Ibid 52 [108], quoting a statement of Menzies in *Afternoon Light* (1967).
72 Ibid 52–6 [108]–[118].
73 Ibid 54 [112].
74 See Ibid 56 [117]; also 59 [125].
75 Ibid 56 [118].
76 Ibid 67–8 [159]–[160].
77 (1983) 153 CLR 415.
78 *S157* (2003) 195 ALR 24, 69 [160].

Time Limits — section 486A

The plaintiff put forward two arguments that s 486A was constitutionally invalid:

(a) it is inseverable from s 474 and therefore invalid because s 474 is invalid;

(b) any time limit on the High Court's s 75(v) jurisdiction is invalid unless provision is made for the Court to extend time for the commencement of proceedings.[79]

The Commonwealth argued that s 486A merely regulated the High Court's s 75(v) jurisdiction and did not eliminate rights of review. Moreover, it worked in combination with s 474 so that a decision could have been set aside if there was a breach of the *Hickman* provisos and proceedings were commenced within 35 days. After that point, Parliament intended the decision to be treated as valid and effective irrespective of any kind of error affecting the decision.

The majority avoided deciding the constitutional question because of the construction which they placed on 'privative clause decision'. Under their construction, s 486A has no effect in respect of decisions where there has been jurisdictional error, although it may have some effect if injunctive relief is sought. The majority recognised that this meant that s 486A has almost no work to do. However, this was justified on the grounds that the fundamental premise of the legislation is unsound because the Parliament wrongly treated the three *Hickman* provisos as the only limitations upon the power of decision-makers under the *Migration Act*. Therefore, it is not surprising that they also passed sections which have no work to do.[80] Chief Justice Gleeson agreed with the majority's construction of s 486A.[81]

Justice Callinan dealt with the constitutional issue and held that while Parliament can regulate the procedure by which proceedings for relief under s 75(v) may be brought, such regulation must not actually amount to a prohibition. His Honour considered that s 486A would be invalid to the extent to which it imposed a 35-day time limit, noting that persons seeking the remedies may be incapable of speaking English and may be detained in places remote from lawyers. He did consider that a substantially longer period might be valid, or even a 35-day limit if accompanied by power to extend time.[82]

ISSUES ARISING FROM THE DECISION

What is jurisdictional error?

The critical question arising out of the decision in *S157* is identifying the content of jurisdictional error. The absence of any discussion regarding the continuing significance of cases regarding jurisdictional error, such as *Project Blue Sky Inc v Australian Broadcasting Authority*,[83] *Craig v South Australia*[84] and *Minister for Immigration*

79 Ibid 47–8 [84]
80 Ibid 48–9 [86]–[91].
81 Ibid 36 [41].
82 Ibid 71 [173]–[176].
83 (1998) 194 CLR 355.
84 (1995) 184 CLR 163. This decision is only referred to by Callinan J: *S157* (2003) 195 ALR 24, 59 [125], in a discussion about the availability of certiorari to correct non-jurisdictional error of law.

and Multicultural Affairs v Yusuf,[85] is surprising. The majority refer to examples such as 'a failure to discharge imperative duties or to observe inviolable limitations or restraints' as examples of jurisdictional error.[86] These tests do not reflect standard jurisdictional error principles (for example, denial of procedural fairness, identification of a wrong issue or reliance on irrelevant material) but come from cases concerning inviolable limitations in statutes.[87]

Perhaps this reflects the decision of the majority in *Project Blue Sky Inc v Australian Broadcasting Authority*,[88] which rejected the traditional analysis of 'mandatory' or 'directory' provisions in determining whether an act done in breach of a condition regulating the exercise of a power is invalid. Rather, the majority in that case considered that the relevant question is 'whether it was a purpose of the legislation that an act done in breach of the provisions should be invalid'.[89] The majority in *S157* indicated that s 474 may assist in determining whether or not a procedural or other requirement is 'essential to the validity of a decision'.[90] This suggests that s 474 might protect against a breach of a non-essential requirement in the legislation, which therefore would not be a jurisdictional error.

It is disappointing that the companion judgment to *S157* (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134 of 2002*[91]) does not assist in answering some of the difficult questions arising from *S157*. This case involved a challenge to decisions of the RRT and the Minister by reason of alleged jurisdictional error. The operation of s 474 was again in question. The majority (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ) found that there had been no missapplication of relevant criteria by the RRT and no jurisdictional error.[92] Further, there was no denial of procedural fairness by the RRT.[93] In addition, the majority considered that 'considerations flowing from the text and structure' of the relevant provision of the *Migration Act* revealed that there was no jurisdictional error on behalf of the Minister, nor illegality or impropriety such as to attract injunctive relief and s 75(v).[94]

In their dissenting judgment, Gaudron and Kirby JJ did attempt the task of reconciling s 474 with the sections of the *Migration Act* in question. Their Honours described the decision in *S157* as requiring an examination of statutory limitations to ascertain whether, in the light of s 474, non-observance of the limitations does or does

85 (2001) 206 CLR 323.
86 *S157* (2003) 195 ALR 24, 45 [76].
87 The majority referred to *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J). See also *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J); *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 632 (Gaudron and Gummow JJ).
88 (1998) 194 CLR 355. The majority was composed of McHugh, Gummow, Kirby and Hayne JJ, all members of the majority in *S157*. However *Project Blue Sky* is only referred to by the majority at 48 [90] in their discussion about s 486A.
89 Ibid 390.
90 *S157* (2003) 195 ALR 24, 44 [69].
91 (2003) 195 ALR 1.
92 Ibid 34 [32].
93 Ibid 35–6 [33]–[40].
94 Ibid 38 [47].

not result in jurisdictional error.[95] Reconciliation between a provision of an Act and a privative clause may not be possible if the particular provision imposes 'an inviolable jurisdictional restraint'.[96] On the other hand, provisions are more likely to be reconcilable if the power to make a decision involves a significant discretionary element or if there is no detailed specification of matters which must be satisfied before a particular decision can be taken. It is unlikely that such provisions would impose restraints which must be observed for the decision to be valid.[97] Their Honours decided that, in the light of these considerations, the RRT had made a jurisdictional error because it had not considered all of the criteria specified in s 65(1) before it made a valid decision to grant or refuse a protection visa.[98]

Application in cases since *S157*

Between February and June 2003, the Federal Court and the Federal Magistrates Court have had to grapple with many difficult issues concerning the content of jurisdictional error and the effect of s 474.

An interesting aspect of the judgment in *S157* is that the decision of a Full Court of the Federal Court in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[99] is completely ignored.[100] In that decision, a bench of five judges of the Federal Court considered five appeals which raised issues concerning the construction and validity of s 474. The decision was complex, each judge writing a separate judgment and majorities lining up differently in different matters. The Full Court unanimously held that s 474 was constitutionally valid and did not contravene Ch III of the *Constitution*.[101] The Court held that the *Hickman* principles applied to the construction of s 474 but differed in their analysis of how those principles operate. Significantly, a majority held that jurisdictional errors of the type identified by the High Court in *Craig v South Australia* were protected by s 474.[102]

There was some early uncertainty about the status of *NAAV* following the decision in *S157*.[103] Some Federal Court decisions initially suggested that the latter decision did not open up all *Craig* type grounds of jurisdictional error but focused attention only on

95 Ibid 44 [72].
96 Ibid 76 [79].
97 Ibid 46–7 [80]–[81].
98 Ibid 48 [88]. Their Honours did not need to consider other arguments regarding the RRT's decision or the Minister's decision. See ibid 50–1 [97]–[100].
99 (2002) 193 ALR 449 ('*NAAV*').
100 The only reference is to be found in the judgment of Gleeson CJ at 35 [36] and this comment does not deal with the substance of the decision.
101 *NAAV* (2002) 193 ALR 449, 458–9 [20]–[22] (Black CJ), 484 [105] (Beaumont J), 522 [308] (Wilcox J), 589–90 [538]–[546] (French J), 621 [645]–[646] (von Doussa J).
102 Ibid 460 [30] (Black CJ), 533 [374] (Wilcox J), 619–21 [636]–[644] (von Doussa J); but see 566 [474]–[476] (French J).
103 For example, *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 144 (Unreported, Gyles J, 6 March 2003) [13]; *Koulaxazov v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 75 (Unreported, Madgwick, Gyles and Conti JJ, 2 May 2003) [73] (Conti J); *WACM v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 92 (Unreported, French, Carr and Finn JJ, 15 May 2003) [36]; *SBBA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 90 (Unreported, Weinberg, Stone and Jacobson JJ, 9 May 2003) [16–17].

essential requirements and manifest defects in jurisdiction.[104] However, a Full Court of the Federal Court has recently declared that the reasoning of the majority in *NAAV* is incorrect and that the decision is no longer binding authority.[105]

A brief survey of cases indicates that Full Courts of the Federal Court have identified the following bases of jurisdictional error sufficient to avoid s 474:

(a) failure to ask the correct question;[106]

(b) failure to consider all elements of a claim or failure to properly undertake the jurisdictional task of review;[107]

(c) failure to take into accout relevant considerations;[108]

(d) failure to correctly address prescribed criteria for visa;[109]

(e) failure to give procedural fairness.[110]

Issues which have not amounted to jurisdictional error are:

(a) failure to refer to each and every aspect of the evidence adduced before the decision-maker;[111]

(b) failure to comply with procedural requirements in s 424A(2) in circumstances where there was no unfairness or failure to accord procedural fairness;[112]

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104 *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 144 (Unreported, Gyles J, 6 March 2003).

105 *SBBG v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 121 (Unreported, Gray, von Doussa and Selway JJ, 6 June 2003) [19].

106 *Zahid v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 24 (Unreported, French, Lindgren and Finkelstein JJ, 26 February 2003).

107 *SAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 65 (Unreported, Cooper, Carr and Finkelstein JJ, 11 April 2003); *SCAT v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 80 (Unreported, Madgwick, Gyles and Conti JJ, 30 April 2003); *VGAO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 68 (Unreported, Wilcox, Cooper and Allsop JJ, 23 April 2003); *NAPL v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 94 (Unreported , Ryan, Finkelstein and Downes JJ, 20 May 2003).

108 *VGAO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 68 (Unreported, Wilcox, Cooper and Allsop JJ, 23 April 2003); *Phuc v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 18 (Unreported, French, Lee and Nicholson JJ, 30 May 2003).

109 See *Scargill v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 116 (Unreported, French, von Doussa and Marshall JJ, 3 June 2003) for an interesting application of Gaudron and Kirby JJ's reasoning in *S134* (2003) 195 ALR 1, 9–10 [36]–[37].

110 *Wu v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 81 (Unreported, Moore, Emmett and Bennett JJ, 6 May 2003); *VAAC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 74 (Unreported, North, Merkel and Weinberg JJ, 17 April 2003); *Bax v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 55 (Unreported, Carr, Merkel and Hely JJ, 27 March 2003).

111 *WADK v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 48 (Unreported, French, Hill and Marshall JJ, 18 February 2003).

112 *NAHV of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 102 (Unreported, Carr, Kiefel and Allsop JJ, 23 May 2003).

(c) a single erroneous finding of fact which cannot be characterised as a jurisdictional fact and which does not negate the bona fides of the Tribunal;[113]

(d) disappointing a legitimate expectation when no injustice or unfairness results;[114]

As might have been expected, the High Court's construction of s 486A has impacted upon the construction of s 477, which sets out time limits for the commencement of proceedings in the Federal Court. A Full Court of the Federal Court has held that an objection to competency based on a failure to comply with s 477 cannot be upheld unless there has been a determination that the relevant decision is a privative clause decision, and this requires consideration of whether jurisdictional error has been made out.[115]

Are there entrenched minimum grounds of review?

An unanswered question arising from the decision in *S157* is whether particular grounds of review are entrenched by s 75(v). For example, it is not clear whether Parliament can expressly legislate to provide that a decision-maker would be authorised to make a decision denying procedural fairness or to make a decision so unreasonable that no reasonable decision-maker would have made it.

It is suggested by the majority that there may be a constitutional requirement for review on the grounds of fraud, bribery, dishonesty or other improper purpose. As noted above, such grounds may be included within the *Hickman* requirement that the decision be made bona fide and s 474 must permit review in all such cases.[116]

Prior to the decision in *S157*, Parliament passed the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).[117] Items 1-6 of Schedule 1 to the Act specify that certain divisions and subdivisions of the *Migration Act* are taken to be an 'exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with'. Item 8 provides that the previous amendments are not taken to limit the scope or operation of s 474. The amendments in items 1-6 are likely to be a clear statutory indication which will assist in the reconciliation process required after *S157*.

What else could Parliament do?

The majority went out of their way to cast doubt on submissions put by the Commonwealth regarding alternative methods to achieve the result which the Commonwealth argued was achieved by s 474. For example, the Commonwealth

113 *NAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 76 (Unreported, Gray, Moore and Weinberg JJ, 24 April 2003).

114 *Untan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 69 (Unreported, Beaumont, Whitlam and Stone JJ, 11 April 2003), applying the High Court's decision in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502.

115 *Ngu v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 54 (Unreported, Carr, Merkel and Hely JJ, 27 March 2003).

116 *S157* (2003) 195 ALR 24, 47 [82].

117 The effect of this legislation was not considered in *S157* because it was not relevant to decisions in question: ibid 37 n 42.

argued that the Parliament might validly delegate to the Minister a power to exercise an open ended discretion as to which aliens can enter and remain in Australia, subject to the High Court deciding any dispute as to the 'constitutional fact' of alien status. Alternatively, the Commonwealth suggested that the *Migration Act* might be redrafted with a provision which indicates that the rest of the statute sets out non-binding guidelines which should be applied.[118]

The majority suggested that the delegation of a broad power to the Minister might be ineffective as it would 'lack that hallmark of the exercise of legislative power' which is the determination of the content of a law because Parliament would not be delineating factual requirements necessary to connect any given state of affairs with the relevant head of power in s 51 of the *Constitution*. Such a connection could not be found through litigation in courts exercising the judicial power of the Commonwealth because that would require a Ch III court to rewrite a statute.[119] This is a surprising comment because, as Callinan J points out, for most of the 20th century the Minister for Immigration had an extremely broad discretion in determining who might be permitted to enter Australia. The various pieces of migration legislation were extremely brief, indicating how few decisions fell to be made under the earlier acts and the 'absolute and generally final nature of the decisions.'[120]

Beaton-Wells has suggested that the Parliament could redefine 'privative clause decision' to include decisions purportedly made under the *Migration Act*, thus extending the protection of s 474 to decisions affected by jurisdictional error.[121] This would be effective in the Federal Court and Federal Magistrates Court, but may be ineffective in the High Court and is likely to divert a massive flow of migration litigation to the High Court, the very problem which the government always wanted to avoid.

Prior to the decision in *S157*, Stephen Gageler SC suggested that Parliament might benefit from turning its attention from limiting the scope of judicial review to addressing the scope of the administrator's jurisdiction. In his view, the policy questions about preconditions to exercise of jurisdiction, including which substantive considerations should be taken into account in exercising decision-making power, and procedures which must be followed, are legitimately questions for Parliament.[122] From a public policy perspective, it would certainly be valuable for Parliament to be required to spell out what is expected so that people can understand the meaning of the legislation. Aronson and Dyer also suggest that, instead of trying to draft ouster clauses, Parliament should consider how to exploit the suggestion in *Project Blue Sky* that Parliament can stipulate that breach of its rules will not invalidate a bureaucrat's decision. They suggest that 'the High Court's section 75(v) jurisdiction would remain, but it would have nothing on which to bite.'[123]

However, there is a question as to whether Parliament could *expressly* expand the decision-maker's power. Could Parliament state that a decision is valid even if the

118 Ibid 50–4 [100]–[111].
119 Ibid 51 [102].
120 Ibid 55 [114]–[115].
121 Caron Beaton-Wells 'Restoring the Rule of Law—*Plaintiff S157/2002 v Commonwealth of Australia*' (2003) 10 *Australian Journal of Administrative Law* 125, 145.
122 Gageler, above n 4, 291.
123 Aronson and Dyer, above n 5, 689.

decision-maker ignored relevant considerations or denied procedural fairness? It is highly likely that the High Court would read such a provision down to avoid inconsistency with s 75(v).

In *NAAV*, French J suggested the safest path to an efficient and expeditious disposition of the large volume of migration cases in the Federal Court is to impose a requirement for leave or an order nisi procedure so that 'hopeless cases can be rejected at the threshold'.[124] Such a suggestion was discussed by the Senate Legal and Constitutional Legislation Committee in its April 1999 report into the Migration Legislation Amendment (Judicial Review) Bill 1998. The Committee considered that the special leave provision offered significant advantages although questions regarding criteria for the grant of leave, and whether determinations are made on the papers, need to be evaluated.[125] In its submissions to the Committee, the Department of Immigration and Multicultural Affairs argued that special leave or order nisi procedures may become as drawn out as the trial process themselves and may lead to a further layer of litigation. However, the special leave procedures in the High Court are certainly effective to limit the number of cases which go to full hearings.[126] In his second reading speech for the MLAJR Bill, the Minister also suggested that the leave requirement was not a viable option because it could be imposed on the Federal Court but, for constitutional reasons, could not be imposed on the original jurisdiction of the High Court. This would again expose the High Court to applicants who wish to avoid leave requirements in the Federal Court.[127]

CONCLUSION

Perhaps the major problem for the Parliament is that, in drafting s 474, it employed a drafting technique where the words of the legislation self evidently did not mean what they said. The blanket ban on access to the courts was not meant to be taken literally and although it was set against a background of complex High Court authority, this gave the High Court the opportunity to impose a new construction on the legislation.

The grounds of review have been opened wide and subsequent Federal Court cases indicate that attempts to confine the reasoning in *S157* to identification of inviolable limitations or manifest errors in jurisdiction have not been successful.

The High Court has reaffirmed the central significance of s 75 of the *Constitution* in holding administrative decision-makers to account. In this decision, the rule of law has won out over parliamentary sovereignty.

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124 *NAAV* (2002) 193 ALR 449 [594] (French J) .

125 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Report into the Migration Legislation Amendment (Judicial Review) Bill 1998*, (1999) [3.4]-[3.13].

126 In the 2001-2002 reporting year special leave was refused in 77% of civil and criminal applications; see *High Court of Australia Annual Report 2001-02*. The numbers are in Part VII, Annexure B, tables 16 and 18 of the 2001-2002 report.

127 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31561.