

CRITIQUE AND COMMENT

PRIVATIVE CLAUSES: EPIC FAIL

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[This comment discusses the effectiveness of privative clauses in Commonwealth and state legislation in light of the High Court of Australia's modern treatment of that subject in the following trilogy of cases: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.]

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I INTRODUCTION

A privative clause is a provision that attempts either to restrict or preclude access to courts for judicial review of administrative or judicial exercises of power. There are several different types of mechanisms that can be used to achieve these ends,¹ but the type of privative clause of present concern, the 'true privative clause', is exemplified by s 474(1) of the *Migration Act 1958* (Cth) ('*Migration Act*') as it stood at the time *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*')² was decided. With some minor editing, it stated that:

(1) A decision ... made ... under this Act:

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¹ Including, for example, time limits on instituting proceedings, to the extent they are valid: see *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; *SZAJB v Minister for Immigration and Citizenship* (2008) 168 FCR 410. See generally Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) ch 17.

² (2003) 211 CLR 476.

- (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.

A true privative clause is one that seeks to prohibit a court either from entertaining any form of legal proceeding to impeach a decision or from issuing specified remedies. Section 474(1) purported to do both and thus represented a ‘double-barrelled’ attack upon the supervisory jurisdiction of the courts.³

Courts have long struggled with the idea of a statute imposing legal constraints on a public body while simultaneously forbidding courts of law from policing those constraints. As Griffith CJ said in 1909, ‘[a] grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms.’⁴ For this reason, courts with supervisory jurisdictions tend to approach privative provisions in legislation with what has been described as ‘a suspicion sometimes bordering on hostility’,⁵ and typically respond to attempts to oust their jurisdiction by reading down privative clauses and giving them a limited effect.

The text of s 474(1) of the *Migration Act* reflected this struggle. It used a variety of formulations to overcome earlier judicial decisions that had read down legislative efforts to exclude judicial review of public bodies. The phrase ‘final and conclusive’ (used in para (a)) has been held to be ‘relatively weak’ and not to affect the availability of certiorari (either for jurisdictional error or for error of law on the face of the record).⁶ A provision that attempts to oust certiorari (by stating that a decision should not be ‘challenged’ or ‘quashed’ etc, as in para (b)) has been held to protect only against non-jurisdictional error of law on the face of the record.⁷ But it is difficult to construe provisions that seek to exclude mandamus and prohibition (as in para (c)) as not intended to protect decisions affected by at least *some* types of jurisdictional error, given those writs are only available in the first place if jurisdictional error exists.⁸

II THE FEDERAL SPHERE: *PLAINTIFF S157*

The matter is complicated in the federal sphere by constitutional considerations, especially the conferral on the High Court, by s 75(v) of the *Constitution*, of original jurisdiction in all matters in which ‘a writ of mandamus or prohibition

³ Enid Campbell and Matthew Groves, ‘Privative Clauses and the *Australian Constitution*’ (2004) 4 *Oxford University Commonwealth Law Journal* 51, 57.

⁴ *Baxter v New South Wales Clickers’ Association* (1909) 10 CLR 114, 131.

⁵ *Svecova v Industrial Commission of New South Wales* (1991) 39 IR 328, 330 (Kirby P).

⁶ *Totalisator Agency Board of New South Wales v Casey* (1994) 54 IR 354, 359 (Kirby P).

⁷ *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 633–4 (Gaudron and Gummow JJ).

⁸ *Ibid* 633; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668 [46], 675 [70] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

or an injunction is sought against an officer of the Commonwealth' — which includes federal judges.⁹ In the words of Gleeson CJ in *Plaintiff S157*:

Section 75(v) ... 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.¹⁰

In addition, the joint judgment (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) stated that s 75(v) introduces into the *Constitution* 'an entrenched minimum provision of judicial review' and 'places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action.'¹¹

How can the express command in s 474(1)(c) of the *Migration Act* be reconciled with the High Court's irrevocable grant of jurisdiction under s 75(v) of the *Constitution*? One answer is found in the judgment of Dixon J in *R v Hickman; Ex parte Fox* ('*Hickman*'),¹² a case concerning the jurisdiction of a tribunal created to settle industrial disputes, by arbitration, in the coal mining industry. Dixon J confirmed that a privative clause could not take away the High Court's jurisdiction to prevent a federal body from acting in excess of its authority. Such a clause could, however, be taken into account in 'ascertaining ... the true limits of the authority of the [tribunal], and whether its decision is void.'¹³ The outcome of the reconciliation process in *Hickman* was to give the privative clause at issue the following operation, as expressed by Dixon J:

no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a *bona fide attempt to exercise its power*, that it *relates to the subject matter of the legislation*, and that it is *reasonably capable of reference to the power given to the body*.¹⁴

These three conditions are generally known as 'the *Hickman* provisos'.

In later cases, Dixon J also referred to certain 'imperative duties or inviolable limitations or restraints' that may be imposed by legislation, contravention of

⁹ *R v Gray; Ex parte Marsh* (1985) 157 CLR 351.

¹⁰ (2003) 211 CLR 476, 482–3 [5].

¹¹ *Ibid* 513–14 [103]–[104]. These constitutional considerations do not apply to federal courts other than the High Court: *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601.

¹² (1945) 70 CLR 598.

¹³ *Ibid* 614 (Dixon J). See also *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 418 (Mason ACJ and Brennan J).

¹⁴ (1945) 70 CLR 598, 615 (emphasis added). See also *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 398 (Dixon J).

which would not be protected by a privative clause.¹⁵ This, of course, is another way of saying that a privative clause must be evaluated in its statutory context to determine whether particular legal errors are covered by its insulating effect. Dixon J referred to this process as a ‘second step’.¹⁶ Brennan J described it as a ‘fourth condition’ if it was not otherwise inherent in the threefold *Hickman* formulation.¹⁷ Spigelman CJ has suggested that it has the appearance of ‘an alternative mechanism of reconciliation’ to that identified in *Hickman*.¹⁸

Read in accordance with the *Hickman* principle, privative clauses in the form adopted by s 474(1)(c) of the *Migration Act* were understood to be constitutionally valid. They were not thought to deprive the High Court of jurisdiction to grant relief in respect of decisions made in the absence of, or in excess of, power. Rather, such clauses were treated as having an implicit effect on the substantive law by extending the lawful authority and powers of the decision-maker.¹⁹ Nor was there any perceived conflict with the separation of powers doctrine.²⁰

Then came *Plaintiff S157*, in which the validity of s 474(1) of the *Migration Act* was challenged. In that case the joint judgment rejected the characterisation of privative clauses as somehow ‘expanding’ the powers of decision-makers.²¹ Further, their Honours said:

A proper reading of [the cases] is not that a privative clause is construed as meaning that decisions are protected so long as they conform to ‘the three *Hickman* provisos’. Rather, the position is that the ‘protection’ which the privative clause ‘purports to afford’ will be inapplicable unless those provisos are satisfied. And to ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause in question.²²

The joint judgment then proceeded to give s 474(1) what has been described as ‘a very narrow and somewhat strained interpretation.’²³ Picking up on the statement in *Minister for Immigration and Multicultural Affairs v Bhardwaj* that an administrative decision which involves jurisdictional error is ‘regarded, in law, as no decision at all’,²⁴ the joint judgment held that the words ‘a decision made under this Act’ were not apt to refer to decisions ‘purportedly’ made under

¹⁵ See, eg, *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248.

¹⁶ *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400.

¹⁷ *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 274.

¹⁸ *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 232 [86].

¹⁹ Subject to the grant of jurisdiction being within the legislative competence of Parliament: *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 250–2 (Mason CJ), 270–5 (Brennan J), 285–93 (Deane, Gaudron and McHugh JJ), 303–9 (Dawson J).

²⁰ See *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 311–12 [20]–[21] (Black CJ), 340 [105] (Beaumont J), 381 [308] (Wilcox J), 448–50 [538]–[546] (French J), 480–2 [640]–[646] (von Doussa J).

²¹ *Plaintiff S157* (2003) 211 CLR 476, 502–4 [64], [67]–[68] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

²² *Ibid* 502 [64] (citations omitted).

²³ Justice Ronald Sackville, ‘The 2003 Term: The Inaccessible Constitution’ (2004) 27 *University of New South Wales Law Journal* 66, 70.

²⁴ (2002) 209 CLR 597, 615 [51] (Gaudron and Gummow JJ) (citations omitted).

the *Migration Act*.²⁵ Therefore, as a matter of construction, s 474(1) was held not to apply to decisions tainted by jurisdictional error. So construed, the privative clause was not in conflict with s 75(v) of the *Constitution* and therefore valid (albeit largely ineffective). This construction of s 474(1) is surprising. It could not have been clearer from the terms of para (c), and the extrinsic material, that the Commonwealth Parliament intended the privative clause to protect against review for at least *some* types of jurisdictional error.²⁶

The joint judgment also gave the following warning: had s 474(1) been construed to apply to *purported* decisions (that is, decisions affected by jurisdictional error), the privative clause:

would be in direct conflict with s 75(v) of the *Constitution* and, thus, invalid. Further, [the clause] would confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the *Constitution* that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.²⁷

III THE STATE SPHERE: *KIRK*

The historical conflict between courts and legislatures has not been limited to the federal sphere.²⁸ For example, industrial legislation in New South Wales has, since 1901, included a privative clause in an attempt to make awards and decisions of that State's industrial courts and tribunals final. For a long time, despite repeated legislative attempts by the New South Wales Parliament to enhance its privative clauses, the High Court and the New South Wales Court of Appeal resisted reading them in a way that excluded review of decisions for jurisdictional error, on the basis that such provisions were intended to apply only to *lawful* 'decisions' (that is, decisions not tainted by jurisdictional error).²⁹ In

²⁵ See *Plaintiff S157* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), citing as apparent authority for that proposition the judgment of Gaudron and Gummow JJ in *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 635. However, the majority in that case declined to express any view on the scope of the privative clause in question: at 609 (Brennan CJ, Dawson and Toohey JJ).

²⁶ See *Plaintiff S157* (2003) 211 CLR 476, 499 [55], 504 [70] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). In contrast, Gleeson CJ took a more straightforward approach to construing the privative clause. His Honour rejected the submission that, once s 474(1) of the *Migration Act* was enacted, there were no 'imperative duties' and no 'inviolable limitations' on the powers and jurisdiction of decision-makers under the Act. Instead, he simply held that s 474(1) did not evince a clear intention to insulate decisions from review where there had been a denial of procedural fairness: at 493–4 [34]–[38].

²⁷ *Ibid* 506 [75].

²⁸ This comment does not consider the position of territorial courts: see *Kruger v Commonwealth* (1997) 190 CLR 1, 174 (Gummow J) (allowing for the possibility that s 75(v) of the *Constitution* applies to judges of territorial courts on the footing that they are 'officers of the Commonwealth'); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 162–3 [27]–[28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (holding that territorial courts may exercise federal jurisdiction under Commonwealth laws, which brings into play the appeal rights in s 73(ii) of the *Constitution*).

²⁹ See *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 228 [61] (Spigelman CJ). Instead, such privative clauses were only effective in removing the Supreme Court's jurisdiction to quash for error of law on the face of the record: *Roos v DPP (NSW)* (1994) 34 NSWLR 254, 262 (Handley JA).

1996, however, the New South Wales Parliament ‘responded rather bluntly to this defiant judicial reasoning’³⁰ by enacting s 179 of the *Industrial Relations Act 1996* (NSW). Although different in form, this section was in substance identical to the privative clause considered in *Plaintiff S157*, except that it referred to both ‘decisions’ and ‘purported decisions’ of the Industrial Relations Commission of New South Wales (a superior court of record), and did not include the words ‘made under this Act’.

In *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (*Mitchforce*), Spigelman CJ noted that ‘[t]he extension of the scope of s 179 beyond a “decision” to encompass a “purported decision” was intended to afford decisions of the Commission protection from jurisdictional error to a substantial degree.’³¹ Nonetheless, the Supreme Court’s supervisory jurisdiction was ‘not wholly extinguished.’³² The Chief Justice referred to statements from various High Court judges to the effect that a state legislature has the power to make an inferior state court or tribunal the sole judge of the extent of its jurisdiction,³³ including *Darling Casino Ltd v New South Wales Casino Control Authority*, where Gaudron and Gummow JJ, two of the authors of the joint judgment in *Plaintiff S157*, had stated that:

provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle.³⁴

Spigelman CJ took the view that, in the context of state legislation, the *Hickman* principle ‘operates by a process of statutory construction without a constitutional overlay.’³⁵ Applying the non-constitutional aspects of the reconciliation process required by *Plaintiff S157*, his Honour concluded that s 179 was effective in excluding judicial review except in relation to a decision ‘which fails to satisfy the threefold *Hickman* principle or, if it be a separate proposition, which fails to observe an inviolable restriction or restraint.’³⁶ However, jurisdictional error that could not be so categorised was ‘exempt from review.’³⁷

The New South Wales Parliament must have had a change of heart, because s 179 was amended in 2005 to remove references to ‘purported decisions’ except

³⁰ Michael Sexton and Julia Quilter, ‘Privative Clauses and State Constitutions’ (2003) 5 *Constitutional Law and Policy Review* 69, 70.

³¹ (2003) 57 NSWLR 212, 228 [65]. However, in *Batterham v QSR Ltd* (2006) 225 CLR 237, the joint judgment (without casting doubt on the validity of s 179) suggested the reference to ‘purported’ decisions in s 179 (as it then stood) was unnecessary — the privative clause would have no work to do if ‘decisions’ were made according to law and valid — thus s 179 necessarily already operates on the hypothesis that it applies to a decision ‘infirm in some respect’: at 249 [26] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

³² *Mitchforce* (2003) 57 NSWLR 212, 228 [65] (Spigelman CJ).

³³ *Ibid* 238 [126], citing *Clancy v Butchers’ Shop Employes Union* (1904) 1 CLR 181, 204 (O’Connor J) and *Baxter v New South Wales Clickers’ Association* (1909) 10 CLR 114, 140 (Barton J), 146 (O’Connor J).

³⁴ (1997) 191 CLR 602, 634, quoted in *Mitchforce* (2003) 57 NSWLR 212, 230 [71] (Spigelman CJ).

³⁵ *Mitchforce* (2003) 57 NSWLR 212, 230 [72].

³⁶ *Ibid* 233 [92]. See also at 229–30 [68]–[70] (Spigelman CJ), 240 [142] (Mason P), 252–3 [204]–[207] (Handley JA).

³⁷ *Ibid* 233 [92] (Spigelman CJ).

in relation to a small class of decisions not presently relevant.³⁸ In 2006 the New South Wales Court of Appeal, in the litigation leading to the High Court's decision in *Kirk v Industrial Court of New South Wales* ('*Kirk*'),³⁹ held that the effect of that amendment was to restore the Supreme Court's supervisory jurisdiction to correct for jurisdictional error.⁴⁰ So by the time *Kirk* itself was decided, there was no question as to whether s 179 protected decisions of the Industrial Relations Commission (now renamed the Industrial Court) from review for jurisdictional error. It was clear that s 179 did *not* have that effect. The issue on which the High Court disagreed with the Court of Appeal was whether the Industrial Court had committed jurisdictional error.⁴¹

It was therefore unnecessary for the High Court to deal with the question of whether state legislatures can enact effective privative clauses.⁴² Despite this, the Court unanimously held, for the first time and contrary to previous authority,⁴³ that it is beyond the legislative competence of a state Parliament to 'strip the Supreme Court of the State of its authority to confine inferior courts [and tribunals] within the limits of their jurisdiction by granting relief on the ground of jurisdictional error'.⁴⁴ How did the Court come to this result? There were three steps. The first two, which are uncontroversial, were that, first, ch III of the

³⁸ See *Industrial Relations Amendment Act 2005* (NSW), sch 1 items 5, 8.

³⁹ (2010) 239 CLR 531.

⁴⁰ *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* (2006) 66 NSWLR 151, 158 [31] (Spigelman CJ), 162 [52] (Beazley JA), 169–70 [83] (Basten JA); at least after the Full Bench of the Industrial Relations Commission had dealt with any appeal to it: at 184–6 [150]–[156] (Basten JA); see also *Kirk v Industrial Relations Commission of New South Wales* (2008) 173 IR 465, 471 [21] (Spigelman CJ).

⁴¹ See *Kirk* (2010) 239 CLR 531, 563 [44], 564–5 [48] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴² And the Court should have declined to answer the unnecessary constitutional question: see *Wurridjal v Commonwealth* (2009) 237 CLR 309, 437 [355] (Crennan J); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ).

⁴³ No reference is made in *Kirk* to the earlier High Court decisions (see above nn 33–4 and accompanying text) that had held that state Parliaments could remove the supervisory jurisdiction of state supreme courts (by making inferior state courts or tribunals the sole arbiters of their jurisdiction), although the Court did question the concept of inferior courts being able to decide questions of law 'authoritatively' — authoritative decisions, the Court says in somewhat circular reasoning, are 'decisions which are not attended by jurisdictional error' and thus not open to review: (2010) 239 CLR 531, 573 [69]–[70] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). The earlier authorities were, 'in accordance with recent High Court practice ... superseded rather than overruled': J J Spigelman, 'Public Law and the Executive' (2010) 34 *Australian Bar Review* 10, 15. Nor was any reference made to *Mitchforce*, the leading intermediate appellate court decision on the effectiveness of state privative provisions, despite it being effectively overturned by *Kirk*. This may be explained by the fact that the High Court 'appears to pay less regard to the opinions of intermediate appellate courts on questions of constitutional law than on non-constitutional issues': Sackville, above n 23, 86 (discussing the failure of the joint judgment in *Plaintiff S157* to refer to *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, the leading authority on s 474(1) of the *Migration Act* at that time, despite overturning it).

⁴⁴ *Kirk* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Although this principle was not applied in *Kirk* itself (since the privative clause in question did not purport to prevent review for jurisdictional error), it was applied by the High Court to 'a more widely drawn privative clause' in *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ), 62 [128] (Gummow J), 78 [193] (Hayne J), 105 [268] (Heydon J), 153 [415] (Crennan and Bell JJ): see *Commissioner of Police v Sleiman* (2011) 249 FLR 242, 288 [215] (Sackville AJA). See also *Wainohu v New South Wales* (2011) 278 ALR 1, 8 [15] (French CJ and Kiefel J), 32 [89] (Gummow, Hayne, Crennan and Bell JJ).

Constitution requires that there be a body fitting the description of ‘the Supreme Court of a State’, and, second, that it is beyond the legislative power of a state to so alter the constitution or character of its supreme court that it ceases to meet the constitutional description.⁴⁵ The third, novel, step was to say that a defining characteristic of state supreme courts (as understood at the time of federation and now) includes an entrenched supervisory jurisdiction to ‘confine inferior courts and tribunals within the limits of their authority’ by granting relief in the nature of prohibition, mandamus and certiorari on the grounds of jurisdictional error.⁴⁶

This is a remarkable outcome. The Court referred to only one authority to support its argument that, at federation, the jurisdiction of the ‘Supreme Court[s]’ referred to in s 73 of the *Constitution* included an unassailable power to issue a writ of certiorari to an inferior court or tribunal where jurisdictional error existed. But the 1874 Privy Council decision cited by the Court — *Colonial Bank of Australasia v Willan* (‘*Willan*’),⁴⁷ which considered the operation of a privative clause on the jurisdiction of the Supreme Court of Victoria — cannot support that conclusion. The privative clause at issue in *Willan*, s 244 of the *Mining Statute 1865* (Vic), purported to prevent proceedings under that Act from being ‘removed ... into the Supreme Court’ (that is, by writ of certiorari). The Privy Council held that the effect of s 244 was not absolute and continued to permit the Supreme Court of Victoria to grant certiorari to quash an order of an inferior court removed to it ‘upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.’⁴⁸ The assumption underlying the High Court’s approach in *Kirk* is that ‘manifest defect of jurisdiction ... [or] manifest fraud’ is equivalent to jurisdictional error. However, as Gleeson CJ explained in *Plaintiff S157*, when discussing Dixon J’s formulation of the principle in *Hickman*:

The echoes of what was said ... in *Willan* are discernible. The concepts of ‘manifest defect of jurisdiction’ and ‘manifest fraud’ are the obverse of what ‘appears to be within power’ and ‘a bona fide attempt to act in the course of ... authority’ ...⁴⁹

Hence, far from supporting the contention, as stated in *Kirk*, that the ‘accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision’,⁵⁰ *Willan* appears to be authority for the opposite — that a privative clause *could*, at federation, operate to prevent judicial review

⁴⁵ *Kirk* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

⁴⁶ *Kirk* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); and habeas corpus: at 581 [98].

⁴⁷ (1874) LR 5 PC 417.

⁴⁸ *Ibid* 440–2 (Sir James W Colvile).

⁴⁹ (2003) 211 CLR 476, 487 [18], referring to *Hickman* (1945) 70 CLR 598, 616 (Dixon J): ‘any decision ... which upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid.’

⁵⁰ *Kirk* (2010) 239 CLR 531, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

by a state supreme court on the grounds of jurisdictional error, subject only to limits equivalent to the *Hickman* provisos.⁵¹

Even the *Hickman* rider may be overstating matters. The Privy Council in *Willan* was not concerned with the question of whether the Supreme Court of Victoria had an entrenched jurisdiction to correct for certain types of legal errors, nor was it dealing with a privative clause that *unequivocally* sought to preclude review for *all* legal errors.⁵² *Willan* is just one in a long line of cases which, as a matter of *construction*, have read down privative clauses purporting to oust certiorari so as to continue to permit review for serious legal errors. But when in 1892 the Supreme Court of Victoria came to consider a privative clause which was expressed to go further, it had no hesitation in finding it effective. The privative clause considered in *Re Biel*,⁵³ s 203 of the *Licensing Act 1890* (Vic), purported to prevent proceedings under pt II of that Act from being ‘removed ... by certiorari or otherwise into the Supreme Court for any want or alleged want of jurisdiction or for any error or alleged error of form or substance or on any ground whatsoever.’ Counsel for the applicant argued that s 203 was ‘merely the ordinary privative section’ that should be read down in a similar manner to the provision considered in *Willan*.⁵⁴ The Supreme Court emphatically disagreed, describing s 203 as a ‘full and complete answer’ to the contention that the impugned decision of the Licensing Court should be quashed for jurisdictional error. Higinbotham CJ, delivering the judgment of the Court, said:

It is difficult to conceive what fuller or more effective language could be employed for the purpose of indicating the intention of the Legislature that the determination of the Licensing Court under Part II of this Act should not be brought before the Supreme Court by writ of certiorari. It is familiar knowledge that general privative clauses taking away certiorari have been found in many Acts of Parliament, and also that notwithstanding such clauses superior courts — the Queen’s Bench in England and the Supreme Court in Victoria — have held that these clauses do not deprive the superior courts of jurisdiction to grant certiorari to inquire into the validity of the determination of an inferior court where there had been a want of jurisdiction in such court. ...

Every kind of want of or excess of jurisdiction is a ground for certiorari going in the case when the ordinary privative clause only exists. But this section is, in

⁵¹ Further, *Willan* concerned only the supervisory jurisdiction of the state supreme courts with respect to inferior courts, not administrative tribunals. Indeed, at federation, it was not yet generally accepted that administrative tribunals were amenable to certiorari unless it was shown that the tribunal was under ‘a duty to act judicially’: see *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 272 ALR 750, 753–5 [6]–[19] (Spigelman CJ), 768 [82]–[84] (Basten JA), 798–800 [251]–[260] (McDougall J). This requirement, since discarded, may explain why certiorari is not referred to in s 75(v) of the *Constitution*.

⁵² English authorities have consistently said that judicial review (for all types of legal error) might be excluded by ‘clear and explicit’ statutory language, but such an attempt has never apparently been made in that jurisdiction: see, eg, *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 583–6 (Denning LJ), 587 (Romer LJ), 588–9 (Parker LJ); *R (Cart) v Upper Tribunal* [2011] 3 WLR 107, 119 [30], 120 [32], 122 [37] (Baroness Hale), 131 [71], 137 [89] (Lord Phillips); Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 610–25. A plan to enact a comprehensive privative clause in 2003 was dropped after pressure from the judiciary: see Richard Rawlings, ‘Review, Revenge and Retreat’ (2005) 68 *Modern Law Review* 378.

⁵³ (1892) 18 VLR 456.

⁵⁴ See *ibid* 457–8 (Madden) (during argument).

our opinion, intended to cover that very case, and to prevent in any case where a total or partial want of or excess of jurisdiction appears in any inferior court, the proceedings of that court being reviewed by means of this writ.⁵⁵

Arguably then, insofar as the jurisdiction to grant certiorari was, at federation, an intrinsic characteristic of state supreme courts, so too was the fact that jurisdiction could be curtailed by legislation (if not completely as held in *Re Biel*, then at least to the extent described, in equivalent terms, in both *Willan* and *Hickman*).

Even leaving the above to one side, saying that state supreme courts had supervisory jurisdiction at 1901 to review for certain types of errors does not explain why that jurisdiction was, and is, characteristic of those courts in the constitutional sense.⁵⁶ Instead, the outcome in *Kirk* seems to be primarily policy driven. The Court in *Kirk* said that:

To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint.⁵⁷

The Court noted that, under s 73 of the *Constitution*, subject to some exceptions, the High Court has jurisdiction to hear appeals from all judgments, decrees, orders and sentences of the supreme courts of each state, so that the supervisory jurisdiction of those courts is ‘ultimately subject to the superintendence’ of the High Court and exercised ‘according to principles that in the end are set’ by that Court.⁵⁸ The unstated corollary seems to be that, if there is no avenue of review from inferior state courts or tribunals to a supreme court to correct for jurisdictional error, the High Court’s appellate jurisdiction itself would be stymied. In other words, the outcome in *Kirk* is better explained in terms of the High Court being protective of its *own* jurisdiction and constitutional position, rather than that of the state supreme courts.⁵⁹ As Zines has commented:

⁵⁵ *Re Biel* (1892) 18 VLR 456, 458–9 (Higinbotham CJ, a’Beckett and Hood JJ); applied in *R v Licences Reduction Board*; *Ex parte Miller* [1909] VLR 327, 328, 330 (a’Beckett J). *Re Biel* was raised in argument before the High Court in *Kirk* but was not referred to in the judgment: (2010) 239 CLR 531, 543–4 (S J Gageler SC) (during argument), 548 (S G E McLeish SC) (during argument). The Solicitor-General for the Commonwealth explained *Re Biel* as an exception to the otherwise uniform application of *Willan*. However, the later cases which applied *Willan* were dealing merely with the ‘ordinary privative section’ which sought to oust certiorari (and not a clause which sought to exclude review for jurisdictional error as in *Re Biel*): see, eg, *R v Bindon*; *Ex parte Cairns* (1879) 5 VLR (L) 93; *R v Cope*; *Ex parte the Mayor of Essendon and Flemington* (1881) 7 VLR (L) 337; *Re Keyes* (1884) 5 LR (NSW) 359; *R v Licensing Justices of Rockhampton*; *Ex parte Skinner* (1901) 11 QLJ 12. See also *R v Commissioner of Police for the Northern Territory*; *Ex parte Holroyd* (1965) 7 FLR 8, 10–11 (Joske J).

⁵⁶ See Chris Finn, ‘Constitutionalising Supervisory Review at State Level: The End of *Hickman*?’ (2010) 21 *Public Law Review* 92, 99–100; John Basten, ‘The Supervisory Jurisdiction of the Supreme Courts’ (2011) 85 *Australian Law Journal* 273, 279.

⁵⁷ *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also at 570 [64], quoting with approval Louis L Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70 *Harvard Law Review* 953, 963: ‘a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions’ requiring ‘control of the courts of more general jurisdiction.’

⁵⁸ *Kirk* (2010) 239 CLR 531, 581 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also *Kable v DPP (NSW)* (1996) 189 CLR 51, 114 (McHugh J).

⁵⁹ A similar policy concern may explain *Edwards v Santos* (2011) 242 CLR 421, where the High Court countered the Commonwealth Parliament’s prescription of exceptions to its appellate

Insofar as supervisory ... jurisdiction of State Supreme Courts can be reduced, the position of the High Court at the apex of the State's judicial system is also reduced. The decision in *Kirk* is in line with this view, even if the Court does not directly use this reasoning.⁶⁰

IV NO-INVALIDITY CLAUSES: *FUTURIS*

Privative clauses are not enacted lightly. There may be good policy reasons for wanting to insulate some types of decision from review for certain types of errors. For example, many judges have recognised that specialised industrial tribunals are better placed than courts to determine industrial policy, to prevent and resolve industrial disputes in the public interest, and to set wages and conditions on an industry-wide basis. These types of decisions affect broad segments of the community and there is a strong need for finality.⁶¹ If privative clauses do not work, what will? One answer may be so-called 'no-invalidity clauses'.⁶²

Jurisdictional error marks the boundary between validity and invalidity. Not every failure to comply with a statutory precondition to the exercise of a power will lead to invalidity. Whether a contravention of a particular condition goes to jurisdiction is to be determined by a process of statutory construction as discussed in *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*').⁶³ If the key question is whether Parliament intended the consequence of the particular breach to go to validity,⁶⁴ there must be a role for provisions that not only prescribe a condition regulating the exercise of a statutory power but also *expressly* state that a breach of that condition should not lead to invalidity.⁶⁵

jurisdiction with respect to certain Federal Court judgments (as permitted by s 73 of the *Constitution*) by rendering the exceptions otiose. In proceedings brought in the Court's *original* jurisdiction under s 75(v) of the *Constitution*, the Court not only allowed the application (with costs) by quashing the relevant decisions of the Federal Court, a majority also substituted different costs orders in the courts below (ordinarily an exercise of *appellate* jurisdiction): at 425 [3]–[5] (French CJ, Gummow, Crennan, Kiefel and Bell JJ), 441–5 [56]–[67] (Heydon J); cf at 426–30 [6]–[20] (Hayne J). The majority relied on s 32 of the *Judiciary Act 1903* (Cth), which requires the Court to grant 'all such remedies' the parties are entitled to in respect of 'any legal or equitable claims' so that, as far as possible, all matters in controversy between the parties are 'completely and finally determined'. However, s 32 is a 'Judicature Act' provision designed to avoid multiplicity of proceedings — it does not confer jurisdiction on the High Court to grant remedies not otherwise permitted under the general law or by statute: see *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150, 161 (Gibbs CJ, Stephen, Mason and Wilson JJ); *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 488–90 (Gibbs J), 506 (Mason J).

⁶⁰ Leslie Zines, 'Recent Developments in Ch III: *Kirk v Industrial Relations Commission of NSW* and *SA v Totani*' (Paper presented at the CCCS/AACL Seminar, Melbourne, 26 November 2010) 12–13, quoted in Basten, 'The Supervisory Jurisdiction of the Supreme Courts', above n 56, 279–80.

⁶¹ See *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 161 (Isaacs J); *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132, 147–8 (Deane J). See also G L Peiris, 'Jurisdictional Review and Judicial Policy: The Evolving Mosaic' (1987) 103 *Law Quarterly Review* 66, 74–7.

⁶² See Mark Aronson, 'Nullity' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 139, 154.

⁶³ (1998) 194 CLR 355.

⁶⁴ See *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 580 [107] (Spigelman CJ).

⁶⁵ See *Plaintiff S157* (2003) 211 CLR 476, 483 [6], 490 [25] (Gleeson CJ).

Such provisions are not privative clauses because they do not purport to exclude review for jurisdictional error.⁶⁶ Instead, they operate to ensure particular errors are characterised as non-jurisdictional.⁶⁷

It seems to be possible for Parliament to state that non-compliance with a *specific* statutory requirement will not lead to invalidity.⁶⁸ But there is a real question about whether a single no-invalidity clause can ‘set out to “cure” breaches of a broader sweep of provisions.’⁶⁹ An example of such a provision is s 175 of the *Income Tax Assessment Act 1936* (Cth), which states:

The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

This provision was considered in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (*Futuris*), where a majority of the High Court (Gummow, Hayne, Heydon and Crennan JJ) held that ‘[w]here s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the *Constitution* or under s 39B of the [*Judiciary Act 1903* (Cth)].’⁷⁰ It is difficult to know what to make of this statement. An all-encompassing no-invalidity clause would appear to give rise to the same type of contradiction (and constitutional issues) that a true privative clause does: a grant of power circumscribed by specific conditions, combined with a general provision intended to ensure those limits do not operate.⁷¹ Although the High Court did not expressly say so, the broad construction given to s 175 may be explained by the legislative context in which it appears, especially the taxpayer’s comprehensive review and appeal rights to correct errors in assessments (including jurisdictional errors).⁷² Section 175 therefore could be construed according to its terms without infringing on any constitutionally entrenched minimum requirement of judicial review.⁷³

But in any event, a no-invalidity clause is no panacea for all types of jurisdictional error. For the purposes of the income tax legislation there still needs to be something that meets the statutory description of an ‘assessment’. In *Futuris* this was held by the majority to exclude so-called ‘tentative’ or ‘provisional’ assess-

⁶⁶ See *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 166 [64] (Gummow, Hayne, Heydon and Crennan JJ).

⁶⁷ This does not mean a limit on power that does not go to validity is not always effective. Illegality may still be prevented by injunctive relief, including under s 75(v) of the *Constitution* (which is not constrained to jurisdictional error): *ibid* 162 [47]; *Project Blue Sky* (1998) 194 CLR 355, 393 [100] (McHugh, Gummow, Kirby and Hayne JJ).

⁶⁸ See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 224–5 [42]–[46] (Gleeson CJ, Gummow and Heydon JJ), 227 [55] (McHugh J). However, Kirby J, in dissent, expressed reservations about the constitutional validity of the provision in question, s 501G(4) of the *Migration Act*: at 250–1 [129].

⁶⁹ Aronson, above n 62, 156.

⁷⁰ (2008) 237 CLR 146, 157 [24].

⁷¹ See *ibid* 183 [124] (Kirby J); Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14, 20: ‘there are serious doubts about the constitutionality of no-invalidity clauses purporting to have a general application.’

⁷² See *Futuris* (2008) 237 CLR 146, 152 [6], 156–7 [23]–[24] (Gummow, Hayne, Heydon and Crennan JJ). See also McDonald, above n 71, 22, 29.

⁷³ See J J Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77, 91.

ments, or assessments created by conscious maladministration.⁷⁴ (As did the earlier authorities which read s 175 in accordance with the *Hickman* principle.⁷⁵) In addition, s 175 only addresses the effect of non-compliance with express statutory requirements, not common law or implied statutory obligations (such as procedural fairness, reasonableness, etc), although a no-invalidity clause could theoretically be drafted to cover such grounds. And, finally, it is likely that courts would require clear language before concluding that the legislature intended that non-compliance with *essential* requirements did not affect the validity of a decision (especially in the absence of alternative review rights). This is because, as the majority in *Futuris* explained, the effect of a no-invalidity clause must be assessed in the manner indicated in *Project Blue Sky* — that is, by asking whether it is a purpose of the Act to render an exercise of power invalid by reason of a failure to comply with a *particular* provision of the Act.⁷⁶ Whether this task differs in any material respect from the reconciliation process espoused in *Hickman* and later cases (including the ‘imperative duties or inviolable limitations or restraints’ test) is questionable. But the High Court now insists that the process is governed by *Project Blue Sky* and that ‘there is no scope ... for the operation of the so-called *Hickman* principle’ or the ‘tortuous path of statutory construction and reconciliation with which Dixon J was concerned.’⁷⁷

V CONCLUSION

At its centre, the controversy over privative clauses is a battle between the legislatures and the courts. Either Parliaments can circumscribe the powers of courts to review exercises of judicial or executive power for jurisdictional error or they cannot. What *Plaintiff S157* and *Kirk* seem to be driving at is that you cannot do it directly. By different constitutional avenues, the High Court has prevented both the Commonwealth and the state Parliaments from enacting effective true privative clauses, and in the process ‘equated State administrative law ... with the position under s 75(v) of the *Constitution*.’⁷⁸

⁷⁴ (2008) 237 CLR 146, 157 [25], 162–3 [49]–[50], 164–5 [55]–[56] (Gummow, Hayne, Heydon and Crennan JJ). In contrast, Kirby J said s 175 did not insulate assessments for jurisdictional error at all: at 183–91 [124]–[152].

⁷⁵ See, eg, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 188 (Mason CJ), 197 (Brennan J), 210–11 (Deane and Gaudron JJ). However, the majority in *Futuris* eschewed any reliance on that case (or *Hickman*): see (2008) 237 CLR 146, 162–3 [49]–[50], 167–8 [68]–[70] (Gummow, Hayne, Heydon and Crennan JJ).

⁷⁶ See (2008) 237 CLR 146, 156–7 [23] (Gummow, Hayne, Heydon and Crennan JJ). This process may be necessary for constitutional purposes. A Commonwealth law cannot be so open-ended that it no longer determines ‘the content of a law as a rule of conduct or a declaration as to power, right or duty’: *Plaintiff S157* (2003) 211 CLR 476, 513 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), quoting *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ). See also Basten, ‘The Supervisory Jurisdiction of the Supreme Courts’, above n 56, 286.

⁷⁷ *Futuris* (2008) 237 CLR 146, 167 [68] (Gummow, Hayne, Heydon and Crennan JJ) (citations omitted).

⁷⁸ Spigelman ‘The Centrality of Jurisdictional Error’, above n 73, 77.

There is now therefore little value in including true privative clauses in federal or state legislation.⁷⁹ While they still may be effective in restricting review for *non*-jurisdictional error of law on the face of the record, the ever-expanding concept of jurisdictional error, combined with the limited meaning given to the term ‘record’, makes it hardly worthwhile.⁸⁰ And while the joint judgment in *Plaintiff S157* left open the possibility that, ‘by reference to the words of s 474, some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of a decision’,⁸¹ it has since been confirmed that s 474 of the *Migration Act* is not capable of ‘curing’ what would otherwise be jurisdictional error.⁸² This itself is an odd outcome — if jurisdictional limits are to be identified by looking at an Act as a whole, surely the existence of a privative clause would have *some* role to play in determining what legal errors are jurisdictional.

But if you can get to the same result using a no-invalidity clause (a possibility left open in *Futuris*), how is that different in substance?⁸³ The problem is that we do not presently know how far legislation can go in dictating what errors are not jurisdictional. The High Court has thus far not directly grappled with this issue, other than to say that s 75(v) of the *Constitution* imports an ‘entrenched minimum provision of judicial review.’⁸⁴ And, as has been pointed out, if this guarantee ‘is to mean anything, there must ... be limits to the extent to which ... no-invalidity clauses can be given effect.’⁸⁵

⁷⁹ Given the High Court’s recent jurisprudence, it is not surprising that the Commonwealth Parliament decided not to include a privative clause in the *Fair Work Act 2009* (Cth), despite a long history of such provisions in federal industrial law.

⁸⁰ There is an invitation in *Kirk* to challenge *Craig v South Australia* (1995) 184 CLR 163 insofar as it rejected an expansion of the concept of ‘record’ to encompass both the reasons for decision and the transcript of proceedings of an inferior court: see (2010) 239 CLR 531, 577–8 [84]–[87] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁸¹ (2003) 211 CLR 476, 504 [69] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (citations omitted). Indeed, in the wake of *Plaintiff S157*, the former Solicitor-General for the Commonwealth argued that the decision did nothing more than confirm the existence of the ‘fourth’ *Hickman* proviso: David Bennett, ‘Privative Clauses — An Update on the Latest Developments’ (2003) 37 *ALAL Forum* 20, 29:

So, the privative clause does not apply to a decision infected by jurisdictional error; but what constitutes jurisdictional error is determined by interpreting the Act in the light of the privative clause. This looks like the expanded, four provisoes version of *Hickman* expressed in a form of circular reasoning ...

This view is not surprising, given the joint judgment in *Plaintiff S157* described jurisdictional error as including ‘a failure to discharge “imperative duties” or to observe “inviolable limitations or restraints”’: (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).

⁸² See Caron Beaton-Wells, ‘Judicial Review of Migration Decisions: Life after *S157*’ (2005) 33 *Federal Law Review* 141, 157–60, discussing the special leave applications in Transcript of Proceedings, *Minister for Immigration and Multicultural and Indigenous Affairs v Scargill, Minister for Immigration and Multicultural and Indigenous Affairs v Lobo* [2004] HCATrans 21 (13 February 2004), and *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 23–6 [47]–[57] (Gummow and Hayne JJ).

⁸³ The joint judgment in *Plaintiff S157* insists that ‘what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble’: (2003) 211 CLR 476, 511 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁸⁴ *Ibid* 513 [103]. It is likely the High Court will reach a similar conclusion, albeit by reference to s 73 of the *Constitution*, with respect to the jurisdiction of the state supreme courts: see Spigelman, ‘The Centrality of Jurisdictional Error’, above n 73, 81.

⁸⁵ McDonald, above n 71, 20.

In terms of what *grounds* of review might be entrenched, in *Plaintiff S157* the joint judgment noted (albeit in relation to the availability of injunctive relief under s 75(v) of the *Constitution*) that the ‘*Hickman* requirement that a decision be made bona fide presumably has the consequence’ that review would always be available for ‘fraud, bribery, dishonesty or other improper purpose.’⁸⁶ One commentator has sought to draw a further distinction between grounds which he argues necessarily involve a failure to comply with a law (eg the relevant/irrelevant considerations grounds, improper purpose, and failure to follow a mandated procedure where the failure goes to validity), and grounds based on errors that could be authorised by law (eg natural justice and the unreasonableness, irrationality and no evidence grounds — since arguably a statute could state that no hearing is required, or that a decision need not be a rational or reasonable exercise of power), on the basis that s 75(v) of the *Constitution*, insofar as it ‘gives effect to the principle of legality’, only requires entrenchment of the former category.⁸⁷

But it may be inappropriate to attempt to catalogue which of the traditional grounds of review are entrenched in the constitutional sense. As Gageler has pointed out, if the purpose of judicial review is to recognise and enforce jurisdictional limits, then:

the traditional grounds of judicial review are ... linked by a common theme. They are not discrete or free-standing. They are all aspects of jurisdiction. They serve to identify the scope of a decision-maker’s power and the conditions of its valid exercise.⁸⁸

If use of the traditional grounds of review is capable of detracting from the true inquiry of determining jurisdictional limits,⁸⁹ then the content of the minimum provision of judicial review guaranteed by the *Constitution* is unlikely to be identified by reference to particular grounds alone. What is constitutionally entrenched is the authority of the High Court and the state supreme courts to review for jurisdictional error, regardless of its form. Those limits are ultimately a matter of legislative choice,⁹⁰ including by way of no-invalidity clauses to the extent they are valid, but Parliaments will encounter difficulties if they focus on particular ‘grounds’ of review without regard to the jurisdiction of a decision-maker as a whole.

⁸⁶ (2003) 211 CLR 476, 508 [82] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 663–4 [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Futuris* (2008) 237 CLR 146, 153–4 [11]–[13], 164–5 [54]–[57] (Gummow, Hayne, Heydon and Crennan JJ).

⁸⁷ Jeremy Kirk, ‘The Entrenched Minimum Provision of Judicial Review’ (2004) 12 *Australian Journal of Administrative Law* 64, 70–1. There is, however, authority to the effect that some breaches of the rules of natural justice may be so serious as to amount to an exercise of power falling outside the *Hickman* provisos entirely — in which case certiorari will always be available: see *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 287 (Deane, Gaudron and McHugh JJ), 305 (Dawson J); *Vanneld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78, 111 (Spigelman CJ).

⁸⁸ Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21 *Australian Bar Review* 279, 287.

⁸⁹ Basten, ‘The Supervisory Jurisdiction of the Supreme Courts’, above n 56, 287, 290–1.

⁹⁰ Gageler, above n 88, 287, 291.

The point is well-illustrated by the recent High Court decision of *Saeed v Minister for Immigration and Citizenship*,⁹¹ which raised the issue of whether there are limits to the extent to which procedural fairness might be excluded by statute. While the question was not ultimately resolved, the High Court did suggest that such restrictions may not operate consistently with a law which requires a decision-maker to form an opinion before making a decision (on the basis that an opinion cannot properly be formed by putting out of consideration potentially relevant material that might have been brought to the decision-maker's attention were procedural fairness accorded).⁹² Even if procedural fairness obligations are excluded, judicial review will be available to determine whether the opinion was properly formed.⁹³ Presumably therefore, depending on the legislative context, there may be cases where a failure to provide natural justice will vitiate a decision even if the relevant law states that natural justice need not be accorded.

The key question remains: to what extent can legislation shape a decision-maker's jurisdiction, so as to limit judicial scrutiny of its errors, in a way that is compatible with the entrenched supervisory role of the High Court and the state supreme courts? It has been suggested that 'a statute that confers on an administrator a jurisdiction that complies with the "*Hickman* principle" will be sufficient to satisfy any constitutional minimum that may exist.'⁹⁴ If that is correct then *Plaintiff S157* and *Kirk* may be a victory of form over substance. But whatever are the constitutional limits, there are also practical ones. It is 'almost inconceivable that Parliament would pass a law expressly providing that a decision-maker could act arbitrarily, capriciously, irrationally or in bad faith' — and in the absence of such direct language courts will construe a law 'as not seeking to achieve that result.'⁹⁵

⁹¹ (2010) 241 CLR 252.

⁹² *Ibid* 269–70 [49]–[55] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁹³ *Ibid* 270 [53].

⁹⁴ Gageler, above n 88, 289. There is dicta in *Plaintiff S157* which supports this view: (2003) 211 CLR 476, 502 [64] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See above n 22 and accompanying text. See also Bennett, above n 81, 28.

⁹⁵ John Basten, 'Constitutional Elements of Judicial Review' (2004) 15 *Public Law Review* 187, 201. See also Kirk, above n 87, 71.