

## PART XIII – PRIVATIVE CLAUSES

### I Introduction

#### A The 'Privative', 'Ouster', or 'Preclusion' Clause

Privative clauses are provisions in a statute which preclude the possibility of certain forms of administrative review. Typically, they vary the availability of certiorari so as to prevent the decision of a tribunal from being quashed. Synonyms include 'ouster' and 'preclusion' clauses. Such clauses have been construed restrictively by courts.

Privative clauses are relatively common in legislation. By means of such clauses, courts will regularly be denied the opportunity to examine the lawfulness of administrative decisions. Recently, they have been used in the context of migration tribunals to restrict review.

Examples of privative clauses:

- 'A decision by this tribunal is final and conclusive'
- 'A court may not grant remedy X' (eg, certiorari)
- 'Judicial review is only possible for reason of X'
- 'No judicial review is possible after time Y' (time limits)
- 'Anything done by body X shall have effect as if enacted by Parliament'
- 'This decision shall be self-executing'
- 'Judicial review is not available in circumstances A, B, Z'

Some privative clauses purport to completely oust judicial review. For example, s 150 of the *Workplace Relations Act 1996* (Cth) provides as follows:

#### **Section 150:**

[A]n award ...

- (a) is final and conclusive;
- (b) shall not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) is not subject to prohibition, mandamus or injunction in any court on any account.

#### B Ideological Tensions

Privative clauses exist primarily for practical and procedural reasons:

- **Protecting the integrity** of tribunal systems by separating informal tribunals from formal legal processes: courts should not decide, eg, industrial disputes;
- **Ensuring finality**: decisions of tribunals ought not to be appealed and are thus said to be non-reviewable;
- **Preventing 'unnecessary' litigation** and interventionist courts: tribunals and internal avenues of appeal are said to afford justice, so to go beyond these measures is arguably unnecessary (hence, eg, migration privative clauses);

- **Efficiency:** appeals litigation consumes resources of court and Minister

In this way, they protect the integrity of the tribunal system, and ensure that executive and judicial functions are separated in appropriate circumstances. For example, the executive branch has the capacity to issue certificates certifying that disclosure under the *FOI Act* would be contrary to the public interest. Because this is an essentially executive decision, privative clauses are used to protect that decision from being undermined by the courts.

However, the existence of private clauses does raise complex issues:

- **Inconsistent parliamentary intention**
  - ‘prima facie inconsistency between one statutory provision which seems to limit the powers of the Tribunal and another provision, the privative clause, which seems to contemplate that the Tribunal’s order shall operate free from any restriction’ (*Coldham* at 418)
- **Parliamentary sovereignty**
  - To what extent ought courts relinquish their own jurisdiction and to what extent should they give effect to one or other of the legislative intentions of Parliament?
  - Give effect to the parliamentary intention – but, which intention? Provisions which restrict the exercise of tribunals’ powers? Or privative clauses?
- **Rights of the citizen to access the courts** (rule of law)
  - Access to the courts is an essential precondition for the operation of the rule of law; therefore, clauses should arguably be read down
  - Alternatively, if the content of the law must be given effect, then the privative clause should be enforced
  - But what about the overriding consideration that the *Constitution* creates the judicial bodies and provides for their use by individuals to enforce their rights and expectations (eg, natural justice, fairness of application)?
- **Constitutionally conferred jurisdiction**
  - The High Court’s jurisdiction to hear applications for certain writs against Commonwealth officials under s 75(v) cannot be abrogated
  - Constitutionalism: that constitutional provisions should prevail
  - Section 75(v): how should a court reconcile a provision purporting to oust the High Court’s ability to review a decision with its constitutionally-enshrined original jurisdiction to do so?
  - Clauses cannot oust jurisdiction under s 75(v); however, they should be interpreted consistently with the *Constitution* where possible to do so (*Coldham*)
- **Representative democracy**
  - Suggests enforcement since Parliament, being democratically elected, is in a more legitimate position to create legal constraints than courts are to review decisions
- **Separation of judicial power**
  - Judicial power: the power to authoritatively decide legal rights and interests (*Boilermakers*)
  - Privative clauses effectively give tribunals power to authoritatively decide the legal limits of its power
  - This would amount to conferring judicial power upon a body that is not a Chapter III court
  - To give such a privative clause its literal effect would therefore be in breach of the *Boilermakers* principle

These tensions raise complex interpretative issues.

## II **Classes of Privative Clause**

### A **Clauses Preventing Appeal**

The phrase 'final and conclusive' refers to the claimant's inability to appeal a decision. However, it does not exclude the remedy of certiorari (*Hockey v Yelland*).

#### ***Hockey v Yelland* (1984) HCA:**

##### Facts

- A medical board refuses compensation to Hockey on the basis that he had not suffered an 'injury' in the sense required by the *Workers Compensation Act 1916* (Cth)
- Section 14C(11) of the Act provided that 'The determination by the Board ... shall be final and conclusive, and the claimant ... shall have no right to have any of those matters heard and determined ... by way of appeal or otherwise, by any court or judicial tribunal whatsoever'
- Hockey seeks certiorari to quash to Board's decision, on the grounds that it reveals an error of law on the face of the record

##### Issue

- Does s 14C(11) preclude issue of certiorari?

##### Reasoning (Gibbs CJ)

- The subject's right of recourse to the courts is not to be taken away except by clear words
- If the subsection had provided that the determination should not be 'quashed or called in question', it would have been effective to oust certiorari for errors of law (but not jurisdiction)
- However, simply providing for 'final and conclusive' determinations is not enough to exclude certiorari

##### Decision

- No
- On the facts, however, there is no error of law disclosed by the decision

### B **Clauses Denying a Remedy**

A clause which purports to prevent a decision from being 'challenged, appealed against reviewed, quashed or called in question' will be effective to oust the issue of prerogative writs (*Houssein*).

#### ***Houssein v Department of Industrial Relations and Technology* (1982) HCA:**

##### Facts

- Section 84(1) of the *Industrial Arbitration Act 1940* (NSW) provides as follows:
  - '(a)... any decision of the commission ... shall be final; and no award ... shall be vitiated by reason only of any informality or want of form or be liable to be challenged, appealed against reviewed, quashed or called in question by any

- court of judicature on any account whatsoever.’
- ‘(b) No writ of prohibition or certiorari shall lie in respect of any award ... of ... (i) the commission ... or (ii) any member of the commission ... relating to any industrial matter or matter in ... which a tribunal has jurisdiction’

Issue

- Does s 84(1)(a) prevent recourse to prerogative writs?

Reasoning

- Only certiorari is requested here: there is no jurisdictional error, error of law, or other basis for review
- The words of s 84(1)(a) refer to ‘quashed’ (being the result of certiorari and not other procedures) and are therefore amply wide enough to include certiorari, thereby ousting it
- However, s 84(1)(b) takes the unusual step of distinguishing between industrial and other matters, heavily protecting the former from review but not the latter

Decision

- Even so, the ouster is effective and no prerogative writ may be issued

### C      *Clauses Denying Judicial Review*

In order for a privative clause to operate, the decision being protected must fall within its scope. If it does not, the clause will have no effect (*Osmond*).

#### ***Osmond v Public Service Board of NSW (1984) NSW CA:***

Facts

- Mr Osmond is denied a position on the Board
- He seeks a declaration that he was entitled to reasons for that decision
- Section 65A(6) of the *Public Service Act 1979* (NSW) provides as follows:
  - ‘(6)... no proceedings, whether for an order in the nature of prohibition, certiorari or mandamus, or for a declaration or injunction or for any other relief, shall lie in respect of — ... (c) the appointment or failure to appoint a person to a position in the Public Service...’

Issue

- Does s 65A(6) prevent the Court from issuing a declaration?

Reasoning (Kirby P)

- Exclusionary clauses are properly read strictly by the courts
- However, the language here chosen is very wide
- It is necessary to examine the description of the acts protected from review: here they are ‘the appointment’ or ‘failure to appoint’, the ‘entitlement or non-entitlement’ or ‘the validity or invalidity’ of any such appointment
- However, the appellant seeks a declaration that he was entitled to reasons; this is an order that the Board perform its legal duties in issuing reasons; this is anterior to his appointment, so it falls outside the scope of the ouster clause
- Even if it didn’t, the ouster clause may be circumvented by other routes: the Court may examine ousted conduct for jurisdictional error (*Anisminic v Foreign Compensation*)

Commission) or denial of natural justice

Decision

- Appeal allowed; s 65A(6) has no application to the appeal

## D Clauses Purporting to Oust Constitutional Jurisdiction

The High Court's inherent jurisdiction under s 75(v) of the *Constitution* cannot be ousted. An attempt to do so will be unconstitutional. Indeed, any attempt by the Parliament to vest authoritative power to determine a matter in a non-judicial body (as by making its decisions unreviewable) is inconsistent with its being a non-judicial body (*Coldham*).

### ***R v Coldham; Ex parte Australian Workers' Union (1983) HCA:***

Facts

- The ACCC makes an order that a Labourers' Federation has the exclusive right to represent construction workers
- The decision was wrong (workers did not have automatic membership of the AWU)
- Section 60(1) of the *Conciliation and Arbitration Act 1904* (Cth) provides as follows:
  - An award of the commission is final and conclusive
  - It cannot be challenged, appealed, reviewed or quashed
  - It 'is not subject to prohibition, mandamus or injunction in any court on any account'

Issue

- Can the prohibition and mandamus be granted by the Court?

Reasoning

- Dawson J:
  - The provision is effective to exclude any general judicial review of the Commission's proceedings
  - However, it cannot preclude the High Court from exercising powers conferred upon it by s 75(v) of the *Constitution* because the members of the Commission are 'officers of the Commonwealth'
  - The Commission's order with respect to a class of employees is dependent upon the existence of a jurisdictional fact (that the employees of that particular class are eligible for membership of the relevant organisation)
  - Here, s 60(1) does not confer convulsive character on the Commission's finding
  - The order is therefore beyond the powers of the Commission and liable to be corrected by writ of prohibition
  - (A refusal on ground of lack of jurisdiction would be a failure by the Commission to perform its lawful function and liable for correction by writ of mandamus)
  - It is not open to the Court to abrogate both its own jurisdiction and the constitutional rights of the citizen by treating the Commission's own decision on jurisdictional fact as being prima facie conclusive
- Mason ACJ and Brennan J:
  - The jurisdiction conferred by s 75(v) of the *Constitution* cannot be ousted by a private clause
  - Section 60 will validate an order of the Commission, to the extent constitutionally

permissible, if three conditions are fulfilled:

- The purported exercise is a *bona fide* attempt to exercise the power
- It relates to the subject matter of the legislation
- Is reasonably capable of being referred to the power (ie, does not on its face go beyond the power)
- *R v Hickman; Ex parte Fox and Clinton* at 614–15
- Section 60 is ineffective to prevent prohibition going when the Tribunal transgresses the restraints upon its jurisdiction
- Not being a judicial body, the Commission cannot determine authoritatively the question of eligibility for membership: s 142A did not vest judicial power in the Commission

#### Decision

- Writs can be granted
- The order nisi for prohibition and mandamus is made absolute

### E *Modern Approach*

A two-step approach to characterising privative clauses is currently favoured by the High Court:

- 1 **Scope**  
Does the decision fall within the scope of the privative clause?
- 2 **Hickman Provisos**  
Assuming it does, can immunity from review be afforded to the decision?

Decisions falling outside the scope of the privative clause will not be excluded from review.

Of those decisions falling within a privative clause, immunity from attack will only attach where the decision represents 'an honest attempt to deal with the subject matter confided to the tribunal' and in reaching which such a body acted 'in pursuance of [its] powers ... in relation to something that might reasonably be regarded as falling within its province' (*Hickman* per Dixon J).

It is a function of constitutionalism, conflicting Parliamentary intentions, the separation of judicial power (*Boilermakers*) and the High Court's inherent jurisdiction under s 75(v) of the *Constitution* that construing privative clauses is an exercise in 'reconciliation' (*Plaintiff S157/2002*).

#### ***Plaintiff S157/2002 v Commonwealth (2003) HCA:***

##### Facts

- The Refugee Review Tribunal denies P a temporary protection visa
- P seeks to challenge that decision on the basis of a denial of natural justice
- Section 474 of the *Migration Act 1958* (Cth) provides as follows:
  - '(1) A private clause decision: (a) is final and conclusive; (b) must not be challenged, appealed against, reviewed, quashed or called into question in any court; and (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'
  - '(2) ... "privative clause decision" means a decision of an administrative character, made ... under this Act'

- Section 486A further provides:
  - '(1) An application to the High Court for a writ ... in respect of a privative clause decision must be made ... within 35 days of the actual ... notification of the decision'
  - '(2) The High Court must not make an order allowing ... an application ... outside the 35 day period'

#### Issue

- Can the High Court make such an order?

#### Reasoning

- Gleeson CJ:
  - Parliament cannot confer upon a tribunal 'power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power' (*Coldham*)
  - 'Legislation which confers ... jurisdiction on ... tribunals ... and which, in addition, ... purports to deprive, courts of jurisdiction to control excess of power or jurisdiction ... involves a potential inconsistency. A provision that defines and limits the jurisdiction of a tribunal may be difficult to reconcile with a provision that states that there is no legal sanction for excess of jurisdiction ...'
  - A clear intention must be demonstrated before fundamental rights and freedoms will be infringed
  - The *Constitution* is framed upon the assumption of the rule of law
  - The clauses must be construed on the basis that the legislature does not intend to deprive its citizens of their right to access the courts
  - The plaintiff submits that a privative clause purporting to deny the High Court's jurisdiction to prohibit acts of Commonwealth officers in excess of their jurisdiction should be declared invalid
    - However, the *Hickman* provisos attempt to reconcile rather than invalidate privative clauses
    - Giving effect to a statute conferring jurisdiction whilst also denying review 'involves a process of statutory construction described as reconciliation'
    - This process involves two steps:
      - First, to note that the protection is inapplicable unless there has been 'an honest attempt to deal with the subject matter confided to the tribunal and to act in pursuance of the powers of the tribunal in relation to something that might reasonably be regarded as falling within its province'
      - Second, to consider 'whether particular limitations on power and specific requirements as to the manner in which the tribunal shall be constituted or shall exercise its power 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'
    - This approach, enunciated by Dixon J in *Hickman*, has been accepted as authoritative
  - Section 474 does not protect a decision taken in breach of the rules of natural justice
    - This is a matter to be decided as an exercise in statutory construction
    - The issue is whether the requirement of a fair hearing is a limitation upon the decision-making authority of the tribunal of such a nature that it is inviolable
    - Parliament has not evinced an intention to treat as valid decisions made





- This reasoning is analogous to the cases considering the effect of unlawful decision-making
- Callinan J:
  - The incidental power may be applied with respect to the federal judiciary
  - However, any limits imposed on the High Court's jurisdiction in time must 'be truly regulatory in nature and not such as to make any constitutional right of recourse virtually illusory as s 486A in my opinion does'
  - Section 474 is effective to prevent certiorari, but will not 'cure manifest error of jurisdiction'
  - However, s 486A is invalid
    - 35 day limit effectively denies people in detention, without a lawyer, and without English language skills, access to the High Court
    - It is thus constitutionally invalid

#### Decision

- A narrow construction is preferred
- Majority: the determination is not within the scope of s 474 because not a 'privative clause decision'
- Callinan J: s 486A is constitutionally invalid

## F Statutory Developments

In 1979, the *AD(JR) Act* was amended to include a s 4, with the effect of nullifying privative clauses in force upon the commencement of the Act. Of course, the *AD(JR) Act* effectively has its own privative clauses. Schedule 1 precludes review of certain decisions, such that a decision will not be one 'to which this Act applies'. In this sense, the Act establishes its own ouster mechanism, having effect in s 3 ('decision to which this Act applies').

However, general law remedies are unaffected by the *AD(JR) Act* s 10. Thus, privative clauses do not exclude common law remedies — just those issued under the Act.

Note also s 12 of the *Administrative Law Act*: privative clauses passed before the commencement of the Act have no effect. This is no longer of any significance today.

Section 85(1) of the *Constitution Act* (Vic) confers jurisdiction upon the Victorian Supreme Court to hear claims in respect of Victorian parties. To exclude s 85 jurisdiction, a provision must indicate the intention to alter (s 85(5)(a)) and provide a statement of reasons for doing so (s 85(5)(b)). It will be void if these requirements are not complied with: s 85(6). Privative clauses are difficult to add in respect of Victorian judicial review procedures because s 18(2A) requires an absolute majority in both Houses of Parliament to effect an alteration of jurisdiction under s 85.