

## THE PRIVATIVE CLAUSE AND THE CONSTITUTIONAL IMPERATIVE

*Robert Lindsay\**

During the Bismarkian era of Prussian expansion the flamboyant politician Ferdinand Lassalle said 'Constitutions are not originally questions of law, but questions of power. Written Constitutions only have value and last if they express the real power relations in society'. In the last twenty years, the High Court has chosen not to scrutinise with the same rigour as the English courts in administrative decision making, largely because of the Court's observance of the separation of powers under the Australian Constitution.<sup>1</sup> Conversely, recent decisions on privative clauses establish how determined the High Court and now other courts in Australia have become in scrutinising the constitutional legality of both judicial and administrative decision making. In doing so the High Court ensures that the legislature confines itself to its proper sphere of operation.

To declare what the law is has always been a central part of the judicial function. Yet, Parliament, whether Federal or State, has frequently sought to close off appellate and review avenues by the use of privative clauses. In recent times the High Court has become increasingly vigilant in ensuring that avenues of judicial review are preserved.

### **Commonwealth legislation**

It is convenient to consider privative clauses in relation to Commonwealth and State Legislation separately, although the decision of the High Court in 2010 of *Kirk v Industrial Relations Commission*,<sup>2</sup> discussed later, has made this bifurcation less meaningful. Formerly, the legislative distinction rested very much upon recognition of the separation of powers under the Commonwealth Constitution, which separation is not to be found in the State Constitutional Acts.

### **Industrial regulations**

Prior to the 21<sup>st</sup> century, the most quoted Australian authority on privative clauses was that of *R v Hickman* ('*Hickman*'). An order nisi for a writ of prohibition under section 75(v) of the Commonwealth Constitution was sought in relation to a board ruling that haulage contractors, who carted coal as well as other things, were required to grant their lorry driver employees minimum wage rates specified under an award. The Commonwealth regulations provided that such regulations 'shall apply to industrial matters in relation to the coal mining industry'. Regulation 17 provided that a decision of the 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'. In ordering that the rule nisi should be made absolute it was held that the employees who carried on the business of carriers were not in any real sense part of the coal mining industry and therefore the minimum wage rates under the award did not apply. Dixon J said that the decision of the board:

should not be considered invalid if they do not upon their face exceed the board's authority and if they do amount to a bona fide attempt to exercise the powers of the board and relate to the subject matter of the regulations.<sup>3</sup>

---

\* *Robert Lindsay is a barrister at Sir Clifford Grant Chambers, Perth WA*

### ***The migration legislation***

In 2002, the Howard Government introduced a privative clause to prohibit appeals from decisions made by the Refugee, Migration and Administrative Review Tribunal to the Federal or the High Court. An amendment to the *Migration Act 1958 (Cth)* prohibited such appeals from decisions described as 'privative clause' decisions. In *Plaintiff S157/2002 v the Commonwealth*<sup>4</sup> Gleeson CJ said that a privative clause may involve a conclusion that a decision or purported decision is not a 'decision ..... under this Act'.<sup>5</sup> The plurality said that a privative clause cannot protect against a failure to make a decision required by the legislature, which decision on its face exceeds jurisdiction.<sup>6</sup>

In commenting upon the Commonwealth Government's argument that the three Hickman provisos, quoted by Dixon J above, enlarged the power of decision makers, to enable such decisions to be protected, so long as they complied with those three provisos, the plurality said that the position was otherwise, that the so called protection which the privative clause affords will be inapplicable unless those provisos are satisfied.<sup>7</sup> To ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause. It is inaccurate to describe the Hickman provisos as expanding or extending the powers of the decision maker. The legal process is not one which can place a construction on the privative clause as one provision and assert that all other provisions may be disregarded.<sup>8</sup> If a privative clause conflicts with another provision, pursuant to which some action has been taken or decision made, its effect will depend upon the outcome of its reconciliation with that other provision.<sup>9</sup> A specific intention in legislation as to the duties and obligations of the decision maker cannot give way to the general intention in a privative clause to prevent review of the decision.<sup>10</sup>

Their Honours said that the expression 'decisions ..... made under this Act' must be made so as to refer to claims which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction. An administrative decision which involves jurisdictional error is 'regarded in law as no decision at all'.<sup>11</sup> Section 474(2) of the *Migration Act 1958 (Cth)* required that the decision in question be 'made under [the] Act' and, where the decision made involved jurisdictional error, such a decision was held not to be 'made under the Act' so as to be protected against judicial review.

In *Plaintiff S157/2002* it was said with reference to section 75(v) of the Constitution which authorised prerogative relief against a Commonwealth officer:

First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.<sup>12</sup>

In the following year in *Minister for Immigration v SGLB*,<sup>13</sup> the Court reaffirmed what had been said in *Plaintiff S157*, that jurisdictional error negating a privative clause decision may arise where there has been a failure to discharge what has been called 'imperative duties' or to observe 'inviolable limitations or restraints' found in the *Migration Act*. As Gummow and Hayne JJ said, the three *Hickman* provisos render a privative clause inapplicable unless they are satisfied. However, *Plaintiff S157* also rejected the proposition that those provisos would always be sufficient, so that the satisfaction of them necessarily takes effect as 'an expansion' or 'extension' of the power of the decision maker in question.<sup>14</sup>

### ***Taxation legislation***

In *Commissioner of Taxation v Futuris*<sup>15</sup> the High Court was asked to consider the validity of an income tax assessment where it was alleged the assessor deliberately double counted

actual income tax. Under the *Income Tax Assessment Act 1936* (Cth) section 175 provided 'the validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'. The High Court upheld the validity of the assessment applying the principles of statutory construction set out in *Project Blue Sky Incorporated v Australian Broadcasting Authority*<sup>16</sup> to the effect that the question in the present case was whether it is a purpose of the Act that a failure by the Commissioner in the process of assessment to comply with the provisions of the Act rendered the assessment invalid. In determining that question of legislative purpose, regard must be had to the language of the relevant provision and the scope and purpose of the statute. When this was done it was found that section 175 was not strictly a privative provision and that the assessor did not engage in 'double counting' with any knowledge or belief that there was a failure to comply with the provisions of the Act.

### **State legislation**

In *Kirk v Industrial Relations Commission*,<sup>17</sup> the High Court considered how far, under State legislation, it was necessary to take account of the requirements of Chapter III of the Constitution. The Court said that, at Federation, each of the Supreme Courts had a jurisdiction that included that of the Court of Queen's Bench in England and, whilst statutory privative provisions had been enacted by colonial legislatures, which had sought to cut down the availability of certiorari in *Colonial Bank of Australasia v Willan*,<sup>18</sup> the Privy Council had said of such provisions:

It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, *except 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* (emphasis added).

In *Kirk* the Court enunciated a new principle that 'legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'.<sup>19</sup>

Under section 179(1) of the *Industrial Relations Act 1996* (NSW) a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any Court or Tribunal'. The High Court said 'more particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decision of an inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework of the Australian Judicial System'.<sup>20</sup> *Kirk* had been charged with offences that inadequately particularised the nature of the offence alleged against the *Occupational Health and Safety Act*; the High Court said that this constituted jurisdictional error against which the privative clause afforded no protection.

Where a privative clause is found, the question arises as to whether there is 'jurisdictional error' of such a kind that the privative clause will not protect against a superior court intervening to review the findings of the decision maker. As the plurality said in *Kirk*, 'the principles of jurisdictional error (and its related concept of jurisdictional fact) are used in connection with the control of tribunals of limited jurisdiction on the basis that a tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction'.<sup>21</sup>

In *Kirk*, the Court referred to its earlier decision in *Craig v South Australia*<sup>22</sup> in which it was said:

if.....an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.<sup>23</sup>

It was reiterated again in *Kirk* that the above reasoning was not to be 'a rigid taxonomy of jurisdictional error'.<sup>24</sup> For example, it was recognised that, in some cases, failure to give reasons may constitute a failure to exercise jurisdiction.<sup>25</sup> So too, natural justice requires that both sides be heard.

### **The Crimes legislation**

In *Wainohu v New South Wales*<sup>26</sup> the *Crimes (Criminal Organisations Control) Act 2009* (NSW) provided that the Attorney General may, with the consent of a Judge, declare a Judge of the Supreme Court to be an 'eligible Judge', for the purposes of the Act. The Commissioner of Police may apply to an 'eligible Judge' for a declaration that a particular organisation is a 'declared organisation', and the Judge may make a declaration that this is so if satisfied that members of a particular organisation are engaged in serious criminal activity and that the organisation 'represents a risk to public safety and order'. The Act said that the eligible Judge is not required to provide any grounds or reasons for making a declaration and, once made, the Supreme Court may on the application of the Commissioner of Police, make a control order against individual members of the organisation. The Act was held to be unconstitutional in that it impaired the institutional integrity of the Supreme Court.

Mr Wainohu was a member of the Hells Angels Motorcycle Club. Under the Act there was no appeal from the Judge's decision and a broadly expressed privative clause purported to prevent a decision by an eligible Judge from being challenged in any proceedings, though it was acknowledged by counsel that this would not protect the decision against jurisdictional error in light of the earlier *Kirk* decision.<sup>27</sup> It was said by French CJ and Kiefel J:

A state legislature cannot, consistent with Ch III, enact a law which purports to abolish the Supreme Court of a State or which excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State.<sup>28</sup>

Gummow, Hayne, Crennan and Bell JJ adopted the earlier comments of Gaudron J, that confidence reposed in judicial officers 'depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matters in issue'.<sup>29</sup>

It can be seen, therefore, that the High Court looks at the exercise of judicial power with emphasis on the need for procedural fairness, manifested in an obligation to provide a fair hearing to a party and observance of a requirement for reasons to be given, and that failure in this regard manifests jurisdictional error against which a privative clause would not afford protection.

### **The building and construction legislation**

The decision in *Kirk* has facilitated review in the area of building and construction adjudication. In *Chase Oyster Bar v Hamo Industries*<sup>30</sup> the NSW Court of Appeal said 'to the extent that the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*<sup>31</sup> decided that the Supreme Court of NSW was not required to consider and determine the existence of jurisdictional error by an adjudicator making a determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW), that an order in the nature of certiorari was available to quash or set aside a decision of an adjudicator, and that their

legislation expressed or implied a limit to the Court's power to deal with jurisdictional error, it was in error.....' It seems likely that there is scope for argument that a determination under section 41 of the *Construction Contracts Act 2004 (WA)* is not final if jurisdictional error is discovered.

***The WA Worker's Compensation legislation: the Seddon case***<sup>32</sup>

Seddon applied for an order nisi for a writ of *certiorari* and writ of *mandamus* arising out of an injury received in 2001 at work. He subsequently lodged with the dispute resolution directorate a claim that his injuries were not less than the 30% threshold for the purposes of a common law claim. The matter was referred to a Medical Assessment Panel by the directorate, as the employer contended that the permanent disability was less than 30%. In September 2010, the Panel determined that the permanent disability was 27% and, in doing so, gave Mr Seddon a nil percentage permanent degree of loss of use of the right arm. The Panel indicated that although there were right shoulder symptoms, this injury was unrelated to the accident. The solicitors for Mr Seddon requested that the Panel reconsider this question because the Panel's jurisdiction under the relevant Act was limited to assessing the degree of disability and not how the disability arose. The Panel, in December 2010, reaffirmed its determination that there was a nil loss of permanent function in relation to the right shoulder.

Prior to November 2005, the *Worker's Compensation Act 1981 (WA)* said that determinations of the Medical Assessment Panel were 'final and binding' but did not exclude judicial review on previous authority.<sup>33</sup> However, a privative clause was introduced in November 2005 by the *Worker's Compensation Reform Act, 2004 (WA)*, which said that 'a decision of a Medical Assessment Panel or anything done under this Act in the process of coming to a decision of a Medical Assessment Panel is not amenable to judicial review'.

In seeking *certiorari* and *mandamus*, Seddon argued: first, that the privative clause does not apply since it was only introduced in November 2005 and the injury had occurred in 2001. Second, if it did apply and, notwithstanding that the provisions of the Act also said that a determination of a Panel is 'final and binding', these provisions did not exclude judicial review where there has been jurisdictional error. A 'decision' should be read as meaning 'a decision within jurisdiction' and not a decision made without jurisdiction. Furthermore, the words 'anything done under this Act' should mean anything validly done under this Act, and the words 'not amenable to judicial review' should be read as 'not amenable to judicial review for non-jurisdictional error'.<sup>34</sup> Finally, it was argued that, if the Court considered that the privative clause excluded judicial review for jurisdictional error in the light of the obiter dictum in *Kirk* (ie 'legislation which would take from the Supreme Court power to grant relief on account of jurisdictional error is beyond State Legislative power'), this would mean that the privative clause was unconstitutional.

It was argued that there had been jurisdictional error because: first, the Panel had not analysed the various conflicting medical reports and thus had failed to take into consideration jurisdictional facts necessary to their decision. Second, the Panel had on both occasions on which they made a determination had regard to whether the injuries were work related and in doing so stepped outside their jurisdiction. Third, the determination did not properly disclose the underlying reasoning process upon which the finding of nil loss of use of the right arm had been made.

Edelman J granted an order nisi on 8 September 2011, finding that it was arguable that jurisdictional errors arose in relation to the determination by the Medical Assessment Panel on the three grounds presented. On 10 January 2012, his Honour found, after hearing argument from the deemed employer, that the order nisi should be made absolute, on grounds that there had been jurisdictional error by the Panel in having regard improperly to

whether or not the arm injury was work related when so to determine was not within their jurisdictional statutory power. His Honour found that this constituted jurisdictional error and that the privative clause, which he did find to be operative, did not protect the determination of the Panel from judicial review.

### Summary of decisions

In recent times the High Court has been ready to permit judicial review in an increasingly wide range of instances, where privative clauses have been impugned on the basis of some form of jurisdictional error. Jurisdictional error itself now casts a wide net.<sup>35</sup> It has been said that 'a privative clause will sometimes, although not often, protect against a refusal or failure to exercise power'<sup>36</sup> but such circumstances appear now increasingly rare in light of the constitutional imperative to ensure the maintenance of a balanced distribution of power under the Constitution. As Ferdinand Lassalle recognised as long ago as 1862 'political institutions matter, that constitutions rest on power relationships, and that human will can change things'.<sup>37</sup>

### Endnotes

- 1 Robert Lindsay, 'Natural Justice: Now We See Through a Glass Darkly' 2010 63 *AIAL Forum* 67 – 79, in which I contrast Australian and English developments in judicial review of administrative law action.
- 2 *Kirk v Industrial Relations Commission* [2010] HCA 1.
- 3 *R v Hickman* (1945) 70 CLR 598.
- 4 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
- 5 *Plaintiff S157/2002* per Gleeson CJ at [19].
- 6 *Plaintiff S157/2002* Gaudron, McHugh, Gummow, Kirby & Hayne JJ at [57].
- 7 *Plaintiff S157/2002* at [64].
- 8 *Plaintiff S157/2002* at [65].
- 9 *Plaintiff S157/2002* at [60].
- 10 *Plaintiff S157/2002* at [65].
- 11 *Plaintiff S157/2002* at [76], see also *Cashman v Brown* [2011] HCA 22 where a privative clause making a determination of a Medical Panel in Victoria 'final and conclusive' was held not to exclude judicial review in respect of a common law claim since the claim was not brought under the *Accident Compensation Act 1985* (Vic).
- 12 *Plaintiff S157/2002* at [98].
- 13 (2004) 207 ALR 12; (2004) 78 ALJR 992.
- 14 SGLB at supra at [57].
- 15 (2008) 247 ALR 506.
- 16 (1998) 194 CLR 355.
- 17 *Kirk* supra footnote 2.
- 18 *Colonial Bank of Australasia v Willan* 1874 LR 5PC 417 at 442.
- 19 *Kirk* supra at [100].
- 20 *Kirk* supra at [93].
- 21 *Kirk* supra French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ at [64].
- 22 *Craig v South Australia* (1995) 184 CLR 180.
- 23 *Kirk* supra at [67].
- 24 *Kirk* supra at [74].
- 25 *Kirk* supra at [63].
- 26 [2011] HCA 24.
- 27 *Wainohu* supra French CJ and Kiefel J at [15].
- 28 *Wainohu* supra French CJ and Kiefel J at [46].
- 29 *Wainohu* supra Gummow, Hayne, Crennan and Bell JJ at [74].
- 30 (2010) 272 ALR 750; [2010] NSWCA 190.
- 31 [2004] NSWLR 421.
- 32 *Seddon v Medical Assessment Panel (No. 1)* 2011 WASC 237; *Seddon v Medical Assessment Panel (No. 2)* 2012 WASC 1.
- 33 *Seddon (No 1)* and cases cited by Edelman J at [37].
- 34 *Seddon (No 2)* at [40] see commentary of Edelman J.
- 35 *Seddon (No 1)* at [55] to [61].
- 36 *Darling Casino Ltd v NSW Casino Corporation* (1997) 191 CLR 602 (Gaudron and Gummow JJ).
- 37 Jonathan Steinberg, *Bismarck* (Oxford University Press, 2011): page 205 citing 1862 lectures by Ferdinand Lassalle.