

## Legislative attempts to reduce challenges to decisions under the *Migration Act 1958*

Australian governments of both political persuasions have long sought to restrict access to Australian courts for people seeking to challenge administrative decisions made under the Migration Act 1958. Two techniques used in their attempts are the inclusion in the Migration Act of a privative clause and the codification of the requirements of procedural fairness.

In each case governments have clearly stated their desire to restrict access to the courts. However, this intention has arguably been thwarted by decisions of the High Court of Australia.

### Privative clauses and migration decisions

The term ‘privative clause’ means a provision in legislation that purports to exclude judicial review (review by the courts) of decisions made under that legislation. In 1997 the Howard Government introduced the Migration Legislation Amendment Bill (No. 4) 1997, to include a privative clause in the Migration Act. The privative clause was eventually enacted as section 474 of the Migration Act by the *Migration Legislation Amendment (Judicial Review) Act 2001*. That Act was passed as part of a package of migration legislation at a time of heightened concern about strengthening border protection following the arrival of *MV Tampa* off the Australian coast in September 2001.

Section 474 states that most administrative decisions made under the Migration Act are ‘privative clause decisions’. Such decisions

are deemed to be ‘final and conclusive’ and cannot be ‘challenged, appealed against, reviewed, quashed or called in question in any court’.

### Judicial consideration of section 474: *Plaintiff S157*

The High Court of Australia considered the validity and effect of section 474 in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476. The case involved a decision of the Refugee Review Tribunal affirming the decision of a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs to refuse the plaintiff’s application for a protection visa.

The plaintiff argued that section 474 attempted to oust the jurisdiction of the High Court, that it was inconsistent with paragraph 75(v) of the Constitution and that therefore it was invalid (see below). The Commonwealth argued that section 474 was enacted on the basis of an expectation that privative clauses would be interpreted in accordance with the statement of Justice Dixon in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 (at 614–615) that a privative clause decision by a government body would be valid if

the decision is a bona fide attempt to exercise [the body’s] 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.

The Commonwealth argued that if a decision made under the Migration Act appeared on its face to be within

power, it should be protected from judicial review by section 474.

### Paragraph 75(v) of the Constitution

Paragraph 75(v) confers jurisdiction in matters involving the Commonwealth on the High Court. That jurisdiction cannot be removed by legislation. Chief Justice Gleeson explained the effect of paragraph 75(v) in *Plaintiff S157* as follows (at 482–483):

It 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 ... 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 [the High Court] of its constitutional jurisdiction to enforce the law so enacted.

Whereas a literal interpretation of a privative clause would mean that the clause purported to oust the High Court’s jurisdiction (and thus the clause would be invalid), the High Court’s approach has been to interpret the clause so as to preserve its validity. Rather than pronouncing a privative clause to be invalid, the High Court has construed the clause strictly to adopt an interpretation consistent with the Constitution.

### The decision in *Plaintiff S157*

The High Court’s decision in *Plaintiff S157* was that section 474 was constitutionally valid because it did not, on its correct interpretation, exclude the jurisdiction of the High Court in relation to a decision that involved ‘jurisdictional error’.

The term ‘jurisdictional error’, appears to be very broad. It seems to include any mistake that would affect the ability of a decision-maker to reach a valid decision. In *Plaintiff S157*, the Court held that a failure to afford procedural fairness (or the principles of natural justice) to the plaintiff amounted to ‘jurisdictional error’.

The decision in *Plaintiff S157* meant that section 474 would have little effect. Where a plaintiff established that a decision was affected by an error such that a court would require the decision to be reconsidered, it would also be established that the decision was affected by ‘jurisdictional error’ and thus not protected by section 474.

### **Migration Amendment (Judicial Review) Bill 2004<sup>1</sup>**

The Government’s response to the decision in *Plaintiff S157* was to introduce the Migration Amendment (Judicial Review) Bill 2004. The object of this Bill is to deem, for some purposes, those decisions of migration review tribunals that are only ‘purported’ decisions (because they are affected by jurisdictional error) to be, for certain purposes, decisions that are ‘made under the [Migration] Act’. (These purposes do not include a bar on judicial review and therefore the restriction on appeals to the High Court in section 474 will still have no real effect).

Under the Bill, a ‘privative clause decision’ would be defined, for certain purposes, to include a ‘purported decision’. The effect, if the Bill is passed, will be that provisions that:

- impose time limits on applications for judicial review
- make judicial review available exclusively from the High Court, the Federal Court and the Federal Magistrates Court, or
- prohibit judicial review where merits review is available will apply both to decisions ‘under the [Migration] Act’ and to ‘purported decisions’ (that is, to

‘decisions’ that are not really decisions under the Migration Act because they involve jurisdictional error). Almost certainly the High Court will be required to consider whether any of these restrictions on judicial review may be said, in some circumstances, to constitute in reality a prohibition on judicial review. For example, very strict time limits arguably constitute a prohibition on judicial review which would be invalid because of paragraph 75(v) of the Constitution.

### **Codification of the requirements of procedural fairness**

Applications for review of decisions made under the Migration Act frequently involve a claim that the decision-maker failed to meet common law requirements relating to procedural fairness. This has led to the use of a further mechanism for limiting judicial review of decisions under the Migration Act: namely, attempts to enact a code limiting the content of the requirement to accord procedural fairness in the area of migration.

The *Migration Reform Act 1992* contained detailed statutory provisions setting out procedures to be followed by the makers of primary decisions under the Migration Act. However, in *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, the High Court held that the statutory procedures did not exclude the common law requirement to accord procedural fairness.

The *Migration Legislation Amendment (Procedural Fairness) Act 2002* attempted to overcome the decision in *Miah*’s case in relation to decisions of the Migration Review Tribunal and the Refugee Review Tribunal. It was intended to exclude the operation of the common law rules of procedural fairness in relation to decisions of those tribunals and to make it absolutely clear that decision-makers are only required to comply

with the procedures set down in the Migration Act.

In enacting the Procedural Fairness Act, the Government sought to prevent access to judicial review where a tribunal had not satisfied all the common law rules of procedural fairness (such as the requirement to give a hearing) but had complied with the procedures set down in the legislation.

The Procedural Fairness Act has yet to be considered by the High Court. It is likely that some Justices would take the view that a decision made in accordance with the procedures set down in the legislation is clearly intended by Parliament to be a decision ‘under the Act’ within the terms of the High Court’s decision in *Plaintiff S157* and therefore would be protected by section 474. Other Justices may take the view that a ‘decision’ involving a breach of the rules of natural justice is infected by jurisdictional error and therefore, following *Plaintiff S157*, is not a decision ‘under the Act’.

1. At the time of writing, this Bill had passed the House of Representatives and had been considered by the Senate Legal and Constitutional Committee; the Second Reading Debate in the Senate had been adjourned.

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