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Paul Gerber

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Privative Clauses! The Last Hurrah?

Abstract
[Extract]The effectiveness of privative clauses have bedevilled the common law ever since the Year Books. In recent times, it has been generally accepted that whenever Parliament creates an inferior tribunal, the courts retain an inherent right to supervise and control it, and any person aggrieved by a decision of the tribunal has a right to ask the court to exercise those powers. This article examines whether it is beyond the capacity of the Parliament – both State and Commonwealth – to confer upon an administrative tribunal the power to make authoritative and conclusive decisions as to the limits of its own jurisdiction.

Keywords
common law, court decisions, privative clauses

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PRIVATIVE CLAUSES! THE LAST HURRAH?

By Dr Paul Gerber[*]

Introduction

The effectiveness of privative clauses have bedevilled the common law ever since the *Year Books*. In recent times, it has been generally accepted that whenever Parliament creates an inferior tribunal, the courts retain an inherent right to supervise and control it, and any person aggrieved by a decision of the tribunal has a right to ask the court to exercise those powers. This article examines whether it is beyond the capacity of the Parliament – both State and Commonwealth – to confer upon an administrative tribunal the power to make authoritative and conclusive decisions as to the limits of its own jurisdiction.

Is it likely that the federal Parliament intended administrative tribunals exercising governmental powers, established by statute, to break the law with impunity, and to make their decisions immune to appeal to the courts by virtue of the inclusion of a privative clause? Given that our basic law is a constitution, which embodies the separation of powers, it is surprising that some eminent jurists believe that at federal level the answer to that question is 'yes'.

Last year, the issue raised its head in an article published in the *Australian Law Journal* under the title: 'Judges who play politics: Two current judicial issues',[1] the contributor being the Hon JB Thomas AM, a former Queensland Supreme Court judge and author of *Judicial Ethics in Australia*. The article produced a heated response from Federal Court Justice Hill in a following issue of the Journal.[2] However, common to the dispute between these two eminent jurists is their assumption that Commonwealth administrative tribunals *can* indeed make final determinations on questions of law, which cannot be reviewed if the legislation establishing these tribunals contain a privative clause. In other words, if such a tribunal arrives at an erroneous decision on a point of law in legislation which makes that decision 'final and conclusive' or 'must not be challenged', this is said to be a *damnum sine injuria*. Thus Thomas, in his article, under the heading **Usurping Parliament's Power**, accuses some judges of 'playing

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* LLB, DJur Assistant General Editor *The Australian Law Journal*.

1 (2003) 77 ALJ 173.

2 (2003) 77 ALJ 278.

politics' by refusing to uphold privative clauses. As an example of such 'usurpation', the author claims that these 'judicial activists' have ignored the provision s 474 (as amended) of the *Migration Act 1958* (Cth), an Act which, so the learned author claims, evidences a clear intent of the Parliament to make decisions of the Refugee Tribunal unappellable. Thomas goes on to assert that 'some members of the Federal Court made public statements showing hostility to that measure', echoing with obvious approval an assertion by the Minister for Immigration that these judges are 'finding a variety of ways of dealing themselves back into the review game'.

Justice Hill, whilst vigorously objecting to the suggestion 'that as a judge I would allow political views that I am supposed to have to affect my legal judgment', does not, however, challenge the effectiveness of privative clauses in ousting judicial review. Indeed, his Honour goes so far as to lament the *impact* such provisions have on the liberty of the citizen. Thus, in his Graduation Address on the occasion of Justice Hill being awarded a Doctorate of Laws (*Honoris Causa*) by the University of Sydney (published in the May issue of the Journal),[3] he told graduants:

> When I became a Judge I took an oath that I would do justice. Yet the result of the legislation to prevent asylum seekers applying to any Court to have judicial review of decisions of the Minister or the Refugee or Migration Review Tribunals is that I can not do justice at all. In one case, for example, I had to listen to a barrister paid by the Government say that the Tribunal has made a decision which is clearly wrong in law. The Tribunal member appeared not to have read the section under which he was supposed to be acting. He completely addressed the wrong question. The barrister then, no doubt instructed by the Government, told me that this decision, wrong in law although it was, must stand and neither I, nor any other Judge in any other Court, could do anything about it. That is not justice. *And it is a dangerous precedent*. This time it is refugee decisions that, while wrong cannot be challenged. Next time it might be some other decision that could personally affect you and your rights.[4] (my emphasis)

It is submitted that, given our constitutional restraints, there are indeed limits to the Commonwealth Parliament's power, and a privative clause – no matter how widely cast – can never apply to proceedings for mandamus or prohibition, if an administrative tribunal makes a decision which is wrong in law. Support for this view is to be found in the decision of the High Court in *Plaintiff S157/2002 v Commonwealth of Australia*[5] in which s 474(4) – the very section claimed by both the above jurists to protect decisions of the Refugee and Migration Review Tribunals from judicial review

3 (2003) 77 ALJ 275.
4 Ibid 271.
5 (2003) 77 ALJR 454.

– was held invalid in an application to the High Court for relief under s 75(v) of the Constitution.

Is there a different approach when privative clauses come before State courts? The answer is to be found in the history of privative clauses and the development in Australia following the *dictum* expressed by Dixon J in *R v Hickman; Ex parte Fox and Clinton*.[6]

In the United Kingdom, it had long been believed that where an administrative tribunal has erred in law, an ouster clause was ineffective against judicial review. This view was finally affirmed by a majority of the House of Lords in *Anisminic v Foreign Compensation Commission*.[7] The facts of that case need not concern us. Suffice it for present purposes that the case turned on an ouster clause which stated: 'The determination by the Tribunal of any application made to them under this Act shall not be called in question in any Court of Law.'

At first instance, Browne J (whose decision is – uniquely – appended to the decision of the House of Lords) put the issue succinctly:

> In my view, whenever Parliament creates a new inferior tribunal, the High Court has an inherent jurisdiction to supervise and control it, and any person aggrieved by a decision of the tribunal has an inherent right to ask the court to exercise those powers.[8]

Two speeches of the majority are worth repeating. Lord Reid put the issue as follows:

> There are many cases where, although the tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these

6 (1945) 70 CLR 598.
7 [1969] 2 AC, 147.
8 [1969] 2 AC, 234.

> errors it is as much entitled to decide that question wrongly as it is to decide it rightly.[9]

In his speech, Lord Wilberforce stated:

> The cases in which a tribunal has been held to have passed outside its proper limits are not limited to those in which it had no power to enter upon its inquiry or its jurisdiction or has not satisfied a condition precedent. Certainly such cases exist (for example *Ex parte Bradlaugh*[10]), but they do not exhaust the principle. A tribunal may quite properly validly enter upon its task, and in the course of carrying it out, may make a decision which is invalid – not merely erroneous. This may be described as 'asking the wrong question' or 'applying the wrong test.[11]

In *Ex parte Bradlaugh*, where a similar statutory provision had been examined some 100 years earlier, Mellor J noted:

It is well established that the provision taking away the certiorari does not apply where there is an absence of jurisdiction. The consequence of holding otherwise would be that a Metropolitan Magistrate could make any order he pleased without question.[12]

Lest it be thought that *Anisminic* preached revolution, that great historian of the law, Lord Denning, had already researched the history of ouster clauses nearly two decades earlier which he set out in his decision in *R v Northumberland Compensation Appeal Tribunal.*[13] The case turned on an ouster clause. The issue was: can the High Court (as successor to the old Court of King's Bench) intervene to correct a decision of a statutory tribunal which is erroneous in point of law? Going back to the *Year Books*, Lord Denning found that:

> The Court of King's Bench has from very early times expressed control over the orders of statutory tribunals, just as it has done over the justices. The earliest instance that I have found are the orders of the Commissioners of Sewers, who were set up by statute in 1531 to see to the repairs of the sea walls and so forth. The Court of King's Bench used certiorari to quash the orders of the Commissioners for errors on the face of them, such as when they failed to set out the facts necessary to show that they had jurisdiction in the matter, or when they

9 Ibid 171.
10 (1878) 3 QBD 509.
11 Above in 8, 210.
12 Above n 10, 513.
13 [1952] 2 KB 338.

> contained some error in point of law. It is recorded that on one celebrated occasion the Commissioners refused to obey certiorari issued out of the King's Bench, and for this the whole body of them were 'laid to heels'. … Since that time it has never been doubted that certiorari will lie to any statutory tribunal.[14]

A similar historic analysis of development of certiorari was undertaken by McHugh J in *Re McBain: Ex parte Australian Bishops.*[15]

> The discretionary nature of the writ of certiorari is the product of its historical development. Although the common law courts had developed the writ by the early part of the fourteenth century, they did not use the writ to quash proceedings until well into the seventeenth century. Historically, the function of the writ was to call up the records of proceedings in inferior courts and tribunals and any records in the custody of an administrative officer where a question had arisen concerning the correctness of the record of proceedings. … Professor Sawer has pointed out[16] that, in all reported cases decided between 1300-1640, no suggestion was made that the writ could be used to prevent inferior courts or tribunals from exceeding their jurisdiction, or to quash their decision because they had made an error of law. Instead, certiorari was used to remove the record 'for some purpose controlled by a proceeding other than the certiorari'. In 1642 in *Commins v Massam*,[17] however, Heath J expressed the view that the King's Bench could use certiorari not merely to remove proceedings, but also to review the merits of the proceedings. Thereafter, 'the new removal procedure quickly became popular'. Once the King's Bench permitted certiorari to be used to quash proceedings in the lower courts, the demand for its use brought about a change in practice that 'eliminated, in most cases, the possibility of a trial at bar [in the King's Bench] after certiorari for orders.[18]

His Honour added a cautionary note:

> Statements to the effect that the Crown is entitled to the writ as of right can no longer be automatically applied to applications for judicial review. As I have indicated, the proposition that the Crown is entitled to the writ as of right arose in cases where the Crown was seeking the removal of cases into the King's Bench.

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14 Ibid 350-351.

15 (2002) 188 ALR 1, 27; (2002) 76 ALJR 694, 713.

16 Sawer, 'Error of Law on the Face of an Administrative Record' (1954) 3 *University of Western Australia Annual Law Review* 24, 26.

17 (1642) March NC 196, 197; 82 ER 473, 473.

18 Henderson, *Foundations of English Administrative Law; Certiorari and Mandamus in the Seventeenth Century* (1963) 106-7.

> Those statements are not directly applicable to, and they should not be applied to, the issue of the writ to quash. [19]

It would therefore seem that the various cases where Australian courts have upheld the right of the Crown to certiorari as of right can no longer be regarded as good law; *cf Re Cook; Ex parte Attorney-General*[20] and *R v Judge Martin; Ex parte Attorney-General*.[21]

Turning to the decision of the High Court in *Plaintiff S157/2002 v Commonwealth of Australia* referred to above, the facts can be briefly stated. The plaintiff, a citizen of Bangladesh, had arrived in Australia on an Indian passport. Having been refused a protection visa by the Refugee Review Tribunal (and having failed to have that decision reversed by the Federal Court), he sought to invoke the jurisdiction of the High Court under s 75(v) of the Constitution to issue a writ of prohibition and mandamus against officers of the Commonwealth, and the power, in an appropriate case, to grant ancillary relief in the form of certiorari. It was claimed on his behalf that he had been denied natural justice. At issue was the effectiveness of the privative clause contained in s 474 of the *Migration Act*, which relevantly provides:

'(1) A '**privative clause decision**'

(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.

The section went on to provide that a ***privative clause decision*** includes a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act, including the granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa).

One of the questions reserved for consideration concerned the validity of s 474 of the Act in respect of an application by the plaintiff to the High Court for relief under s 75(v) of the Constitution.

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19 Above n 15, 714.
20 (1967) 69 SR (NSW) 247, 268.
21 [1973] VR 339, 361.

Section 75 of the Constitution provides:

> **'Original jurisdiction of High Court**
>
> In all matters –
> …
> (v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth the High Court shall have original jurisdiction.'

The plaintiff submitted that the *Migration Act* was clear and unambiguous – s 474, so it was said, clearly states that the Minister's decision can neither be challenged, nor is subject to mandamus, prohibition or certiorari in any court on any account. Thus the section purported to oust the jurisdiction conferred upon the High Court by s 75(v) of the *Constitution*, and hence was invalid.

The Commonwealth, on the other hand, submitted that s 474, which was inserted into the *Migration Act 1958* by Sched 1 of the *Migration Legislation Amendment (Judicial Review) Act 2001*, which came into operation on 2 October 2001, should not be read literally, having a more restricted meaning, being 'enacted against a backdrop of established judicial interpretation of similar provisions, and Parliament acted in the light of that interpretation. Furthermore, s 15A of the *Acts Interpretation Act 1901* (Cth) requires that an Act is to be 'read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth'.[22]

In the result, the Court unanimously rejected the 'literal' interpretation, affirming that the section *would* be invalid if, on the construction contended for by the plaintiff, it attempted to oust the jurisdiction of the High Court. However, after referring to a long line of authorities, all the judges held that the constitutional writs of prohibition and mandamus are available for jurisdictional error. It followed that s 474 could not be read as protecting from review decisions involving jurisdictional error, if only because any other interpretation would be in conflict with s 75(v) of the Constitution and is valid in its application to the proceedings which the plaintiff would initiate.

The thrust of the decision was neatly summarised in the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ:

22 Above n 5 per Gleeson CJ at para 4.

> A decision flawed for reasons of a failure to comply with the principles of natural justice is not a 'privative clause decision' within s 474(2) of the Act.[23]

It is of interest that Gleeson CJ should seek support for the same proposition by reference to the English common law:

Speaking of a nation with a unitary constitution, Denning LJ said:

> If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.[24]

> In a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, there is a further issue that may be raised by a privative clause. It is beyond the capacity of Parliament to confer upon an administrative tribunal the power to make authoritative and conclusive decisions as to the limits of its own jurisdiction, because that would involve an exercise of judicial power.[25]

The *Anisminic* decision has been frequently cited, followed, distinguished and reviewed by Australian courts. The sheer number of decisions brought up Online compels selective references. In *Craig v South Australia*,[26] the High Court, in a joint judgment, after citing the speech of Lord Reid quoted above, went on to observe:

> In *Anisminic*, the respondent Commission was an administrative tribunal. Read in context, the above comments should, in our view, be understood as not intended to refer to a court of law. That was recognised by Lord Diplock in *In re Racial Communications Ltd*[27] and affirmed by the English Divisional Court in *R v Surrey Coroner; Ex parte Campbell*.[28] It is true that Lord Reid's comments were subsequently suggested by Lord Diplock[29] and held by the Divisional Court[30] to be also applicable to an inferior court with the result that the distinction between jurisdictional error and error within jurisdiction has been seen as effectively

23 Ibid para 83.
24 *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 586.
25 Ibid paras 8 and 9.
26 [1995] 184 CLR 163.
27 [1981] AC 374, 382-383. See also *BHP Petroleum Pty Ltd v Balfour* (1987) 180 CLR 474, 480.
28 [1982] QB 661, 675.
29 *O'Reilly v Mackman* [1983] 2 AC 237, 278.
30 *R v Greater Manchester Coroner; Ex parte Tal* [1985] QB 67, 81-3.

> abolished in England.[31] That distinction has not, however, been discarded in this country,[32] and for the reasons which follow, we consider that Lord Reid's comments should not be accepted here as an authoritative statement of what constitutes jurisdictional error by an inferior court for the purposes of certiorari. *In that regard, it is important to bear in mind a critical distinction which exists between administrative tribunals and courts of law.* (emphasis added).
>
> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law. That point was made by Lord Diplock in *In re Racial Communications Ltd.*[33]
>
> *Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a court of law, Parliament did not intend to do so.* (emphasis added)
>
> The position is, of course, a fortiori in Australia where constitutional limitations arising from the doctrine of separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal. If such 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 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.[34]

Whilst it is true that Parliaments, in their untrammelled authority, can authorise administrative tribunals to determine questions of law, is it equally true that the inclusion of a privative clause protects a decision, which is clearly wrong in law, in a

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31 *Pearlman v Harrow School* [1979] QB 56, 69; *O'Reilly v Mackman* [1983] 2 AC 237, 278. But cf *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363.

32 See, in particular, *Public Service Association (SA) v Federated Clerks Union* (1991) 173 CLR 132, 141, 149, 165; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351, 371-2. And also *Houssein v Under Secretary of Department of Industrial Relations and Technology (NSW)* (1982) 138 CLR 88, 93-4; *Hockey v Yelland* (1984) 157 CLR 124, 130; R v Gray; *Ex parte Marsh* 1985) 157 CLR 351, 374-7.

33 Ibid 27, 383.

34 [2001] HCA 76.

legal system which embodies a separation of legislative, executive, and judicial power? Whilst the Australian authorities cited are ultimately grounded on federal constitutional safeguards, it is tentatively submitted that State Acts can no longer protect administrative decisions which are wrong in law by the use of ouster clauses.

Having said that, the High Court is not to be understood as suggesting that any error of law on the part of a tribunal will suffice for jurisdictional error. In other words, the distinction between jurisdictional and non-jurisdictional error on the part of a tribunal has not – unlike in England – been removed in this country. The distinction is subtle. As Kirby J pointed out in *Re MIMA; Ex parte Holland*:[35]

> I sought to explain to the applicant and Mr Holland the distinction between errors of jurisdiction and errors within jurisdiction. This is not an easy distinction to explain to lawyers, still less to non-lawyers. In England, the distinction has been abolished by the courts [*cf* the majority decision in *Anisminic*]. I too would abolish the distinction, at least so far as constitutional writs are concerned, and hold that those writs are available to redress established errors of law. However, that does not represent the present doctrine of this court which I am obliged to apply at this stage of the proceedings.

The issue was explained in greater detail by Kiefel J in *Linett v Australian Education Union*,[36] where her Honour noted:

> I do not consider that the High Court is to be understood as suggesting that any error of law on the part of a tribunal will suffice for jurisdictional error. That is to say, the distinction between jurisdictional and non-jurisdictional error on the part of the tribunal has not been removed: see per Wilcox and Madgwick JJ in *Construction, Forestry, Mining and Energy Union v Australian Relations Commission* (1999) 93 FCR 317 at 340-1 [68]; 164 ALR 73. The maintenance of the distinction may be inferred from the apparent approval of Lord Reid's speech with respect to tribunals. The context in which the Court was speaking in *Craig's* case[37] is of importance. As Finkelstein J pointed out in *Edwards v Justice Giudice* (1999) FCR 561 at 590 [106]; 169 ALR 89, in *Craig's* case the High Court was indicating that, absent a clear intention to the contrary, administrative tribunals established by statute do not have jurisdiction to break the law. Indeed, it is unlikely that parliament intended them to make final determinations on questions of law. The distinction between jurisdictional error and a 'mere error of law' is maintained, the latter being one which has been arrived at on an issue that has been entrusted to the inferior court or tribunal to decide for itself, even if the decision is wrong;

35 (2002) 185 ALR 504, 509.
36 (2002) 191 ALR 597, 605.
37 Above n 26.

Parisienne Basket Shoes Pty Ltd v Whyte (1938) 59 CLR 369 at 391-2. This approach would appear to be consistent with the later decision of the High Court in *Coal & Allied Operations Pty Ltd* (2000) ALR 585 at 594-5).

Jurisdictional error

In *Craig*, the Full Court of the High Court declared under the rubric of 'jurisdictional error':

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its function or powers in a case where it correctly recognises that that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to squash a decision or order, an inferior court will fall into jurisdictional error for purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction[38] … an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case.[39] … If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself the 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, or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is a jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

In *MIMA v Bhardwaj*[40] Gaudron and Gummow JJ went so far as to suggest that:

> There is, in our view no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.

38 (1995) 184 CLR 163, 177-8.
39 Ibid, 179.
40 (2002) 187 ALR 117, 129.

The statements in *Craig* seriously erode the submission by counsel in the case quoted by Hill J in his oration at Sydney University, where it was conceded on behalf of the Crown that the tribunal 'had addressed the wrong question … that this decision, wrong in law although it was, must stand and neither I, not any other judge in any other Court could do anything about it'.

The proposition, so neatly put by Browne J in *Anisminic* at first instance:

> Whenever Parliament created a new inferior tribunal, the (courts have) an inherent duty to supervise and control it, and any person aggrieved by a decision of the tribunal has an inherent right to ask the court to exercise those powers.

is likewise applied in this country in cases in which the outcome does not depend on the safeguards provided by s 75(5) of the *Constitution*. For example, Spender J had no hesitation in allowing an appeal from an administrative tribunal in *Walker v Secretary, Department of Social Security*,[41] where his Honour identified an error 'of the kind' identified in *Craig*. A similar provision applies to the approach to privative clauses found in State legislation. The approach to the interpretation of State statutes containing privative clauses was enunciated by Dixon J in *Hickman*,[42] and developed by him in later cases. His Honour stated:

> It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution … It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition.

The above view of the law has been described in *Plaintiff S157/2002* as 'the *Hickman* principle', Gleeson CJ noting that 'the reason of Dixon shows that, although *Hickman* was decided in the context of federal jurisdiction, he also had unitary constitutions in mind.'[43]

Somewhat surprisingly, in *Mitchforce v Industrial Relations Commission* (NSW),[44] the New South Wales Court of Appeal recently adopted a narrower approach to the

41 (1997) 48 ALD 277.
42 [1969] 2 AC 586, 616.
43 (2003) 77 ALJR 454, 459.
44 [2003] NSWCA 151.

Hickman principle. In that case, s 179 of the *Industrial Relations Act 1996* (NSW) purported to prevent review of a jurisdictional error at first instance. A unanimous Court (Spigelman CJ, Mason P and Handley JA) held that, notwithstanding the assumption of jurisdiction by the Commission was erroneous, the section protected the decision from review by the courts. One may well ask what has become of the dictum of Denning LJ, quoted with such approval by Gleeson CJ in *Plaintiff S157/2002*.[45]

> If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

On the other hand, the High Court has shown a reluctance to uphold decisions which are offensive in their consequences. An example of this reluctance can be seen in the decision of the majority in *Carseldine v The Director of the Department of Children's Service*.[46] In that case, the present writer persuaded a majority of the High Court (Barwick CJ, McTiernan, Stephen and Mason JJ; Menzies J dissenting) to override a provision in the *Children's Services Act 1965-1973* (Qld) which vested the guardianship in the Director of Children's Services on terms of that no court could interfere with the guardianship which the Act itself created in positive terms.

At issue was the fate of four young girls who were in the care and protection of their mother, pursuant to s47 of the Act. There was unchallenged medical evidence that all four girls were being sexually abused by the mother's *de facto* (this does not appear in any of the reported decisions). Notwithstanding clear evidence of sexual abuse, the Director resisted all efforts by the maternal grandparents to obtain custody of these children, and strongly defended his action through the courts. Having failed to obtain an order for custody, both at first instances and on appeal to the Full Court of the Supreme Court of Queensland, [47] the grandparents had a win in the High Court, where the majority accepted the submission that the jurisdiction *parens patriae* had been exercised by the Court of Chancery since ancient times, and nothing in the relevant legislation ousted that jurisdiction.

In 'distinguishing' the decision in *Minister of the Interior v Neyens*,[48] in which the High Court upheld the validity of an Ordinance of the ACT which made the Minister the guardian of a child or young person 'notwithstanding any other law of the Territory

45 Above n 25.
46 (1974-1975) 133 CLR 345.
47 [1974] QWN 3.
48 (1964) 113 CLR 411.

relating to the guardianship or custody of children or young persons', McTiernan J Noted:

> I find nothing in [the Act] … to indicate that its provisions are to take any precedence over existing laws in relating to custody or guardianship or over the Supreme Court's equitable jurisdiction.[49]

The majority ordered that the matter be remitted back to the Supreme Court, where the Minister, after some 15 court appearances, finally agreed to a consent order, awarding custody to the grandparents.

It seems that on this issue, the last word has not yet been spoken. If a cat has kittens in an oven, can a State Parliament make them into cakes?

49 Above n 46 352.