

SECTION 75(V), NO-INVALIDITY CLAUSES AND THE RULE OF LAW

CHARLES NOONAN*

I INTRODUCTION

Judicial review of administrative action ensures that official power is only exercised in accordance with the law. In *Constitutional Fundamentals*, William Wade explained the significance of judicial oversight of public power in the following terms:

[T]o exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power. It is no exaggeration, therefore, to describe this as an abuse of the power of Parliament, speaking constitutionally. This is the justification, as I see it, for the strong, it might even be said rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice, giving too much weight to temporary convenience and too little to constitutional principle. The law's delay, together with its uncertainty and expense, tempts governments to take short cuts by elimination of the courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease.¹

The importance of section 75(v) of the *Australian Constitution* in maintaining the rule of law by preserving judicial review 'cannot be over-estimated'.² Section 75(v) states that the High Court shall have original jurisdiction in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. As was stated by Dixon J in *Bank of New South Wales v Commonwealth*, section 75(v) makes it 'constitutionally certain that there [is] a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power'.³ In safeguarding the jurisdiction of the High Court to conduct judicial review, section 75(v) is said to secure 'a basic element of the

* BA/LLB (Hons) (Monash); Law Graduate, King & Wood Mallesons. I would like to acknowledge the guidance of Professor Jeffrey Goldsworthy, who provided me with invaluable advice while preparing this paper.

1 H W R Wade, *Constitutional Fundamentals* (Stephens & Sons, 1980) 66.

2 *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 44 (Spender J).

3 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363.

rule of law⁴ and is seen to incorporate into the *Constitution* ‘an entrenched minimum provision of judicial review’.⁵

While traditional privative clauses attempt to restrict the ability of courts to conduct judicial review or grant a judicial review remedy for jurisdictional error, no-invalidity clauses provide that a failure to comply with a statutory requirement will not give rise to jurisdictional error and will not affect the validity of a decision. Although courts retain their jurisdiction to review for jurisdictional error in the presence of a no-invalidity clause, no reviewable errors will exist as a result of the clause. It is for this reason that no-invalidity clauses may be seen to create ‘islands of power immune from supervision or restraint’.⁶ Due to this indirect manner in which no-invalidity clauses operate to circumvent the constitutionally-entrenched review jurisdiction of the High Court, no-invalidity clauses are commonly viewed as a greater threat to the rule of law than traditional privative clauses.⁷

While it is apparent that section 75(v) will operate to prevent legislative attempts at removing judicial review through privative clauses,⁸ the position with respect to evading judicial review through no-invalidity clauses remains ‘radically unclear’.⁹ This uncertainty has been further exacerbated by the High Court’s decision to give effect to a broad no-invalidity clause in *Federal Commissioner of Taxation v Futuris Corporation Ltd.*¹⁰ However, it may be that the Court in *Futuris* permitted the operation of a no-invalidity clause due to the presence of alternative avenues for appeal contained in the legislation. This article will focus on the circumstance where no such alternative avenue for appeal is available. In such a situation, it is likely that a no-invalidity clause will evoke a degree of judicial hostility that is similar to the hostility that has been provoked by privative clauses, because ‘[i]f you take away appeal rights as well as judicial review rights, the result is ... worrying’.¹¹

This article commences at Part II with an historical analysis of section 75(v). Despite the significance that has been attributed to section 75(v) since its enactment, an analysis of the Convention Debates reveals that the forerunner to section 75(v) was subject to great opposition by various members of the Convention. Further, while courts and academics have embraced the accountability function of section 75(v) in restraining public power and

4 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 (Gleeson CJ) (*‘Plaintiff S157’*).

5 *Ibid* 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

6 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Note that although the case used this description for a traditional privative provision, the description is also apt for no-invalidity clauses.

7 Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 209.

8 See *Plaintiff S157* (2003) 211 CLR 476.

9 Will Bateman, ‘The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review’ (2011) 39 *Federal Law Review* 463, 463.

10 (2008) 237 CLR 146 (*‘Futuris’*).

11 Mark Aronson, ‘Commentary on “The Entrenched Minimum Provision of Judicial Review and the Rule of Law” by Leighton McDonald’ (2010) 21 *Public Law Review* 35, 36.

preserving judicial review, Part II shows that section 75(v) was enacted for a number of distinct (yet somewhat interrelated) purposes, namely (a) the allocation of jurisdiction, (b) federalism and (c) accountability.¹² This Part explores these three particular purposes in order to understand the scope and rationale of section 75(v).

Part III examines the precise operation of section 75(v) as a constitutional mechanism for ensuring that executive power is exercised according to law. This Part introduces the remedies of mandamus and prohibition by reference to their ‘prerogative writ’ ancestors and assesses the implications of the High Court recognising their status as ‘constitutional writs’. Part III then evaluates the ‘notoriously slippery’¹³ concept of jurisdictional error in order to understand the bases upon which a constitutional writ may be invoked. Finally, this Part examines the elusive remedy of the ‘constitutional injunction’ and the uncertainty of its operation in the context of section 75(v).

Part IV assesses the way in which the judiciary has dealt with legislative attempts to exclude judicial review through privative clauses. This Part begins by analysing the nature of privative clauses and the conflict that these clauses raise between the legislature and the judiciary. Part IV then examines the precise way in which courts have dealt with privative clauses through an analysis of the decision of Dixon J in *R v Hickman; Ex Parte Fox and Clinton*¹⁴ and the judgment of the majority in *Plaintiff S157*.¹⁵ This Part concludes by exploring the ‘general principles’ canvassed by the High Court in *Plaintiff S157* due to the possible application of these principles to no-invalidity clauses.

From this setting, Part V examines whether section 75(v) may operate to restrain the exercise of public power in the face of a no-invalidity clause. Part V commences by introducing the concepts of plenary provisions and no-invalidity clauses. This Part then examines the plausibility of two possible solutions to no-invalidity clauses contained in section 75(v), namely incompatibility with section 75(v) ‘as a matter of practical effect’ and the entrenchment of the substantive grounds of judicial review. Two potential limitations to no-invalidity clauses contained outside section 75(v) are also evaluated, namely the requirement of a ‘law’ and the separation of powers doctrine. This Part concludes by analysing the operation of the constitutional injunction and demonstrating that this constitutional remedy may provide a plausible solution to the threat of no-invalidity clauses.

12 James Stellios, ‘Exploring the Purposes of Section 75(v) of the Constitution’ (2011) 34 *University of New South Wales Law Journal* 70, 72.

13 Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14, 18.

14 (1945) 70 CLR 598 (‘*Hickman*’).

15 (2003) 211 CLR 476.

II BACKGROUND TO SECTION 75(V)

A The Convention Debates

1 *Objections to the Inclusion of Section 75(v)*

Despite the significance that has been attributed to section 75(v) in preserving the rule of law and judicial review, Quick and Garran note that there was considerable doubt as to whether the inclusion of section 75(v) in the *Constitution* was necessary.¹⁶ In fact, the subsection was struck out during the Melbourne Federal Convention before ultimately being reinserted.¹⁷ Sir Isaac Isaacs strongly condemned the inclusion of the provision at the Melbourne Federal Convention Debates, stating '[i]t seems to be wholly unnecessary; it cannot work any good and it may work a great deal of harm.'¹⁸ Objections of this kind were due to concerns that section 75(v) conferred jurisdiction that had already been conferred by section 75(iii), that implications may be drawn that the High Court had no jurisdiction with respect to remedies not expressly specified, and that section 75(v) may enable the judiciary to unduly interfere with political matters.¹⁹ The concern that the inclusion of section 75(v) would permit undue political interference by the judiciary was simply dealt with by reference to the suggestion that the subsection merely confers jurisdiction, not any new right.²⁰ However, Isaacs recognised the difficulty with this notion, asserting 'you cannot put within the judicial power a mere remedy where there is no right.'²¹ Whether the operation of section 75(v) safeguards any substantive rights remains contentious and will be examined in Part V. However, an illustration of the remaining objections, as well as how these objections were addressed, is provided as follows.

(a) *Overlap with Section 75(iii)*

Section 75(iii) gives the High Court original jurisdiction in all matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.'²² This subsection is said to have been incorporated into the *Constitution* in order to ensure a jurisdiction in which the legal actions of

16 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 778.

17 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 320–1 (George Reid, Edmund Barton, Josiah Symes, Patrick Glynn, Isaac Isaacs); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885 (Isaac Isaacs, Edmund Barton).

18 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1880 (Isaac Isaacs).

19 Quick and Garran, above n 16, 779–80.

20 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1883–5. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139 (Hayne J); *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 178 (Mason CJ); *Werrin v Commonwealth* (1938) 59 CLR 150, 166–8 (Dixon J).

21 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1882–3 (Isaac Isaacs).

the Commonwealth and its agents could be redressed.²² During the Melbourne Convention Debates, Isaacs contended that section 75(v) was unnecessary on the basis that the jurisdiction to be conferred by section 75(v) was already covered by section 75(iii).²³ It has been suggested that section 75(v) was incorporated as a safeguard against the possibility that the meaning of section 75(iii) would be read down by reference to United States ('US') case law.²⁴ However, the willingness of courts to adopt a broad construction of section 75(iii) to encompass 'the agents and instrumentalities of the Commonwealth suing or being sued in their official or governmental capacity'²⁵ has supported Isaacs' contention, albeit not entirely.

As it is settled law that an application for a prerogative writ will constitute a 'suit' for the purposes of section 75(iii),²⁶ section 75(iii) undoubtedly 'provides scope for the High Court to engage in judicial review.'²⁷ In safeguarding the High Court's jurisdiction to engage in judicial review, it is likely that the constitutional writs contained in section 75(v) would also be protected by section 75(iii). From this, both courts and academics continue to question whether the content of section 75(v) is already contained in section 75(iii).²⁸ Jackson states that, in order to determine the extent of the overlap between the subsections, one must consider whether the category of persons who could be sued 'on behalf of the Commonwealth' would encompass all of those who qualify as an 'officer of the Commonwealth.'²⁹ An 'officer of the Commonwealth' is not determined by reference to the exercise of federal power, but rather to a connection to the Commonwealth that involves 'an "office" of some conceivable tenure, and ... an appointment, and usually a salary'.³⁰ This definition of 'officer' under section 75(v) clearly encompasses a range of Commonwealth 'agents and instrumentalities' under section 75(iii), indicating a significant overlap between the two subsections. However, Zines doubts whether judges of federal courts would fall into the definition of the 'Commonwealth or a person suing or being sued on behalf of the Commonwealth', despite being characterised as 'officers of the Commonwealth'.³¹ In any event, it remains clear that 'on all accounts, the

22 Leslie Katz, 'Aspects of the High Court's Jurisdiction to Grant Prerogative Writs under s 75(iii) and s 75(v) of the Constitution' (1976) 5 *University of Tasmania Law Review* 188, 192; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 363–7 (Dixon J).

23 Quick and Garran, above n 16, 779; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1882–3 (Isaac Isaacs).

24 Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (The Federation Press, 3rd ed, 2002) 48; *Re Refugee Review Tribunal*; *Ex parte Aala* (2000) 204 CLR 82, 92 (Gaudron and Gummow JJ).

25 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 367 (Dixon J).

26 *R v Murray and Cormie*; *Ex parte Commonwealth* (1916) 22 CLR 437, 456–7 (Isaacs J).

27 D F Jackson, 'Development of Judicial Review in Australia over the Last 10 Years: The Growth of the Constitutional Writs' (2004) 12 *Australian Journal of Administrative Law* 22, 23; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 204 (Deane and Gaudron JJ).

28 Zines, above n 24, 48; *Re Refugee Review Tribunal*; *Ex parte Aala* (2000) 204 CLR 82, 92 (Gaudron and Gummow JJ).

29 Jackson, above n 27, 23.

30 *R v Murray and Cormie*; *Ex parte Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J); Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 *Public Law Review* 3, 3.

31 Zines, above n 24, 48; Jackson, above n 27, 23.

purposes of sections 75(iii) and 75(v) are symbiotically linked³² and that the overlap between the two heads of jurisdiction is ‘very great’.³³

(b) Section 75(v) as a Limitation of Jurisdiction

During the Melbourne session of the 1898 Constitutional Convention, Edmund Barton and Isaac Isaacs initially raised concerns that the inclusion of section 75(v) would raise an ‘irresistible’ inference that the High Court had no jurisdiction with respect to remedies not expressly enumerated, such as the writs of certiorari or habeas corpus.³⁴ While the subsection was struck out in order to prevent such a limitation,³⁵ it was later reinserted following various individuals addressing these concerns to the satisfaction of the Convention.³⁶ John Quick’s suggestion that section 75(v) encompass a ‘complete enumeration embracing all possible writs for the enforcement of remedies’³⁷ was never properly addressed by the Convention and therefore, the precise justifications for not including a broader range of remedies in section 75(v) remains unclear. However, according to Quick and Garran,³⁸ the Convention accepted that section 75(v) was merely a non-exhaustive conferral of jurisdiction that left the original jurisdiction of the Court otherwise unaltered. The High Court would therefore be able to utilise all appropriate remedies whenever it was ‘incident or necessary to the exercise of their original jurisdiction’³⁹ and the availability of these remedies would not be affected by section 75(v).⁴⁰ It is for this reason that Quick and Garran note that the subsection must not be confounded with the jurisdiction of the High Court, whether original or appellate, to employ all appropriate remedies in the exercise of its lawful jurisdiction.⁴¹ This is notwithstanding that ‘in a certain class of cases the nature of the remedy sought is made the ground of jurisdiction.’⁴²

2 *The Purposes of Section 75(v)*

While courts and academics have embraced the accountability function of section 75(v) in preserving judicial review, a historical analysis of this subsection reveals that accountability was not the sole, or even primary, purpose of section 75(v) at the time of its enactment. Through an examination of the Convention Debates and successive drafts of the *Constitution*, Stellios persuasively identifies

32 Stellios, above n 12, 83.

33 Zines, above n 24, 48.

34 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 320–1 (Edmund Barton, Isaac Isaacs).

35 *Ibid* 321.

36 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885.

37 *Ibid* 1881 (John Quick).

38 Quick and Garran, above n 16, 779.

39 *Ibid*.

40 Gabriel A Moens and John Trone, *Lumb & Moens’ The Constitution of the Commonwealth of Australia Annotated* (Butterworths, 6th ed, 2001) 267.

41 John Quick and Littleton Groom, *The Judicial Power of the Commonwealth* (Lawbook Company of Australasia, 1904) 122.

42 Quick and Garran, above n 16, 780.

three main purposes of section 75(v), namely (a) the allocation of jurisdiction, (b) federalism and (c) accountability.⁴³ These purposes have been described as ‘three distinct understandings’ of section 75(v).⁴⁴ However, an analysis of these purposes reveals significant misunderstandings among members of the Convention as to the intended operation of this provision.

(a) *Allocation of Jurisdiction*

Being a great admirer of the *United States Constitution* and the judicial supremacy of the US Supreme Court,⁴⁵ Inglis Clark based his Draft Constitution of 1891, including what was to become chapter III of the *Australian Constitution*, ‘in accordance with the distinctive feature of the *American Constitution* ... with such alterations and additions as the local circumstances of the Colonies and the political history of the United States seemed to indicate ... as being desirable.’⁴⁶ One such addition that Inglis Clark deemed desirable was the forerunner to section 75(v). This provision was incorporated into Inglis Clark’s Draft Constitution of 1891 in order to prevent the jurisdictional uncertainty that the US Supreme Court exposed in the case of *Marbury v Madison*.⁴⁷

In *Marbury v Madison*, the US Supreme Court had to consider whether it had original jurisdiction to hear a claim for mandamus against a federal government officer under the *Judiciary Act of 1789*. Section 13 of the *Judiciary Act of 1789* expressly provided that the US Supreme Court may ‘issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.’⁴⁸ Section 2(1) of Article III of the *United States Constitution* defines federal judicial power by reference to a list of particular cases and section 2(2) of Article III allocates a number of these cases to the original jurisdiction of the Supreme Court. Section 2(1) of Article III states that the federal judicial power shall extend to:

[A]ll Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

43 Stellios, above n 12, 72.

44 Ibid.

45 Robert French, ‘Constitutional Review of Executive Decisions: Australia’s US Legacy’ (2010) 35 *University of Western Australia Law Review* 35, 35–6.

46 William Buss, ‘Andrew Inglis Clark’s Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*’ (2009) 33 *Melbourne University Law Review* 718, 794–5; John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 67.

47 5 US 137 (1803).

48 *Marbury v Madison*, 5 US 137 (1803), 173 (Marshall CJ).

As a claim for mandamus under the *Judiciary Act of 1789* was considered a case ‘arising under ... the law of the United States’, the matter came within the scope of the federal judicial power as defined under section 2(1) of Article III. However, in determining whether the Court had original jurisdiction to hear the matter, the court closely examined section 2(2) of Article III of the *Constitution*. This provision stated:

In all cases affecting ambassadors, other public Ministers and Consuls, and those in which a state shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

As section 2(2) of Article III did not allocate original jurisdiction to the Supreme Court in cases ‘arising under ... the laws of the United States’, Marshall CJ concluded that the Court had only appellate jurisdiction with respect to issuing writs of mandamus in such circumstances.⁴⁹ From this, the *Judiciary Act of 1789* was invalid insofar as it attempted to confer original jurisdiction on the Supreme Court where no such jurisdiction was conferred by the *Constitution*.⁵⁰

When Inglis Clark inserted the forerunner to section 75(v) into his Draft Constitution of 1891, he was apparently seeking to avoid the deficiency exposed by the US Supreme Court in *Marbury v Madison*.⁵¹ Quick and Garran commented that, in the absence of section 75(v), *Marbury v Madison* would be applicable to the *Australian Constitution* and thus, the High Court would have no original jurisdiction to hear a claim for mandamus unless such a claim fell within the Court’s original jurisdiction under other subsections of section 75.⁵² However, this comment, it is contended, is not entirely accurate.

The operation of section 75(v) would have remedied the defect in *Marbury v Madison* if Clark’s Draft Constitution of 1891 had been adopted.⁵³ However, it appears that a ‘collective confusion’ existed during the Convention as to the significance that Clark attributed to this case.⁵⁴ Unlike Article III of the *United States Constitution*, the Constitution Bill being debated (as well as the *Constitution* eventually enacted) enabled Parliament to add to the High Court’s original jurisdiction.⁵⁵ From this, in absence of section 75(v), a conferral of jurisdiction by Parliament of the kind under the *Judiciary Act of 1789* in *Marbury v Madison* would still have been constitutionally valid; it would have merely conferred additional original jurisdiction under section 76(ii) as a matter ‘arising

49 Ibid 175–6 (Marshall CJ).

50 Ibid 177 (Marshall CJ).

51 See Williams, above n 46, 846 citing Edmund Barton’s letter to Inglis Clark, dated 14 February 1898. This letter refers to Clark expressing concerns to Barton about *Marbury v Madison* and its possible application to the *Australian Constitution*.

52 Quick and Garran, above n 16, 779.

53 Clark’s Draft Constitution of 1891 did not have an equivalent to s 76(ii) of the *Australian Constitution* that permitted the conferral of additional original jurisdiction. See Williams, above n 46, 108–9.

54 Buss, above n 46, 779.

55 Ibid 784; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1883, 1885. See also Williams, above n 46, 1096–7.

under any laws made by the Parliament'. It is therefore apparent that the Drafting Committee's amendments to chapter III largely rendered redundant this jurisdictional purpose that Clark had in mind when drafting this provision.⁵⁶

(b) *Federalism*

As it was seen to be 'cumbrous and undesirable if an officer of the Commonwealth could be proceeded against in a state court',⁵⁷ section 75(v) was also seen to protect the Commonwealth government and its officers from state judicial power in ensuring that such matters were within the exclusive scope of federal jurisdiction.⁵⁸ Josiah Symon, the chairman of the Judiciary Committee and one of the main contributors to the development of section 75(v),⁵⁹ stated that this federalist purpose of section 75(v) was 'the sole object that the Judicial Committee had in view in inserting it at first instance'.⁶⁰ As Inglis Clark later wrote that the content of s 75(v) fell into a category of matters that were exclusive to the Commonwealth,⁶¹ Clark is also likely to have had this federalist purpose in mind when drafting this provision. However, as chapter III includes a scheme for allowing state courts to exercise federal jurisdiction, as well as a mechanism for defining the extent to which matters of federal jurisdiction are exclusive to federal courts, the inclusion of these matters within section 75(v) did not, in itself, make these matters exclusively federal.⁶² Isaacs recognised this difficulty, stating 'if the power to make such an application in the state court exists the insertion of these words cannot take that power away.'⁶³ Despite this, the High Court continues to give effect to the federalist view of section 75(v) advocated by Symon and Clark, stating that, in absence of sections 38 and 39 of the *Judiciary Act 1903* (Cth) (which render section 75 matters exclusively federal), the matters contained within section 75(v) are 'necessarily exclusive of the judicial power of the states'.⁶⁴

56 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 327.

57 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1878 (Josiah Symon).

58 Stellios, above n 12, 82.

59 *Ibid* 72.

60 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1879 (Josiah Symon).

61 A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 177–8.

62 Stellios, above n 12, 82.

63 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1879 (Isaac Isaacs).

64 Clark, above n 61, 177–8, cited in *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 618 (Gleeson CJ, Gummow and Hayne JJ); Stellios, above n 12, 87. Stellios also points out difficulties with such an interpretation due to the operation of cl 5 of the *Constitution* which makes the *Constitution* binding on state courts: at 88. See also Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 265, 275.

(c) *Accountability*

Section 75(v) was also believed to constitutionally entrench the original jurisdiction of the High Court to review administrative action through engaging in judicial review.⁶⁵ While Barton ostensibly reintroduced section 75(v) for Clark's purpose of allocating jurisdiction,⁶⁶ Barton undoubtedly believed that section 75(v) would also serve this accountability function in ensuring that judicial power protected people from unlawful actions of the executive.⁶⁷ This is clear from Barton's concluding remarks on this provision before it was ultimately reinserted, emphasising that:

This provision is applicable to those three special classes of cases [namely when a writ of mandamus or prohibition or an injunction is being sought against an officer of the Commonwealth] in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution.⁶⁸

While Barton and Clark appreciated the significance of section 75(v) in ensuring that executive action would be subject to judicial review,⁶⁹ the framers of this provision could not have anticipated the significance that it would eventually be attributed. In addition to stating that 'as a matter of safety, it would be well to insert these words',⁷⁰ Edmund Barton remarked that the inclusion of section 75(v) 'cannot do harm, and may protect us from a great evil.'⁷¹ This has since been described extracurricularly by Chief Justice Robert French as a 'masterly understatement' when viewed in light of the significance that has been attributed section 75(v) since its enactment;⁷² in safeguarding the High Court's jurisdiction to require officers of the Commonwealth to act within the law, section 75(v) is now said to secure 'a basic element of the rule of law'⁷³ and 'introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review.'⁷⁴

65 Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 37.

66 Stellios, above n 12, 81; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875 (Edmund Barton).

67 Aronson and Groves, above n 65, 38.

68 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885 (Edmund Barton).

69 Buss, above n 46, 788–9.

70 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1876 (Josiah Symon).

71 *Ibid.*

72 French, above n 45, 38.

73 *Plaintiff S157* (2003) 211 CLR 476, 482 (Gleeson CJ).

74 *Ibid* 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

III THE OPERATION OF SECTION 75(V) IN RESTRAINING PUBLIC POWER

While not the sole motivation in the development of section 75(v), it is the accountability function that has come to dominate our understanding of section 75(v) and its purpose.⁷⁵ This can be attributed to the fact that section 75(v) is now seen to provide a source of access to the High Court for the protection of judicial review and the rule of law.⁷⁶ In *Bank of New South Wales v Commonwealth*, Dixon J explained the significance of section 75(v) by reference to its accountability function and the rule of law, contending that section 75(v) was incorporated into the *Constitution* in order ‘to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.’⁷⁷ This function of section 75(v) is further explained by Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157*:

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. ... The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.⁷⁸

Section 75(v) is therefore of ‘cardinal importance’ in maintaining the rule of law within the national legal structure.⁷⁹ It is acknowledged that section 75(v) provides a constitutionally-entrenched mechanism for challenging the legality of the exercise of official power.⁸⁰ The precise way in which section 75(v) operates to restrain officers of the Commonwealth from exceeding their jurisdiction is illustrated as follows.

75 Stellos, above n 12, 92.

76 Buss, above n 46, 787; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff S157* (2003) 211 CLR 476, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

77 (1948) 76 CLR 1, 363.

78 (2003) 211 CLR 476, 513–14.

79 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 438 (Kirby J).

80 Robert French, ‘Administrative Law in Australia: Themes and Values’ in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamental Principles and Doctrines* (Cambridge University Press, 2007) 18.

A The Constitutional Writs

Section 75(v) states that the High Court shall have original jurisdiction in all matters ‘in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’. In *Plaintiff S157*, Gleeson CJ explained the function of the remedies contained in section 75(v), stating:

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.⁸¹

Mandamus and prohibition are two members of a family of public law remedies that are traditionally known as ‘prerogative writs’. These writs have their origins in the early courts of England, including the King’s Council and King’s Bench,⁸² where they served the function of ‘safeguarding the Crown and its prerogatives against legal non-compliance’.⁸³ Despite this descent, the High Court has stated that ‘prerogative writ’ is an ‘inapt description’ for the remedies of mandamus and prohibition under section 75(v).⁸⁴ This is due to the fact that mandamus and prohibition, when granted pursuant to section 75(v), have a foundation and operation that is distinct from their prerogative writ ancestors.⁸⁵ It is for this reason that the High Court has favoured the description ‘constitutional writ’ when referring to the writs of mandamus and prohibition issued in the context of section 75(v).⁸⁶ However, drawing a distinction between ‘prerogative writs’ and ‘constitutional writs’ in this manner should not be viewed purely as an academic exercise. Sofronoff explains the significance of this distinction, asserting:

This is more than a change of nomenclature. It signals an abandonment of the common law as the ultimate constitutional foundation and, instead, a requirement that the scope of the writs is to be determined by a consideration of the terms of the *Constitution* and the necessary implications to be drawn from it – that is to say, that the *Constitution* itself is the ultimate foundation of Australian law.⁸⁷

Therefore, when issued in the context of section 75(v), mandamus and prohibition are not only analysed by reference to their operation at general law, but by reference to their constitutional context.⁸⁸ Further, when granted under section 75(v), mandamus and prohibition are given an importance and operation

81 *Plaintiff S157* (2003) 211 CLR 476, 482–3.

82 Walter Sofronoff, ‘Constitutional Writs’ (2007) 14 *Australian Journal of Administrative Law* 145, 147.

83 Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd ed, 2009), 1083.

84 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 93 (Gaudron and Gummow JJ).

85 *Ibid* 93–4 (Gaudron and Gummow JJ), 133–4 (Kirby J); French, above n 45, 38–9. Eg, the High Court has explained that ‘writs under s 75(v) were issued in fidelity required by covering cl 5 to the Constitution itself rather than any fidelity owed to the Crown’: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92 (Gleeson CJ).

86 Jackson, above n 27, 24.

87 Sofronoff, above n 82, 152.

88 James Spigelman, ‘Public Law and the Executive’ (2010) 34 *Australian Bar Review* 10, 15.

beyond that understood at common law.⁸⁹ In any case, it is important to note that the term ‘prerogative writ’ is still often used to describe remedies such as mandamus, prohibition and certiorari when not used in the context of section 75(v).⁹⁰ Due to the differences that have developed in granting judicial review remedies under section 75(v), the general law and under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and its state and territory equivalents, the High Court’s distinction between ‘prerogative writs’ and ‘constitutional writs’ has been said to give rise to a ‘complex triumvirate of systems for judicial review’.⁹¹

B The Development of the Common Law Grounds of Review

While section 75(v) confers original jurisdiction on the High Court to issue specific remedies, section 75(v) does not specify the grounds upon which these remedies may be issued.⁹² However, it is established that the grounds that apply to remedies granted under section 75(v) are defined by reference to ‘administrative law principles that have developed (and that continue to develop) under the common law’.⁹³ From this, the High Court is able to ‘draw upon and contribute to the evolution of the grounds of judicial review ... in exercising its jurisdiction under section 75(v).’⁹⁴ Despite its constitutional foundations in section 75(v), the development of grounds of review in this manner ‘can only be described as a common law process.’⁹⁵ Due to its significant role in preserving judicial review and facilitating its development, Groves states that the ‘Australian Constitution simultaneously enables and constrains judicial review, and ... has enabled the High Court to secure its own position and, from that vantage point ... strike at the heart of some of the most politically charged legislation of the day.’⁹⁶ However, as section 75(v) is silent as to the grounds on which the remedies specified may be awarded, the extent to which any of the grounds of judicial review are constitutionally entrenched remains unclear.⁹⁷

89 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 632–3 (Gaudron and Gummow JJ); *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620, 652–4 (Toohey, McHugh and Gummow JJ).

90 Benjamin O’Donnell, ‘Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution’ (2007) 28 *Australian Bar Review* 291, 302.

91 Jackson, above n 27, 26.

92 Matthew Groves and H P Lee, ‘Australian Administrative Law: The Constitutional and Legal Matrix’ in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 11.

93 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59, 94 (Kirby J).

94 Groves and Lee, above n 92, 11–12.

95 Spigelman, above n 88, 17.

96 Matthew Groves, ‘Judicial Review of Administrative Action in the High Court of Australia’ (2008) 33 *Queen’s Law Journal* 327, 330.

97 Cane and McDonald, above n 7, 37. This will be the subject of analysis in Part V.

C Jurisdictional Error

As an application for a remedy contained in section 75(v) is enlivened by jurisdictional error,⁹⁸ jurisdictional error has been described as ‘the central gatekeeper for the constitutional writs’.⁹⁹ A jurisdictional error will arise if a ‘decision-maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks the power to do.’¹⁰⁰ This can be contrasted with a non-jurisdictional error, or error made within jurisdiction, which arises when a decision-maker incorrectly decides ‘something which the decision-maker is authorised to decide.’¹⁰¹ Chief Justice Robert French explains the concept of jurisdictional error by reference to the proper or improper exercise of power:

Ultimately, the question of jurisdictional error is, for all intents and purposes, one of power. The question is, did the decision-maker have the power to make the decision or, relevantly to mandamus, did the decision-maker wrongfully decline to fulfil his or her duty to make a decision?¹⁰²

‘Jurisdictional error’ is a means of stating a conclusion with respect to legality rather than a test for legality itself,¹⁰³ breaching a particular ground of review may constitute a jurisdictional error but jurisdictional error is not, in itself, a ground of review. Due to the overlap of grounds that may give rise to jurisdictional error and the indefinite way in which these grounds are often expressed,¹⁰⁴ Spigelman contends that jurisdictional error remains a ‘general concept of undefined, probably undefinable, content.’¹⁰⁵ In any case, Aronson and Groves state that the catalogue of jurisdictional error in Australia consists of the following grounds of judicial review:

1. A mistaken assertion or denial of the very existence of jurisdiction.
2. A misapprehension or disregard of the nature or limits of the decision-maker’s functions or powers.
3. Acting wholly or partly outside the general area of the decision-maker’s jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances ...
4. Mistake as to the existence of a jurisdictional fact or other requirement when the relevant Act treats that fact or requirement as something which must exist objectively as a condition precedent to the validity of the challenged decision ...
5. Disregarding relevant considerations or paying regard to irrelevant considerations, if the proper construction of the relevant Act is that such errors should result in invalidity.

98 French, above n 45, 39.

99 O’Donnell, above n 90, 294.

100 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 (Hayne J).

101 *Ibid.*

102 French, above n 45, 40.

103 Mark Aronson, ‘Jurisdictional Error without the Tears’ in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) 333; Spigelman, above n 88, 16.

104 Aronson, above n 103, 335; see generally *Craig v South Australia* (1995) 184 CLR 163, 176–80.

105 Spigelman, above n 88, 17.

6. Some, but not all, errors of law. In particular, if the decision-maker is an inferior court or other legally-qualified adjudicative body, the error is likely to be jurisdictional only if it amounts to a misconception of the nature of the function being performed or of the body's powers ...
7. Acting in bad faith.
8. Breaching the hearing or bias rules of natural justice.¹⁰⁶

The catalogue of conduct that may constitute jurisdictional error in Australia is not closed,¹⁰⁷ and the High Court has recognised that a wide range of conduct may give rise to jurisdictional error. Despite this, only one legal consequence exists for decisions infected with jurisdictional error: the decision is declared null and void.¹⁰⁸ It is for this reason that nullity has been described as the 'legal result or bundle of results flowing from jurisdictional error',¹⁰⁹ as a decision attended by jurisdictional error is regarded as 'no decision at all'.¹¹⁰

D The Constitutional Injunction

Unlike mandamus and prohibition, an injunction has never been classified as a 'prerogative writ'.¹¹¹ Rather, the injunction is a discretionary equitable remedy that is available in private law and public law to prevent all forms of illegality.¹¹² While it is unclear why the injunction was incorporated into section 75(v), the injunction may have been included due to its analogy with both prohibition (in the case of a prohibitive injunction) as well as mandamus (in the case of a mandatory injunction).¹¹³ Due to the fact that an injunction may be ordered at the court's discretion to prevent *all forms* of illegality, it is likely that an injunction issued pursuant to section 75(v), or a 'constitutional injunction', is available in a wider range of circumstances than the constitutional writs. This is apparent, as in *Project Blue Sky Inc v Australian Broadcasting Authority*, McHugh, Gummow, Kirby and Hayne JJ stated that an injunction may be awarded in circumstances where a decision is unlawful, despite not being invalid.¹¹⁴ Further, in *Plaintiff S157*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ stated that an injunction ordered pursuant to section 75(v) may be available on grounds that are wider than jurisdictional error.¹¹⁵ Whether an injunction will be available to

106 Aronson and Groves, above n 65, 17–18. See also *Craig v South Australia* (1995) 184 CLR 163, 176–80; *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid); *Plaintiff S157* (2003) 211 CLR 476, 508–9; *Re Refugee Review Tribunal*; *Ex Parte Aala* (2000) 204 CLR 82.

107 Aronson and Groves, above n 65, 18.

108 Aronson, above n 103, 333.

109 Mark Aronson, 'Nullity' (2004) 40 *Australian Institute of Administrative Law Forum* 19, 21.

110 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15 (Gaudron and Gummow JJ).

111 O'Donnell, above n 90, 304.

112 Aronson and Groves, above n 65, 8.

113 Cane and McDonald, above n 7, 109; Quick and Garran, above n 16, 783.

114 (1998) 194 CLR 355, 393 ('*Project Blue Sky*'). See also *Abebe v Commonwealth* (1999) 197 CLR 510, 551–2 (Gaudron J).

115 *Plaintiff S157* (2003) 211 CLR 476, 508; *Abebe v Commonwealth* (1999) 197 CLR 510, 551–2 (Gaudron J); cf *Plaintiff S157* (2003) 211 CLR 476, 520–1 (Callinan J).

prevent non-jurisdictional errors of law was not conclusively determined in *Plaintiff S157*, although the majority stated that ‘in any event, injunctive relief would clearly be available for fraud, bribery, dishonesty or other improper purpose.’¹¹⁶ In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah*, Kirby J hypothesised that, if the constitutional injunction did protect against both jurisdictional and non-jurisdictional errors of law, the distinction between jurisdictional and non-jurisdictional error would be redundant;¹¹⁷ while mandamus and prohibition may only be enlivened by jurisdictional error, the injunction would protect against all errors of law. The precise operation and limits of the constitutional injunction remains unclear. However, the distinction between jurisdictional and non-jurisdictional errors of law remains a central concept to the remedies contained in section 75(v).

IV SECTION 75(V) AND PRIVATIVE CLAUSES

In requiring officers of the Commonwealth to act within the law, section 75(v) undoubtedly secures ‘a basic element of the rule of law’ in Australia which ‘cannot be taken away by Parliament.’¹¹⁸ For this reason Jackson states that:

[Section] 75(v) reflects a distinct constitutional value, namely that there will always be a court which has jurisdiction to determine the legality of the performance by officers of the Commonwealth, judicial or non-judicial, of their functions, or the legality of their failure to perform them.¹¹⁹

Despite the role of section 75(v) in preserving judicial review, Parliament continues to test the boundaries of this constitutional safeguard by enacting provisions which seek to restrict, exclude or bypass the jurisdiction of the courts to conduct judicial review.¹²⁰ This Part will analyse the main ways in which courts have dealt with legislative attempts to preclude or restrict judicial review through the enactment of privative clauses. This will be achieved through an analysis of the two most significant cases concerning privative clauses, namely *Hickman* and *Plaintiff S157*.

A Privative Clauses

A privative clause is the most well-known mechanism utilised by Parliament in order to exclude or restrict judicial review.¹²¹ A traditional privative clause is a provision enacted by Parliament that operates to ‘deprive the courts of their

116 *Plaintiff S157* (2003) 211 CLR 476, 508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

117 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miha* (2001) 206 CLR 57, 122 (Kirby J), cited in O’Donnell, above n 90, 326.

118 *Plaintiff S157* (2003) 211 CLR 476, 482 (Gleeson CJ).

119 Jackson, above n 27, 29.

120 Mary Crock and Edward Santow, ‘Privative Clauses and the Limits of the Law’ in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007), 349. For common methods of restricting judicial review, see Aronson and Groves, above n 65, 943–4.

121 Bateman, above n 9, 466.

judicial review jurisdiction and/or the power to issue remedies which would otherwise be available in a judicial review application.¹²² Such a clause attempts to remove or restrict the ability of the courts to conduct judicial review as a matter of procedure, even if a judicial review remedy would be available but for the privative provision.¹²³ In conducting judicial review, the courts determine whether a decision has been legally made by reference to the law enacted by Parliament. While a privative clause may indicate a strong parliamentary intention that the judiciary is not to conduct judicial review, it is clear that ‘the courts have on occasion resisted the call for restraint in deference to higher duties’.¹²⁴

I R v Hickman; Ex Parte Fox and Clinton

(a) Facts

The case of *Hickman* concerned an application for prohibition under section 75(v) of the *Constitution* directed against the chairman and members of a Local Reference Board constituted under the *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth). The regulations conferred power on the Local Reference Board to ‘settle disputes as to any local matter likely to affect the amicable relations of employers and employees in the coal mining industry.’¹²⁵ Regulation 17 contained a privative clause stating that a decision of the Local Reference 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.’ Fox and Clinton were haulage contractors who operated lorries for the cartage of coal and other commodities. The Local Reference Board made orders against Fox and Clinton, finding that they were both engaged in the coal mining industry and that they were therefore required to provide their lorry drivers with the minimum rates of wages prescribed by the Mechanics (Coal Mining Industry) Awards. As the jurisdiction of the Local Reference Board was limited to settling disputes between employers and employees in the coal mining industry, Fox and Clinton contended that they were not engaged in the coal mining industry and thus, the decision of the Local Reference Board was made without jurisdiction.

(b) The Judgment of Dixon J

Despite the existence of the privative clause, all five judges of the High Court unanimously agreed that the Court had jurisdiction to grant prohibition on the basis of jurisdictional error; Fox and Clinton were not ‘in the coal mining industry’ and thus, the Local Reference Board did not have jurisdiction to make a decision with respect to the minimum wages of their employees. However, it is

122 McDonald, above n 13, 15.

123 Ibid.

124 Crock and Santow, above n 120, 346.

125 *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth) reg 14(1)(a).

the judgment of Dixon J that has ‘come to be regarded as classical’¹²⁶ and which ‘governed the operation of such clauses ... for more than half a century.’¹²⁷ Like other members of the Court, Dixon J acknowledged that a privative clause could not, and did not intend to, affect the constitutionally-entrenched jurisdiction of the High Court under section 75(v) to grant a writ of mandamus, prohibition or an injunction against an officer of the Commonwealth.¹²⁸ From this, Dixon J interpreted the ‘whole legislative instrument’ in an attempt to reconcile two conflicting manifestations of parliamentary intent, namely the unrestricted protection that a privative clause purports to afford and the limited conferral of jurisdiction contained in the Regulations.¹²⁹ The result of this reconciliation was that the privative clause expanded the jurisdiction of the decision-maker to the maximum extent possible so that jurisdictional error would be cured in certain circumstances. From this, decisions ‘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*.’¹³⁰

As a result of this interpretation, privative clauses were not interpreted to ‘set at large’ decision-makers so that the legality of their conduct could not be questioned.¹³¹ Rather, the approach of Dixon J in *Hickman* enabled the Court to ‘strike a balance between recognizing and preserving the role of the courts, on the one hand, and acknowledging the intention of Parliament to restrict the scope of judicial review on the other hand.’¹³² In any case, Dixon J held that the Board had undoubtedly exceeded its authority, as the fact that the regulations contained the words ‘in the coal mining industry’ operated as a clear limitation of the powers, duties and functions of the Board.

2 Plaintiff S157

(a) Facts

In *Plaintiff S157*, the plaintiff was refused a protection visa under the *Migration Act 1958* (Cth) (*‘Migration Act’*) by a delegate of the Minister for Immigration and Multicultural Affairs. On an application for review to the Refugee Review Tribunal, the refusal to grant the protection visa was affirmed. The plaintiff sought to challenge the decision of the Tribunal on the ground that the decision was made in breach of the rules of procedural fairness. However, as

126 *Coal Miners’ Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 454–5 (Menzies J). However, it appears that the practical impact of the *Hickman* principle in restricting judicial review may have been inflated; see Aronson and Groves, above n 65, 951–3; Duncan Kerr and George Williams, ‘Review of Executive Action and the Rule of Law under the Australian Constitution’ (2003) 14 *Public Law Review* 219, 223.

127 John Basten, ‘Revival of Procedural Fairness for Asylum Seekers’ (2003) 28 *Alternative Law Journal* 114, 115.

128 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 614–15 (Dixon J).

129 *Ibid* 617.

130 *Ibid* (emphasis added).

131 *Ibid* 615 (Dixon J).

132 Groves, above n 96, 369.

review of this decision was seemingly excluded by section 474 of the *Migration Act*, the plaintiff sought a declaration that this provision was invalid due to its apparent inconsistency with section 75(v) of the *Constitution*. While section 486A of the *Migration Act* also sought to limit judicial review through imposing a time limit of 35 days for applications to the High Court for judicial review, this analysis will focus solely on section 474.¹³³ Section 474 of the *Migration Act* contained a broad privative clause, which provided:

- (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.
- (2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not) ...

The Commonwealth accepted that, if read literally, section 474 would be invalid for purporting to oust the jurisdiction of the High Court in a manner prohibited by section 75(v).¹³⁴ However, the Commonwealth relied on the Second Reading Speech of the *Migration Litigation Reform Act 2005* (Cth) to assert that the function of this clause was merely to expand the jurisdiction of the decision-maker in the manner expressed in *Hickman*:

The privative clause in the Bill is based on a very similar clause in *Hickman's case* ... Members [of Parliament] may be aware that the effect of a privative clause such as that used in *Hickman's case* is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.¹³⁵

The High Court therefore had to consider the validity of section 474 of the *Migration Act* and what protection, if any, it afforded to the Refugee Review Tribunal.

(b) *The Majority Judgment*

The High Court unanimously held that section 474 was valid. While Gleeson CJ and Callinan J delivered separate judgments on the matter, the majority

133 For an analysis of the Court's decision with respect to s 486A, see Helen Robertson, 'Truth, Justice and the Australian Way – *Plaintiff S157 of 2002 v The Commonwealth*' (2003) 31 *Federal Law Review* 373, 387.

134 *Plaintiff S157* (2003) 211 CLR 476, 482 (Gleeson CJ).

135 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2001, 31560–1 (Phillip Ruddock) as cited in Katherine Reimers, 'How Should Courts Construe Privative Clauses?' (2008) 56 *Australian Institute of Administrative Law Forum* 29, 35; *Plaintiff S157* (2003) 211 CLR 476, 499 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ will be the focus of this analysis. The majority recognised that the *Hickman* principle was a rule of statutory construction allowing for the reconciliation of apparently conflicting statutory provisions, but stated that there could be ‘no general rule as to the meaning or effect of privative clauses.’¹³⁶ However, their Honours rejected the submission of the Commonwealth that the existence of a privative clause expanded the jurisdiction of a decision maker in any manner, stating that ‘it is inaccurate to describe the outcome in a situation where the [*Hickman*] provisos are satisfied as an “expansion” or “extension” of the powers of the decision-makers in question.’¹³⁷ While not prepared to overrule *Hickman*, their Honours instead contended that ‘a proper reading’ of the *Hickman* principle was that any protection which the privative clause purports to afford would only be afforded if the *Hickman* provisos were satisfied.¹³⁸ From this, the majority stated that the protection that a privative clause purported to afford must be determined by reference to the terms of the privative clause itself, as well as the terms of the legislation as a whole.¹³⁹

In attempting to determine the protection that a privative clause purports to afford, the Court held that two rules of statutory construction would apply. First, if there was any conflict between the *Constitution* and a privative clause, the privative clause should be interpreted by ‘adopting [an] interpretation [consistent with the *Constitution* if] that is fairly open’.¹⁴⁰ Secondly, it must be presumed that Parliament does not intend to exclude or restrict the jurisdiction of the courts unless the legislation expressly states or necessarily implies this.¹⁴¹ Accordingly, the majority stated that section 474 must be construed in accordance with section 75(v). From this, their Honours stated that ‘the expression “decision[s] ... made under this Act” must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act.’¹⁴² As a decision which is attended by jurisdictional error was stated to be ‘regarded, in law, as no decision at all’, a decision involving jurisdictional error could not be described as a ‘decision ... made under this Act’. Therefore, as section 474 of the *Migration Act* did not, ‘upon its true construction’, protect against decisions involving jurisdictional error, and the availability of the remedies contained in section 75(v) were not affected by this provision.¹⁴³ While such a construction of section 474 may not be consistent with the intention of the legislature and may indeed have emptied the provision ‘of all meaning’,¹⁴⁴ it

136 *Plaintiff S157* (2003) 211 CLR 476, 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

137 *Ibid* 502.

138 *Ibid*.

139 *Ibid* 502–3.

140 *Ibid* 504 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), citing *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 616 (Dixon J).

141 *Ibid* 505.

142 *Ibid* 506.

143 *Ibid* 508.

144 David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) 113, cited in McDonald, above n 13, 17.

nevertheless preserved the constitutional validity of the privative clause and maintained the ability of the Court to conduct judicial review in accordance with the rule of law.¹⁴⁵

(c) ‘General principles’

The decision of the majority in *Plaintiff S157* has been heralded as ‘one of the most important decisions handed down on the rule of law by the High Court’¹⁴⁶ and is said to be ‘an important landmark in our understanding of the relationship between the *Australian Constitution* and judicial review of executive action.’¹⁴⁷ In addition to maintaining the jurisdiction of the courts to engage in judicial review in the manner expressed above, the majority judgment also set out a range of ‘general principles’ governing the construction of privative clauses in Australia. The majority commenced this analysis by asserting that their decision and reasoning in relation to privative clauses were ‘real and substantive’ and should not be disregarded as a ‘verbal or logical quibble.’¹⁴⁸ This was said to be due to two ‘fundamental constitutional propositions’:

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.¹⁴⁹

It was then stated that section 75(v) ‘introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review’ which may be viewed as a ‘textual reinforcement’ of the rule of law, ‘assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.’¹⁵⁰ It is therefore clear that the High Court has ‘unambiguously avowed its place as the final arbiter in relation to the lawfulness of the Executive’.¹⁵¹ However, as Parliament develops new and inventive provisions in an attempt to evade judicial review altogether, the precise scope of section 75(v) and its ‘entrenched minimum provision of judicial review’ remains unclear.

145 Kerr and Williams, above n 126, 224.

146 Ibid.

147 Ibid 232.

148 *Plaintiff S157* (2003) 211 CLR 476, 511 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

149 Ibid 511–12.

150 Ibid 513–14.

151 Alexander Skinner, ‘*Plaintiff S157 v The Commonwealth: A Vindication of Judicial Review of Administrative Action*’ (2007) 16 *Polemic* 41, 45.

V SECTION 75(V) AND NO-INVALIDITY CLAUSES

A Plenary Provisions

While privative clauses traditionally attempt to exclude the review or remedial powers of the court as a matter of procedure, more recently, Parliament has attempted to remove the substantive basis upon which a decision may be reviewed. This is achieved through legislative enactment of ‘plenary provisions’¹⁵² or ‘substantive privative clauses’.¹⁵³ Although section 75(v) safeguards the jurisdiction of the High Court to conduct judicial review, plenary provisions do not directly conflict with this jurisdiction. Rather, a plenary provision indirectly avoids the jurisdiction of the court by removing the substantive basis upon which a judicial review remedy may be granted. Just as privative clauses may seek to restrict the ability of the court to conduct judicial review in a variety of ways, plenary provisions may evade judicial review through a wide range of means. As Bateman notes, the term ‘plenary provision’ may refer to a provision that:

(i) provides that non-compliance with a statutory requirement will not result in invalidity (‘no-invalidity provision’); (ii) specifically removes a substantive ground of review ... or (iii) empowers a decision-maker to exercise a power for a purpose or taking account of considerations beyond the ‘subject matter, scope and purpose’ of the Act.¹⁵⁴

While certain parts of the examination below may be relevant to a number of plenary provisions which alter the substantive limitations of public power,¹⁵⁵ the ‘no-invalidity clause’ will be the focus of this analysis.

B No-Invalidity Clauses

Due to the way in which no-invalidity clauses may circumvent judicial review in a way that is not expressly inconsistent with section 75(v), it has been said that no-invalidity clauses ‘loom as more significant threats to the maintenance of the High Court’s jurisdiction than do privative clauses aimed directly at the court’s jurisdiction.’¹⁵⁶ A no-invalidity clause is a legislative provision which indicates that ‘an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision.’¹⁵⁷ As the limits of executive jurisdiction are determined by reference to the intention of Parliament as ‘communicated by

152 Bateman, above n 9, 467.

153 David Dyzenhaus, ‘Disobeying Parliament? Privative Clauses and the Rule of Law’ in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (2006) 503.

154 Bateman, above n 9, 467.

155 *Ibid.*

156 Cane and McDonald, above n 7, 209.

157 McDonald, above n 13, 15. For examples of no-invalidity clauses generally, see *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212; *Futuris* (2008) 237 CLR 146.

means of a formally enacted statute',¹⁵⁸ a no-invalidity clause clearly conveys a parliamentary intention that it is not 'a purpose of the legislation that an act done in breach of the provision should be invalid.'¹⁵⁹ A no-invalidity clause therefore operates to expand the jurisdiction of a decision-maker so that a failure to comply with a particular statutory requirement will not affect the validity of a decision. As the 'conclusion that a decision is not invalid means that the decision-maker had the power (that is, jurisdiction) to make it',¹⁶⁰ no jurisdictional error is able to arise in light of a no-invalidity clause. As mentioned in Part III, the constitutional writs will only be available for jurisdictional error. It follows from this that a no-invalidity clause removes any basis upon which a constitutional writ may be enlivened. While not expressly inconsistent with the constitutionally-entrenched jurisdiction of the High Court to conduct judicial review, a no-invalidity clause clearly leaves the jurisdiction of the Court to conduct judicial review with 'nothing on which to bite.'¹⁶¹

C *Commissioner of Taxation v Futuris Corporation Ltd*

In *Futuris*, the High Court had to consider the constitutional validity of a broadly framed no-invalidity clause contained in section 175 of the *Income Tax Assessment Act 1936* (Cth). *Futuris* sought judicial review of the Tax Commissioner's income tax assessment on the ground that the Commissioner had misapplied anti-avoidance provisions in relation to capital gains tax.¹⁶² The application for judicial review was made pursuant to section 39B of the *Judiciary Act 1903* (Cth) (which has been interpreted consistently with the constitutional regime of judicial review contained in section 75(v)).¹⁶³ In order to obtain a constitutional writ under section 39B, *Futuris* was required to establish that the decision of the Commissioner was infected with jurisdictional error. However, section 175 provided that 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 majority held that the effect of the no-invalidity clause was that:

[T]he validity of an assessment is not affected by failure to comply with any provision of the Act, but a dissatisfied taxpayer may object to the assessment in the manner set out in Pt IVC of the Administration Act ... Where 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*.¹⁶⁴

158 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 232.

159 *Project Blue Sky* (1998) 194 CLR 355, 390 (McHugh, Gummow, Kirby and Hayne JJ).

160 McDonald, above n 13, 15.

161 Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (Lawbook Co, 2nd ed, 2000) 689, cited in Enid Campbell and Matthew Groves, 'Privative Clauses and the Australian Constitution' (2004) 4 *Oxford University Commonwealth Law Journal* 51, 69.

162 McDonald, above n 13, 20.

163 *Ibid.*

164 *Futuris* (2008) 237 CLR 146, 157 (Gummow, Hayne, Heydon and Crennan JJ).

While this may seem to be an alarming result, it appears that the operation of section 175 was only permitted on the basis that the legislation provided for alternative review procedures in the Administrative Appeals Tribunal and the Federal Court.¹⁶⁵

The majority further stated that section 175 would only operate where there had been an ‘assessment’ for the purposes of the *Income Tax Assessment Act 1936* (Cth). While Kirby J found that an ‘assessment’ could not be a valid ‘assessment’ if attended by jurisdictional error (using similar reasoning to the majority in *Plaintiff S157*),¹⁶⁶ the majority in *Futuris* found that an ‘assessment’ for the purposes of the Act would only fail to meet the requirement of an ‘assessment’ (and thus be susceptible to review) in situations where a decision was infected with a ‘manifest jurisdictional error’,¹⁶⁷ such as a ‘conscious maladministration’ of the assessment process.¹⁶⁸

From this, despite the majority finding that a broad no-invalidity clause was not inconsistent with section 75(v), it appears that the no-invalidity clause raised no ‘judicial hackles’ in *Futuris* because generous appeal rights were granted under the relevant legislation in lieu of judicial review.¹⁶⁹ Due to the existence of these alternative appeal rights, fundamental concepts underpinning section 75(v), such as the rule of law and the role of the courts in ensuring legal accountability, were able to be maintained.¹⁷⁰ Nevertheless, such an approach to no-invalidity clauses remains problematic; if the reasoning of the majority in *Futuris* was applied in situations where no alternative avenues of appeal were available, a decision-maker may effectively be immune from any kind of judicial oversight.

D Possible Limitations to No-Invalidity Clauses Contained in Section 75(v)

1 Incompatibility with Section 75(v) ‘as a Matter of Practical Effect’

As a constitutionally-entrenched concept, it may be that the jurisdiction conferred by section 75(v) to conduct judicial review for jurisdictional error may not simply be ‘hollowed out’ by clever drafting.¹⁷¹ To find that section 75(v) entrenches the concepts of judicial review and jurisdictional error, while simultaneously permitting Parliament to remove any jurisdictional limitations, may ‘empty the constitutional conception of jurisdictional error of all content and privileges form over substance.’¹⁷² From this, it may be argued that no-invalidity clauses are not constitutionally valid as they are inconsistent or incompatible with the jurisdiction conferred on the High Court under section 75(v). In *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court found that a mandatory time limitation, which restricted

165 McDonald, above n 13, 21.

166 *Futuris* (2008) 237 CLR 146, 183 (Kirby J).

167 *Ibid* 165 (Gummow, Hayne, Heydon and Crennan JJ).

168 *Ibid* 157.

169 Aronson, above n 11, 39.

170 McDonald, above n 13, 33.

171 Bateman, above n 9, 502.

172 *Ibid*.

the timeframe within which subjects could seek judicial review, was unconstitutional.¹⁷³ While not expressly inconsistent with section 75(v), the High Court found that attempts to circumvent its section 75(v) review process would only be valid where a provision did not, ‘whether directly or as a matter of practical effect ... so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure.’¹⁷⁴ From this, it may be said that, ‘as a matter of practical effect’,¹⁷⁵ a no-invalidity clause is unconstitutional because it is inconsistent with the jurisdiction conferred on the High Court under section 75(v). Favouring substance over form in this manner would be consistent with the well-known principle that ‘the Parliament cannot do indirectly what it cannot do directly.’¹⁷⁶ However, as the High Court has given no clear endorsement of this argument in the context of no-invalidity clauses, whether the High Court would determine that a no-invalidity clause is inconsistent with section 75(v) ‘as a matter of practical effect’ remains questionable.

2 *Entrenchment of the Substantive Grounds of Judicial Review*

It can be argued that, in entrenching the jurisdiction of the High Court to grant constitutional writs for judicial review, the substantive grounds of review that give rise to these remedies are also constitutionally entrenched. If this is the case, Parliament would not be able to enact no-invalidity clauses that restrict or exclude substantive grounds of judicial review. As it is said that the constitutional writs are enlivened by jurisdictional error, jurisdictional error has been described as a constitutionally-entrenched concept which forms ‘the basis of the constitutional entrenchment of judicial review’.¹⁷⁷ Despite the notion that jurisdictional error is a constitutionally-entrenched concept, it may not necessarily follow that the *Constitution* preserves a *right* to the existence of jurisdictional limits. While the constitutional entrenchment of the substantive grounds of judicial review has been viewed as the ‘simplest and most obvious’ way of resisting no-invalidity clauses,¹⁷⁸ the following analysis reveals that this proposition should be rejected for a number of reasons.

173 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671–2 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

174 *Ibid* 671 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

175 *Ibid*.

176 *New South Wales v Commonwealth* (2006) 229 CLR 1, 130 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ); *O’Toole v Charles David Pty Ltd* (1990) 171 CLR 232, 308 (Dawson J); *Wragg v New South Wales* (1953) 88 CLR 353, 387–8 (Dixon CJ); *South Australia v Commonwealth* (1942) 65 CLR 373, 425 (Latham CJ); *Toohey v Gunther* (1928) 41 CLR 181, 195 (Isaacs J); *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 491 (Isaacs J).

177 Bateman, above n 9, 468, 502. See also *Plaintiff S157* (2003) 211 CLR 476, 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

178 Jeremy Kirk, ‘The Entrenched Minimum Provision of Judicial Review’ (2004) 12 *Australian Journal of Administrative Law* 64, 66.

(a) *Section 75(v) Only Confers Jurisdiction*

As discussed in Part II, section 75(v) is traditionally viewed as a provision concerned with the conferral of jurisdiction, not the protection or conferral of substantive rights. It may be that, in entrenching the jurisdiction of the High Court to grant the remedies of mandamus, prohibition or an injunction against an officer of the Commonwealth, the right of subjects of the Commonwealth to seek these remedies through judicial review proceedings is indirectly preserved by section 75(v). However, it seems that this entrenchment of jurisdiction may not extend to the substantive grounds of judicial review which may give rise to the remedies contained in section 75(v). This point was reinforced by Hayne J in *Re Refugee Tribunal; Ex parte Aala*:

It is important to notice that s 75(v) is not a source of substantive rights. It is a grant of jurisdiction in cases where certain remedies are sought against officers of the Commonwealth. It does not confer the power to issue those remedies. ... The use of the expression 'constitutional writs' should not distract attention from the fact that the Constitution is silent about the circumstances in which the writs may issue. What is constitutionally entrenched is the jurisdiction of this Court when the writs are sought, rather than any particular ground for the issue of the writs.¹⁷⁹

However, in *Plaintiff S157*, the majority hinted that particular grounds of review may, in fact, be preserved by the High Court's jurisdiction to grant an injunction under section 75(v); it was stated that '[i]n any event, injunctive relief would clearly be available for fraud, bribery, dishonesty or other improper purpose'.¹⁸⁰ Aronson notes that 'the net result is that fraud and dishonesty are entrenched grounds of judicial review in the High Court'.¹⁸¹ Thus, while some judgments have questioned the notion that section 75 merely establishes jurisdiction and not the underlying law to be applied in its exercise,¹⁸² this matter is yet to be conclusively determined. However, in the absence of any binding authority to the contrary, the traditional conception remains that section 75 is a provision concerned purely with the conferral of jurisdiction.¹⁸³

(b) *Logical Difficulties with Entrenchment*

There is also a clear logical flaw in concluding that common law grounds of review are constitutionally entrenched.¹⁸⁴ As mentioned above, the limits of executive jurisdiction and the grounds of judicial review are traditionally determined by reference to the intention of Parliament, as expressed through the

179 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139, 142.

180 *Plaintiff S157* (2003) 211 CLR 476, 508 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

181 Aronson, above n 11, 37.

182 Aronson and Groves, above n 65, 40, citing *Commonwealth v New South Wales* (1923) 32 CLR 200, 207 (Knox CJ) and 216 (Isaacs, Rich and Starke JJ); *Musgrove v Commonwealth* (1937) 57 CLR 514, 550 (Evatt and McTiernan JJ).

183 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1883–5 (Isaac Isaacs, Bernhard Wise, Edmund Barton); *Werrin v Commonwealth* (1938) 59 CLR 150, 166–8 (Dixon J); *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 178 (Mason CJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139 (Hayne J). See also Stellios, above n 56, 341.

184 Kirk, above n 178, 66–7.

provisions of a particular statute. However, a no-invalidity clause clearly illustrates an intention of Parliament that it is not ‘a purpose of the legislation that an act done in breach of the provision should be invalid.’¹⁸⁵ While the effect of such an intention may be viewed as undesirable, the intention of Parliament is nevertheless clear. From this, concluding that certain grounds of judicial review are entrenched by section 75(v) would enable these grounds to override the intention of Parliament that they were developed to protect. For this reason, it is also difficult to comprehend how any grounds of judicial review would operate if they were constitutionally-entrenched. Kirk recognises this conceptual difficulty, asserting that ‘[o]ne cannot purport to uphold statutory law by overruling it.’¹⁸⁶

(c) *Granting a ‘Blank Constitutional Cheque’*

As section 75(v) does not specify the grounds upon which a mandamus, prohibition or an injunction may be issued, it has been stated in Part III that the grounds which may give rise to these remedies are defined by administrative law principles which have developed, and which continue to develop, at common law.¹⁸⁷ As ‘constitutional expressions’, it is possible that the *Constitution* and the common law are ‘bound in a symbiotic relationship’¹⁸⁸ so that the underlying principles of the constitutional writs and the constitutional injunction evolve over time. However, as the precise categories of grounds which may constitute jurisdictional error remain open and the precise scope of these grounds remains unclear, finding that any or all of the grounds of review are entrenched by section 75(v) is clearly problematic. Kirk states that entrenching any particular grounds of review which are naturally subject to evolution at common law would be to grant ‘some blank constitutional cheque ... to judges to continue to develop the principles of judicial review as they saw fit ... in an overriding manner.’¹⁸⁹ Further, this would clearly raise issues in relation to section 75(v) entrenching a ‘minimum provision of judicial review’, as the precise scope and operation of this ‘minimum provision’ would remain unclear and would be subject to constant change at the behest of the judiciary.¹⁹⁰

(d) *Which Grounds of Review May Be Constitutionally Entrenched?*

If the *Constitution* did, in fact, preserve a right to the existence of jurisdictional limits, this inevitably raises the difficult question of ‘[w]hich ... of the accepted species of the genus “jurisdictional error” are constitutionally

185 *Project Blue Sky* (1998) 194 CLR 355, 390 (McHugh, Gummow, Kirby and Hayne JJ).

186 Kirk, above n 178, 67.

187 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59, 94 (Kirby J).

188 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 141 (Brennan J), cited in Justice W M C Gummow, ‘The Constitution: Ultimate Foundation of Australian Law?’ (2005) 79 *Australian Law Journal* 167, 172.

189 Kirk, above n 178, 67.

190 *Ibid.*

entrenched?’¹⁹¹ McDonald notes that while the ‘conclusion that none of the standard grounds (including breach of statutory requirements) are entrenched would enable Parliament to evade the court’s constitutional review jurisdiction’, it seems that ‘the conclusion that all the grounds of review are entrenched is equally implausible’ as it would leave ‘too much discretion to judges.’¹⁹² While attempts have been made to determine which particular grounds of review (if any) may be entrenched,¹⁹³ no particular method for doing so remains convincing. It is for this reason that McDonald states that characterising section 75(v) and its ‘entrenched minimum provision of judicial review’ in terms of jurisdictional error and substantive grounds of review is problematic.¹⁹⁴

E Possible Limitations to No-Invalidity Clauses outside Section 75(v)

1 The Requirement of a ‘Law’

The High Court has speculated that a legislative provision which merely confers non-jurisdictional requirements or non-mandatory guidelines on an administrative decision-maker may not meet the requisite description of a ‘law’ and may therefore be invalid.¹⁹⁵ McDonald has explained the complexity of such a suggestion, stating that ‘[t]his is a difficult thought and raises contestable conclusions about the nature of “law”.’¹⁹⁶ However, the majority in *Plaintiff S157* indicated that the High Court may be willing to enter these ‘treacherous jurisprudential waters’ if faced with a legislative measure to prevent the High Court from performing its Constitutional function.¹⁹⁷ This was apparent as the majority suggested:

The provisions canvassed [which included non-binding guidelines which ‘should’ be applied] ... would appear to lack that hallmark of the exercise of legislative power ... namely ... ‘the content of a law as a rule of conduct or a declaration as to power, right or duty’.¹⁹⁸

When examining the no-invalidity clause in *Futuris*, Kirby J asserted that a law must not be arbitrary and must be ‘based on an ascertainable criterion and be susceptible to judicial scrutiny.’¹⁹⁹ It may be that such an Act which contained ‘nothing which a court could enforce would not be a real “law”, at least in the Austinian sense of a law having to embody a genuine command.’²⁰⁰ However,

191 McDonald, above n 13, 18.

192 Ibid.

193 For examples, see Kirk, above n 178; Zach Meyers, ‘Revisiting the Purposes of Judicial Review: Can There Be a Minimum Content to Jurisdictional Error?’ (2012) 19 *Australian Journal of Administrative Law* 138.

194 McDonald, above n 13, 18.

195 *Plaintiff S157* (2003) 211 CLR 476, 512–13 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Bateman, above n 9, 492; Meyers, above n 193, 147.

196 McDonald, above n 13, 19.

197 Ibid.

198 *Plaintiff S157* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), citing *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ).

199 *Futuris* (2008) 237 CLR 146, 170 (Kirby J).

200 Aronson, above n 11, 36; Transcript of Proceedings, *Plaintiff S157/2002 v Commonwealth* [2002] HCATrans 420 (3 September 2002) (McHugh J); *Plaintiff S157* (2003) 211 CLR 476, 535 (Callinan J).

Bateman has recognised the difficulty with such a suggestion, noting that a statutory power affected by a no-invalidity clause will remain a ‘power’ under the definition of a law canvassed by the majority in *Plaintiff S157*; it will simply be a power without enforceable limitations.²⁰¹ Further, if the presence of a ‘law’ depends on the extent to which an enactment is capable of judicial enforcement, it is difficult to ascertain how non-justiciable requirements or purely directory provisions could remain ‘laws’. As McDonald recognises, any particular conclusion with respect to this proposition canvassed by the High Court is largely dependent on one’s particular definition of ‘a law’.²⁰² Despite the High Court’s suggestions to the contrary, for the reasons discussed above, it is unlikely that an Act would fail to meet the requirements of a law purely because it contained a broadly-framed no-invalidity clause.

2 *The Separation of Powers*

A possible limitation to the constitutional validity of no-invalidity clauses may also be found in the separation of powers doctrine. With respect to the separation of judicial power from legislative and executive power, the High Court have accepted two clear principles: (i) federal judicial power may only be exercised by chapter III courts, and (ii) chapter III courts may only exercise federal judicial power or non-judicial power incidental to the exercise of federal judicial power.²⁰³ As Bateman recognises, the majority in *Plaintiff S157* suggested that plenary provisions, including broad no-invalidity clauses, may infringe both limbs of this principle.²⁰⁴

(a) *Federal Judicial Power May Only Be Exercised by a Chapter III Court*

In *Plaintiff S157*, the majority suggested that a no-invalidity clause (or other plenary provisions) may be an invalid conferral of judicial power on a body which is not a chapter III court. The majority stated that ‘the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with chapter III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.’²⁰⁵

Despite the suggestion that a no-invalidity clause may enable the executive to conclusively determine the limits of its *own* jurisdiction, it seems that it is *Parliament* which is determining the unlimited nature of the executive’s jurisdiction when enacting a no-invalidity clause. Nevertheless, in providing that the validity of a decision will not be affected by a statutory requirement not having been complied with, the High Court has indicated that a no-invalidity clause may attempt to permit the executive to perform an exclusively judicial

201 Bateman, above n 9, 497.

202 McDonald, above n 13, 19.

203 Bateman, above n 9, 497; James Stellios, ‘Reconceiving the Separation of Judicial Power’ (2011) 22 *Public Law Review* 113, 113–14; Stellios, above n 56, 79.

204 Bateman, above n 9, 497.

205 *Plaintiff S157* (2003) 211 CLR 476, 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

function, namely the ability to conclusively determine the validity of administrative action.²⁰⁶ In *Futuris*, the judgment of the majority appeared to suggest that the executive will not be conclusively determining legality or jurisdiction where alternative appeal avenues exist in lieu of judicial review.²⁰⁷ However, if no alternative appeal avenues exist within a statute containing a no-invalidity clause, a no-invalidity clause may preclude any challenges as to the legality of an administrative decision (assuming that the remedies contained in section 75(v) are only available for jurisdictional error). In such cases, the High Court has indicated that a no-invalidity clause may be invalid for attempting to vest judicial power in the executive.²⁰⁸

(b) Chapter III Courts May Only Exercise Federal Judicial Power

Further, it was also suggested in *Plaintiff S157* that a no-invalidity clause may require a chapter III court to impermissibly exercise legislative power. If a no-invalidity clause, or any other plenary provision, provides an administrative decision-maker with a near unlimited discretion, this may not provide sufficient ‘factual requirements to connect any given state of affairs with the constitutional head of power’.²⁰⁹ In supplying such a connection, a court may be accused of ‘rewriting of the statute, the function of the parliament, not a chapter III court.’²¹⁰ However, as it has been held that the section 51 heads of power require nothing more than that the object of the power be ‘singled out’,²¹¹ it is unlikely that a statute containing specific statutory requirements coupled with a no-invalidity clause would raise such an issue.

F Proposed Solution – The Constitutional Injunction

As discussed in Part III, the precise operation and scope of the constitutional injunction under section 75(v) remains unclear. However, rather than being confined to jurisdictional error, it has been suggested that an injunction is a broad remedy that may be available pursuant to section 75(v) in a wide range of instances to cure *all forms* of illegality.²¹² As indicated above,²¹³ an injunction may be available where a decision is unlawful, despite not being invalid.²¹⁴ While a no-invalidity clause may prevent invalidity, a decision made in breach of a particular statutory requirement remains unlawful despite the existence of a no-invalidity clause; a non-jurisdictional error of law may have occurred, but it is an

206 Ibid 484 (Gleeson CJ).

207 *Futuris* (2008) 237 CLR 146, 157 (Gummow, Hayne, Heydon and Crennan JJ).

208 Bateman, above n 9, 497; *Plaintiff S157* (2003) 211 CLR 476, 511–12 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

209 *Plaintiff S157* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Meyers, above n 193, 145.

210 *Plaintiff S157* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

211 Meyers, above n 193, 146; *New South Wales v Commonwealth* (2006) 229 CLR 1, 121 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

212 Aronson and Groves, above n 65, 8.

213 See Part III, D *The Constitutional Injunction*.

214 *Project Blue Sky* (1998) 194 CLR 355, 393 (McHugh, Gummow, Kirby and Hayne JJ).

error of law nonetheless. From this, it may be that a constitutional injunction under section 75(v) can be granted to prevent this form of illegality.

However, O'Donnell notes that, unlike the remedy of certiorari, an injunction cannot operate to retrospectively invalidate or 'quash' a validly made decision.²¹⁵ Thus, if an error of law is made within jurisdiction which does not result in invalidity, an 'injunction cannot cure such an error once the decision has been finalised'²¹⁶ as a valid decision 'must be given all of its ordinary legal consequences.'²¹⁷ From this, O'Donnell claims that an applicant may only obtain an injunction to compel a decision-maker to observe a non-jurisdictional requirement after becoming aware of the breach, but before the decision is made.²¹⁸

How then, is one able to reconcile this technical limitation of the injunction with the above comments of the High Court in relation to the possible scope and operation of constitutional injunctions to protect against non-jurisdictional errors? In particular, such a limitation is contrary to the suggestion in *Project Blue Sky* that an applicant may be able to 'obtain an injunction restraining that body from taking any further action based on its unlawful action.'²¹⁹ It is unlikely that such suggestions would have been canvassed by the High Court if the operation of a section 75(v) injunction has such a limited scope. One possible solution is that, as the injunction contained in section 75(v) is a constitutional remedy, its operation may differ from the injunction at common law or in equity. If this was the case, there may be scope for a constitutional injunction to restrain an officer of the Commonwealth from taking any further action on a validly made decision infected with an error of law, while not retrospectively invalidating or 'quashing' the decision. However, as the High Court has not yet provided any definitive clarification regarding the precise operation of the constitutional injunction, it currently provides no clear solution to the problem of no-invalidity clauses. In any case, if permitted to do so, it appears that the constitutional injunction may have the potential to quell the threat of no-invalidity clauses once and for all.

VI CONCLUSION

Due to its significant role in safeguarding judicial review of public power in accordance with the rule of law, section 75(v) 'stands in a special position

215 O'Donnell, above n 90, 298.

216 Ibid.

217 Ibid.

218 Ibid 326.

219 *Project Blue Sky* (1998) 194 CLR 355, 393 (McHugh, Gummow, Kirby and Hayne JJ).

within our national legal structure.²²⁰ While the framers of section 75(v) may have produced more than they could have anticipated, an examination of the Convention Debates reveals that a central motivation for enacting section 75(v) was a determination to ensure that administrative action would be subjected to judicial scrutiny.²²¹ Since its enactment, section 75(v) has undoubtedly served this purpose and preserved the ideal that ‘the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion.’²²² However, it seems that this right is again under threat by the legislative enactment of no-invalidity clauses.

Due to the precise way in which no-invalidity clauses avoid judicial review in a way which does not expressly conflict with section 75(v), the focus of Parliament has shifted from the privative clause to the no-invalidity clause.²²³ In altering the substantive basis upon which a decision may be reviewed, a no-invalidity clause may render a decision-maker effectively immune from judicial oversight, and thus may create ‘islands of power immune from supervision or restraint’.²²⁴

In light of the High Court’s emphasis on the significance of section 75(v) in preserving the rule of law and safeguarding judicial review, it is doubtful that the High Court would permit a no-invalidity clause to circumvent its constitutionally-entrenched jurisdiction under section 75(v) where no alternative avenue for appeal is available. Indeed, ‘it would be a sorry day for the rule of law in this country if it [did]’.²²⁵

From the general principles canvassed by the majority in *Plaintiff S157* it may appear that the High Court has secured a position whereby, if necessary, it is able to strike at the heart²²⁶ of a no-invalidity clause in vindication of the rule of law. However, a close examination of section 75(v) and the operation of no-invalidity clauses appears to reveal a more complex picture than the High Court conveys.

The potential of the constitutional injunction to address the threat of no-invalidity clauses is promising. However, just as the way in which the judgment of the majority in *Plaintiff S157* could not have been anticipated, the High Court’s response to a no-invalidity clause that seeks to evade all legal accountability cannot be predicted with any degree of certainty.²²⁷ In any case, it is clear that ‘when it comes to Commonwealth attempts to

220 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59, 73 (McHugh and Gummow JJ).

221 Buss, above n 46, 788.

222 H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 599.

223 Aronson, above n 11, 38.

224 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

225 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 251 (Kirby J).

226 Groves, above n 96, 330.

227 Campbell and Groves, above n 161, 69.

diminish judicial review, the High Court “holds all the cards”.²²⁸ While it has been said that the ‘most important card is jurisdictional error’,²²⁹ an analysis of section 75(v) reveals that this is not the only card that the High Court has at its disposal.

228 Aronson, above n 11, 38; McDonald, above n 13, 33.

229 Aronson, above n 11, 38.