Chapter 6. Judicial Review Under the Migration Act 1958

Immigration lawyers in Australia will be thoroughly familiar with the attempt by successive governments, dating from the major restructuring of the Migration Act 1958 (Cth) (‘the Act’) in December 1989, to limit or even remove the power of the courts to judicially review decisions made under that Act. At that time, the Act was expanded and the Migration Regulations 1989 introduced, with the purpose of removing discretion from individual decision makers and basing these decisions instead on law. It was thought at the time that setting out the criteria for grant of a visa or entry permit in legislation would make the immigration process clearer, and that applications for judicial review would fall in number. As we know, this approach failed to reduce the recourse to the courts by failed migration applicants.

The next major move was to bring the judicial review of migration decisions ‘in house’, under the Act itself. Until 1 September 1994, immigration decisions were simply one more Commonwealth decision that could be reviewed under the ADJR Act. The Migration Reform Act 1992, which came into effect on that date, created Part 8 of the Act, which purported to limit the grounds on which the Federal Court could set aside a decision of the Migration Review Tribunal (MRT) or Refugee Review Tribunal (RRT). While the constitutionality of Part 8 was upheld in Abebe v Commonwealth,¹ again the amendment did not achieve its objective of reducing applications for judicial review.

The final step was the introduction of the privative clause, by means of the Migration Legislation Amendment (Judicial Review) Act 2001, in the wake of the famed Tampa incident. This Act substituted the former Part 8 with a new Part 8, the centerpiece of which was s 474. However, the decision of the High Court in Plaintiff S157/2002 v Commonwealth of Australia² has rendered s 474 of little, if any, effect. Given that Australian courts have studiously avoided clearly delineating the scope of ‘jurisdictional errors’, and that a decided case has yet to turn on the question of whether an error of law is ‘jurisdictional’ or not, the question must now be asked whether there is any point to a separate regime of judicial review for migration decisions.

¹ Abebe v the Commonwealth; Re Minister for Immigration and Multicultural Affairs, Ex parte Abebe (1999) 162 ALR 1.
Part 1 – Structure of the Act and mechanisms for judicial review

Prior to 21 December 1989, the date on which the *Migration Legislation Amendment Act 1989* came into effect, the *Migration Act 1958* conferred a largely unfettered discretion on the Minister and his or her delegates to grant visas or entry permits to non-citizens, or order the deportation of non-citizens from Australia. Stephen Gageler, then the Solicitor-General and now Gageler J of the High Court, has summed up the pre-1989 position as follows:¹

As it existed from 1983⁴ until 1989, the central elements of the *Migration Act* were that:

A non-citizen who entered or remained in Australia without an entry permit became a prohibited non-citizen (ss 6(1), 7(3)).

The grant or withholding of an entry permit was a matter within the unconstrained discretion of a Commonwealth officer or a State or Territory police officer, save that a non-citizen could not be granted an entry permit after entry into Australia, unless one or more specified conditions was fulfilled (ss 6(1), 6A), one of those conditions being the existence of a determination that the non-citizen had the status of ‘refugee’ within the meaning of the Refugees Convention (s 6A(1)(c)); and

The deportation of prohibited non-citizens (s 18), together some other non-citizens who had been convicted of offences (s 12), was a matter within the unconfined discretion of the Minister.

Decision-making guidelines were largely set out in policy prior to 1989. One of the main purposes of the 1989 legislation was to reduce the discretion available to immigration decision makers, and provide greater ‘certainty’ for both decision makers and applicants. It was felt that this, along with the creation of the IRT, would reduce the recourse of unsuccessful applicants to the courts.

### Migration Reform Act 1992

The first attempt to limit the jurisdiction of the courts in immigration-decision making came with the insertion of a new Part 8 into the Act by means of the ¹²

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2. This was the year in which the Act was amended to shift its constitutional basis from the ‘immigration and emigration’ power in s 51(xxvii) of the Constitution to the ‘aliens and naturalisation’ power in s 51(xix). This change was made by way of the *Migration Amendment Act 1983*, which came into effect on 2 April 1984.
Chapter 6. Judicial Review Under the Migration Act 1958

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Migration Reform Act 1992 (‘the MRA ’). The MRA, which did not come into effect until 1 September 1994, substantially renumbered and reordered the Act. The key provision of the new Part 8 was s 476, which provided in part as follows:

(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

The term ‘judicially reviewable decision’ was defined in s 475 of the Act, and included decisions made by the Immigration Review Tribunal (IRT), Refugee Review Tribunal (RRT) or Administrative Appeals Tribunal (AAT) relating to visas. Primary decisions made by the Department were expressly excluded from
that definition under s 475(2). At the same time, new Parts 5 and 7 of the Act essentially provided for independent merits review of all onshore decisions relating to visas. The clear intention was that applicants would pursue merits review rather than judicial review, but the end result was that many applicants pursued both merits and judicial review.

The Explanatory Memorandum (EM) to the MRA elucidated on Part 8 as follows:

[44] In acknowledgement of the special nature of immigration decisions and as a result of the widened availability of merits review, the Reform Bill amends the Act to set down reformulated grounds of judicial review. To ensure procedural fairness, procedures for decision-making which embody the principles of natural justice have been set out in the Reform Bill.

[45] The specific codified procedures in the Reform Bill, and those to be set out in the Migration Regulations, replace the current uncertain rules with regard to natural justice and statutory criteria for decision-making which will clarify the matters that must be considered in making a decision. An applicant will be able to appeal to the Federal Court if the codified procedures and criteria have not been followed by decision makers, but a court appeal will only be permitted where the applicant has first pursued all merits review rights.

The EM explained the removal of the ‘unreasonableness’ ground at paragraph 415:

New subsection [sic – paragraph] 166LB(2)(b)\(^5\) provides that an application for review of a decision may not be made on the grounds that a decision was so unreasonable that no reasonable person could have so exercised that power. This ground of review, commonly known as *Wednesbury* unreasonableness,\(^6\) is currently available where the court assesses that a decision maker has made a decision that is so unreasonable that no reasonable person could have made the decision. It has long been recognised that this ground of review, if not interpreted with great care and precision, will come close to a review of the decision on the merits, especially where review of the merits is not available. The review procedures established in this Bill provide for comprehensive merits review of all visa-related decisions, and in recognition of this, this ground of review will no longer be available.

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\(^5\) Renumbered as s 476 after the passage of the *Migration Reform Act*.

\(^6\) Referring to *Associated Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.
It has been argued\(^7\) that *Wednesbury* unreasonableness *is* a form of review of the merits of a decision, and the only difference between this ground of review of the forms of substantive review of administrative decisions found in Canada and the United Kingdom is the degree of deference given to the decision maker. The rather touching belief that an independent merits reviewer could not possibly make an unreasonable decision is also a distinctive feature of this paragraph, and one that is hardly borne out in reality.

The then Minister for Immigration and Ethnic Affairs, Mr Hand, stated as follows in his second reading speech:\(^8\)

The measures I have announced so far will lead to greater precision in our efforts to control the border. Under the reforms, decision-making procedures will be codified. This will provide a fair and certain process with which both applicant and decision maker can be confident. Decision makers will be able to focus on the merits of each case knowing precisely what procedural requirements are to be followed. These procedures will replace the somewhat open-ended doctrines of natural justice and unreasonableness.

The Reform Bill proposes significant extensions to the current system for review of migration decisions. Credible independent merits review will ensure that the Government’s clear intentions in relation to controlling entry to Australia, as set out in the Migration Act, are not eroded by narrow judicial interpretations. Under the Reform Bill, the following people who are adversely affected by a decision will be entitled to independent merits review: onshore refugee claimants; onshore cancelled visa holders, except those cancelled at the border; onshore applicants for a visa, except those detected at the border; and an Australian sponsor of an offshore applicant for a visa.

Again, there was a clear assumption that the provision of independent merits review would have the effect that refused visa applicants would not go a step further and take their case to judicial review after receiving merits review. It is unclear where this assumption could have come from, and it was certainly not proved correct.

Because of the Constitutional entrenchment of the jurisdiction of the High Court, Part 8 of the Act could only apply to courts created by statute, such as the Federal Court. This meant that there was a significant shift of cases from the


\(^8\) House of Representatives Hansard, Wednesday, 4 November 1992 at 2620.
Federal Court to the High Court after the implementation of Part 8, especially after the High Court’s decision in *Abebe*,\(^9\) which upheld the constitutional validity of s 476. McHugh J commented as follows in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham*:\(^{10}\)

[13] Given this history and the need for this Court to concentrate on constitutional and important appellate matters, I find it difficult to see the rationale for the amendments to the *Migration Act (Cth)* (‘the Act’) which now prevent this Court from remitting to the Federal Court all issues arising under that Act which fall within this Court’s original jurisdiction. No other constitutional or ultimate appellate court of any nation of which I am aware is called on to perform trial work of the nature that these amendments to the Act have now forced upon the Court.

[14] There is no ground whatever for thinking that the judges of the Federal Court are not capable of dealing with all issues arising under the Act which fall within this Court’s jurisdiction. Although the refugee matters that cannot be remitted to the Federal Court do arise under this Court’s constitutionally entrenched jurisdiction, most of them are not constitutional matters as that term is ordinarily understood. The great majority of the matters which cannot be remitted simply involve questions of administrative law with which the Federal Court has long been familiar and in respect of which it has great experience and expertise.

[15] The reforms brought about by the amendments are plainly in need of reform themselves if this Court is to have adequate time for the research and reflection necessary to fulfil its role as ‘the keystone of the federal arch’ and the ultimate appellate court of the nation. I hope that in the near future the Parliament will reconsider the jurisdictional issues involved.

It should also be pointed out that the restrictions on the grounds of judicial review in Part 8 of the Act occasionally backfired on the Minister. In 1996, the AAT handed down its decision *Jia and Minister of Immigration and Multicultural Affairs*,\(^{11}\) finding that Mr Jia, who had a conviction for rape, was nevertheless of good character, essentially by blaming his victim for her own rape. When the Minister initially challenged this decision in the Federal Court, he could not rely on the grounds of unreasonableness or taking irrelevant considerations into account, which are the grounds on which the decision should really have been

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\(^9\) Supra n1.
\(^{10}\) (2000) 168 ALR 407.
\(^{11}\) (1996) AAT 236.
challenged. Instead, the Minister was reduced to effectively arguing that the AAT had no evidence that the victim deserved to be raped, thereby continuing the stereotypes egregiously relied on by the AAT.12

**Migration Amendment (Judicial Review) Act 2001**

The next major amendment to the judicial review provisions of the Act came with the *Migration Amendment (Judicial Review) Act 2001* (‘the MAJR Act’), which was introduced in the wake of the *Tampa* incident in August 2001. The key amendment was the introduction of a new s 474, and subsections 474(1) and (2) provided as follows:

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), other than a decision referred to in subsection (4) or (5).

Subsection 474(3) made it clear that a decision to grant or refuse a visa was a ‘privative clause decision’. Subsections 474(4) and (5) listed a number of decisions that were taken not to be privative clause decisions.

At its simplest, a privative clause is a ‘clause in regulatory legislation prohibiting review of decisions by courts’.13 In fact, there are two kinds of privative clause, and both frequently appear in the same legislative provision. These are the finality clause which protects an administrative decision from further internal review, and the ouster clause, which purports to protect the decision from judicial review. Other varieties of privative clause may remove the remedial powers of the court, while still others may determine the kind of evidence that is final and conclusive. Section 474 combines the finality and ouster clauses in one provision of the Act.

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Judicial approaches to privative clauses

There is an obvious conflict to be resolved by a court when it is confronted with a privative clause, given that it is ‘ultimately the constitutional function of an independent judiciary to determine the rights of individuals according to law’. This is also a problem for the rule of law, as it is an attempt by the legislature (and the executive) to exclude the judiciary from its role as the final arbiter of the law. Australian commentators have generally taken the view that all privative clauses, or at least those that protect errors of law made by administrative decision makers, are contrary to the rule of law.

The High Court of Australia has found that a privative clause can never completely oust judicial review, primarily because s 75 of the Constitution explicitly provides for a right to at least some judicial review of Commonwealth decisions. Nevertheless, the famous (or infamous) decision of _R v Hickman, Ex parte Fox and Clinton_ was broadly sympathetic to privative clauses, but more recently _S157/2002_ upheld the constitutional validity of s 474 of the _Migration Act_, but then proceeded to render it of almost no effect.

Stated reasons for the section 474 privative clause

Subsection 474(1) appears on its face to contradict ss 75(iii) and (v) of the Constitution, which guarantees a right of judicial review of Commonwealth administrative action. The Explanatory Memorandum to the Bill provided as follows:

[14] New subsection 474(1) introduces a privative clause for decisions made under the _Migration Act_, regulations made under that Act or other instruments under that Act except for decisions made under the provisions set out in new subsection 474(4) or as prescribed under new subsection 474(5). A privative clause affects the extent of judicial review by both the Federal Court and the High Court of decisions covered by the clause.

[15] A privative clause is a provision which, although on its face purports to oust all judicial review, in operation, by altering the substantive law, limits review by the courts to certain grounds. Such a clause has

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15 To give just one example, the Honourable Duncan Kerr, the former Commonwealth Minister for Justice, authored an article entitled ‘Privative Clauses and the Courts: Why and How Australian Courts have Resisted Attempts to Remove the Citizen’s Right to Judicial Review of Unlawful Executive Action’ (2005) 5 _Queensland University of Technology Law and Justice Journal_ 195. Kerr entitled two of the chapters in that article ‘Attempts to Thwart Judicial Review of Executive Action’ and ‘A Detour to Deference: The Hickman Myth’.
16 (1945) 70 CLR 598.
17 Supra n2.
been interpreted by the High Court, in a line of authority stemming from the judgment of Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, to mean that a court can still review matters but the available grounds are confined to exceeding constitutional limits, narrow jurisdictional error or *mala fides*.

[16] The intention of the provision is to provide decision makers with wider lawful operation for their decisions such that, provided the decision maker is acting in good faith, has been given the authority to make the decision concerned (for example, by delegation of the power from the Minister or by virtue of holding a particular office) and does not exceed constitutional limits, the decision will be lawful.

In his second reading speech to the House of Representatives on 26 September 2001, Minister Ruddock stated that the then current Part 8 of the Act had failed to achieve its objectives:18

That scheme has not reduced the volume of cases before the courts: just the opposite. Recourse to the Federal Court and the High Court is trending upwards, with nearly 400 applications in 1994–95; nearly 600 in 1995–96; 740 in 1996–97; nearly 800 in 1997–98; around 1,130 in 1998–99; nearly 1,300 in 1999–2000; and around 1,640 in 2000–01. Based on current litigation trends it is anticipated that applications made to the courts will reach at least 2,000 in the current financial year.

Minister Ruddock then described the purpose of the privative clause as follows:19

In the migration area, litigation can be an end in itself – it is an area where delaying the final determination is seen as beneficial by those pursuing the court action. Given the importance they attach to staying in Australia, there is a high incentive for refused applicants to delay removal from Australia for as long as possible.

Faced with the problem I have outlined, I asked the Department of Immigration and Multicultural Affairs in early 1996 to explore options for best achieving the government’s policy objective of restricting access to judicial review … The advice received from legal counsel was that the only workable option was a privative clause …

Counsels’ advice was that a privative clause would have the effect of narrowing the scope of judicial review by the High Court and of course the Federal Court. That advice was largely based on the High Court’s

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18 House of Representatives Hansard, 27 September 2001 at 31559.
19 Ibid at 31560.
own interpretation of such clauses in cases following the seminal High Court case of *Hickman* in 1945. The privative clause in the bill is based on a very similar clause in *Hickman’s* case.

The High Court has not since, despite opportunities to do so, repudiated the *Hickman* principle as formulated by Justice Dixon in *Hickman’s* case. Indeed, that principle was described as ‘classical’ in a later High Court case. Members 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. In practice, the decision is lawful, provided:

- the decision maker is acting in good faith;
- the decision is reasonably capable of reference to the power given to the decision maker – that is, the decision maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member;
- the decision relates to the subject matter of the legislation – it is highly unlikely that this ground would be transgressed when making decisions about visas since the major purpose of the *Migration Act* is dealing with visa decisions; and
- constitutional limits are not exceeded – given the clear constitutional basis for visa decision making in the *Migration Act*, this is highly unlikely to arise.

The options available to the government were very much shaped by the Constitution. While the government accepts that the precise limits of privative clauses may need examination by the High Court, there is no other practical option open to the government to achieve its policy objective.

**Migration Legislation Amendment Act (No 1) 2001**

The *Migration Legislation Amendment Act (No 1) 2001*, which came into effect on 27 September 2001, inserted s 486A into the Act, which purported to impose time
limits on applications to the High Court in its original jurisdiction. Section 486A was then further amended by the MAJR Act, which came into effect on 2 October 2001. At the time that S157 was decided, ss 486A(1) and (2) provided as follows:

(1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.

(2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.

Migration Legislation Amendment (Procedural Fairness) Act 2002

The Migration Legislation Amendment (Procedural Fairness) Act 2002 (‘the MLAPF Act’) was an attempt to ensure that the various ‘codes of procedure’ set out in the Act for dealing with visa or review applications were in fact an exhaustive statement of natural justice requirements under the Act. The MLAPF Act was a response to the High Court’s decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Miah,20 which had found that Subdivision AB of the Act, despite setting out a ‘Code of Procedure’ for dealing with visa applications, did not exclude the common law rules of procedural fairness.21

The MLAPF Act inserted new sections 359A and 422B into the Act, which deal with reviews by the MRT and RRT respectively. Subsections 359A(1) and 422B(1) are identical, and provide that ‘[t]his Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with’. As will be seen, ss 359A and 422B have not been particularly effective either. The EM to the Bill expressly referred to the Miah decision as follows:

[3] In Re MIMA; Ex parte Miah [2001] HCA 22 the High Court held, by a narrow majority, that the ‘code of procedure’ for dealing fairly, efficiently and quickly with visa applications in Subdivision AB of Division 3 of Part 2 of the Act did not exclude common law natural justice requirements. The majority considered that such exclusion would require a clear legislative intention and that there was no such clear intention in the Act.

21 Ibid at paragraphs 95 and 96.
[4] The purpose of this Bill is to provide a clear legislative statement that the ‘codes of procedure’ identified in the Bill are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

The MLAPF Bill received Royal Assent on 3 July 2002 and came into effect the following day.22

The High Court’s decision in S157

Plaintiff S157/2002 v Commonwealth of Australia23 involved a constitutional challenge to the validity of s 474 of the Migration Act 1958 and administrative challenges to a number of decisions that were defended on the basis of this section. At the time of the judgment, subsections 474(1) and (2) relevantly provided as follows:

(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) …

Subsection 474(3) made it clear that a decision to grant or refuse a visa was a ‘privative clause decision’.

The applicants argued that s 474 conflicted with s 75 of the Constitution and was therefore invalid, or alternatively that s 474 did not protect ‘jurisdictional errors’, a term that will be explained shortly. The High Court rejected the first argument but accepted the second, which left s 474 ‘on the books’, but rendered it of almost no effect. The leading judgment was given by Gaudron, McHugh, Gurnmow, Kirby and Hayne JJ. At paragraph 73, their Honours stated that:

A privative clause cannot operate so as to oust the jurisdiction which other paragraphs of s 75 confer on this Court, including that conferred

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23 Supra n2.
by s 75(iii) in matters ‘in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’. Further, a privative clause cannot operate so as to allow a non-judicial tribunal or other non-judicial decision-making authority to exercise the judicial power of the Commonwealth.24 Thus, it cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction.

Their Honours stated at paragraph 76 that an administrative decision affected by jurisdictional error is a legal nullity, referring to Minister for Immigration and Multicultural Affairs v Bhardwaj.25 Therefore, a ‘decision’ affected by a privative clause is only a putative decision and cannot be a ‘privative clause decision’ for the purposes of s 474. When read in this way, there was no conflict between s 474 and s 75 of the Constitution, and the provision was therefore constitutionally valid. Indeed, s 75(v) was reaffirmed to amount to ‘an entrenched minimum provision of judicial review’26 ‘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’.27

The remaining issue was the definition of ‘jurisdictional error’. Curiously, none of the judgments referred to the High Court’s decision of just two years previously, Minister for Immigration and Multicultural Affairs v Yusuf.28 In that case, McHugh, Gummow and Hayne JJ defined the term as follows at paragraph 82:

> It is necessary, however, to understand what is meant by ‘jurisdictional error’ under the general law and the consequences that follow from a decision maker making such an error. As was said in Craig v South Australia,29 if an administrative tribunal (like the Tribunal) ‘falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers’. Such an error of law is a jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

‘Jurisdictional error’ can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not

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24 Referring to R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254.
25 (2002) 76 ALJR 598 at paragraph 51.
26 Supra n2 at paragraph 104.
27 Ibid at paragraph 105.
exhaustive\textsuperscript{30} ... if an error of those types is made, the decision maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.

The kinds of ‘jurisdictional error’ identified by Craig and Yusuf are very wide, and endorse the Anisminic\textsuperscript{31} approach as far as possible without expressly abolishing the distinction between jurisdictional and non-jurisdictional errors. The majority judges in S157 came to the conclusion that a failure of procedural fairness was a ‘jurisdictional error’ and therefore s 474 did not protect the Tribunal decision from such a claim. The Hickman\textsuperscript{32} principle has therefore been overturned. The result is that when a decision is protected by a privative clause, deference will be shown to the decision maker on a point of law to the extent that no jurisdictional error is involved. Otherwise, the decision will be set aside.

It is important to note that the High Court decision in S157 does not simply return the law to a pre-Hickman position. On the contrary, the approach in \textit{R v Commonwealth Court of Conciliation and Arbitration} (‘the Tramways Case’)\textsuperscript{33} was to strike down the privative clause altogether as constitutionally invalid. The High Court in S157 gutted s 474 of the Migration Act rather than invalidating it, and has effectively found that non-jurisdictional errors will be protected while jurisdictional errors will not. This gives the courts the power to determine what a jurisdictional error is and what is not, and allows the courts great control over the executive, while still upholding those decisions that do not (in their opinion) display any error of law.

Finally, the time limits on applications to the High Court also came under scrutiny in S157. As the Federal Court and Federal Circuit Court are courts created entirely by statute, applications to these courts can be restricted by any time limits the Parliament wishes. However, the High Court, with its constitutionally mandated original jurisdiction, is in a different position. The Court in S157 found that the time limit in s 486A, like the privative clause in s 474(1), operated, in terms, only in respect of ‘privative clause decisions’. Hence, the time limit was effectively inoperative in respect of decisions involving jurisdictional error.\textsuperscript{34} Only Callinan J addressed the more general question of validity raised by the imposition of an absolute time limit on proceedings in the High Court. In his view, legislation imposing time limits would be authorised by the exercise of the incidental power in s 51(xxxix) of the Constitution, providing that the legislation was

\textsuperscript{30} See also \textit{Re Refugee Review Tribunal; Ex parte Aala} (2000) 204 CLR 82 at paragraph 163.

\textsuperscript{31} \textit{Anisminic Pty Ltd v Foreign Compensation Commission} (1969) 2 AC 147.

\textsuperscript{32} Supra n16.

\textsuperscript{33} (1914) 18 CLR 54.

\textsuperscript{34} Supra n2 at paragraph 91.
regulatory in character. Section 486A, according to Callinan J, was not of such a character. Rather it was ‘in substance a prohibition’ because, having regard to the difficulties faced by non-English speaking applicants detained in remote places, it rendered ‘any constitutional right of recourse virtually illusory’. This is a fascinating decision made by one of the more conservative members of the bench!

**Government response to S157**

The government was very quick to respond to the High Court’s decision in S157. The first attempt to deal with the judgment came with the Migration Amendment (Judicial Review) Bill 2004, which was introduced to the House of Representatives on 25 March 2004, but lapsed with the calling of the 2004 Federal election. The key amendment in the Bill was the insertion of a definition of ‘purported privative clause decision’, which had the effect that even those tribunal decisions later found to be affected by jurisdictional error would be affected by time limits for judicial review and so on.

The 2004 Bill was largely resurrected as the Migration Litigation Reform Act 2005 (‘the MLRA’) after the election. The MLRA included three main amendments. The first was the insertion of a definition of ‘purported privative clause decision’ in s 5E of the Act. Subsection 5E(1) provides as follows:

In this Act, **purported privative clause decision** means a decision purportedly made, proposed to be made, or required to be made, under this Act or under a regulation or other instrument made under this Act (whether in purported exercise of a discretion or not), that would be a privative clause decision if there were not:

(a) a failure to exercise jurisdiction; or

(b) an excess of jurisdiction;

in the making of the decision.

Under s 5(1) of the Act, a ‘migration decision’ now includes a privative clause decision, a ‘non-privative clause decision’ and a ‘purported privative clause decision’.

Secondly, s 476(1) of the Act now provides that ‘[s]ubject to this section, the Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the

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35 Ibid at paragraph 176.
36 Ibid.
Constitution’. This ensures that there is no longer any incentive for applicants to take a case to the High Court in its original jurisdiction, rather than the Federal Circuit Court, as it is now titled.

Thirdly, while a *prima facie* time limit for making an application to the High Court in its original jurisdiction remained, the High Court was given the power to extend that time limit. Subsections 486A(1) and (2) of the Act now provide as follows:

(1) An application to the High Court for a remedy to be granted in exercise of the court’s original jurisdiction in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

(2) The High Court may, by order, extend that 35 day period as the High Court considers appropriate if:

(a) an application for that order has been made in writing to the High Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the High Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

Similar powers to extend time limits are found in ss 477 and 477A of the Act, relating to the jurisdiction of the Federal Circuit Court and Federal Court respectively. This appeared to remove the problem with strict time limits identified by S157. Note, however, that even the amended version of s 486A was found to be unconstitutional by the High Court in *Bodruddaza v Minister for Immigration and Multicultural Affairs*, in which Gleeson CJ and Gummow, Kirby, Hayne, Heydon and Crennan JJ stated as follows:38

[55] Section 486A is cast in a form that fixes upon the time of the actual notification of the decision in question. This has the consequence that the section does not allow for the range of vitiating circumstances which may affect administrative decision-making. It is from the deficiency that there flows the invalidity of the section ...

[57] The fixing upon the time of the notification of the decision as the basis of the limitation structure provided by s 486A does not allow for supervening events which may physically incapacitate the applicant or otherwise, without any shortcoming on the part of the applicant, lead to a failure to move within the stipulated time limit.

The Parliament finally surrendered on the issue of time limits on applications to the High Court with the *Migration Legislation Amendment Act (No 1) 2009*. This Act amended s 486A to provide for a prima facie limitation period of 35 days from the date of the ‘migration decision’ (a term defined in s 477(3) of the Act), but gives the High Court the power to extend this indefinitely if an application for that order has been made in writing to the High Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and the High Court is satisfied that it is necessary in the interests of the administration of justice to make the order (s 486A(2) of the Act).

**Part 2 – Reasons for the attack on the courts in the migration jurisdiction**

**Incentives for delay in litigation**

It has been argued on behalf of the Minister and the Department that judicial review of immigration decisions is different to any other kind of judicial review, because it is one of very few – maybe the only – fields of law in which the plaintiff or applicant has an incentive to delay proceedings,\(^39\) where it is more common in civil litigation for a defendant to have an incentive to delay. We have already seen how the then Minister, Mr Ruddock, defended the introduction of the privative clause in his second reading speech to the *Migration Amendment (Judicial Review) Bill 2001* on the basis that ‘litigation can be an end in itself’.\(^40\)

Mr Ruddock also stated as follows in 1997:\(^41\)

> Much of the growth in applications for judicial review has come from the refugee area; that is, appeals from the RRT to the Federal Court. I see this high level of litigation, particularly by onshore asylum seekers, as highly undesirable given the associated costs and delays, and for those in detention, significantly longer periods of detention. I am also concerned that, given around 49% of applicants in all migration cases withdraw before hearing, there are a substantial number using the legal process as a means to extend their stay in Australia.

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39 It could also be the case that a plaintiff may have an incentive to delay proceedings in some defamation cases, where the objective of the lawsuit might be to frighten critics of the plaintiff into silence rather than recovering damages from the defendant.
40 See page 12.
Mr Ruddock made similar comments in 2002, defending the then new privative clause:42

Between one third to one half of applicants withdraw their applications prior to the court hearing. Of the cases that go on to substantive hearings, the merits-based decision is currently upheld in over 90 per cent of cases. It is hard not to conclude that there is a substantial number of applicants who are using the legal process primarily in order to extend their stay in Australia.

This view that migration litigants often resort to the courts purely for the purpose of delaying their removal is not restricted to the Minister. The then General Counsel to the Department, Robyn Bicket wrote as follows in 2010:43

Another noteworthy figure which supports delay as the primary litigation driver is the Minister’s overwhelming success in matters defended. Since 1993–94. the Minister has been successful in, on average, 93% of cases. This means that, putting aside cases from which we withdrew, in only 7% of cases did the affected person get a favourable decision, which may have included a rehearing by the tribunal. (Of course, whether the person actually achieved a favourable visa outcome in the end is another matter.) When the success rate is viewed together with the upward trend in applications, 1,045 total new applications in 1997–98, 1,590 applications in 1999–2000, 2,605 applications in 2001–2002 and peaking in 2002–2003 with 5,397 new applications, it is clear that delay is a real factor driving litigation, and one for which there is no easy solution, let alone a legislative one.

The current government seems to have accepted that appeals to the High Court cannot be stopped, but Minister Morrison has been reported as stating as follows:44

The Coalition also announced it would retrospectively apply its tough temporary protection visa scheme to more than 30,000 people already in Australia awaiting refugee assessment decisions.45

45 This is a reference to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014.
Opposition immigration spokesman Scott Morrison conceded asylum seekers would still have the right to appeal to the High Court, but said a Coalition government would move to cut their access to the Refugee Review Tribunal and the Federal Court. 'At the end of the day . . . appeals can always be made to the High Court about pretty much anything', Mr Morrison said. 'We're not changing the constitution.'

When an applicant challenges a decision of Comcare or superannuation bodies in the courts, it is in their interests to get a decision as quickly as possible. On the other hand, a migration applicant may be able to delay his or her removal from Australia simply by making an application for judicial review, regardless of whether such an application is legally merited. It is notable that the Act does permit the removal of an unlawful non-citizen who has a current matter before the courts46 (although not an applicant who has a merits review matter in process), but Departmental policy is that unlawful non-citizens with current applications before a court will not be removed until that application is finalised.47 In any event, if the Department attempted to remove a non-citizen who had an active case before the courts, it is likely that the court in question would issue an injunction preventing any such removal – see for example s 15 of the Federal Circuit Court Act.

**Polycentricity in immigration policy**

Another reason that has been given for seeking to curtail rights of judicial review in immigration cases is the polycentric nature of immigration law and policy. The term ‘polycentric’ means that more than two competing interests are in play – in the case of formulation of immigration policy, matters such as population policy, national security, health policy and labour market policy (amongst others) may all be relevant, aside from the rights of individuals seeking to enter Australia. Another classic example of polycentric decision-making is in applications for development,48 where a government has to weigh the rights and interests of developers against a number of other factors. Phillip Ruddock took up the theme of polycentricity in 2000:49

The refugee determination system comprises more than a mechanism for judicial review of administrative action. As Margaret Allars acknowledges, many disciplines, such as political and organisational

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46 Section 153 of the *Migration Act 1958*.  
47 PAM3 – MIGRATION ACT > PAM – Compliance and Case Resolution > Case resolution > Returns and removals > PAM – Removal from Australia, section 38.  
theory, and social psychology, impinge upon administrative law.\textsuperscript{50} Associated with these disciplines are values other than legal norms such as the rule of law, including public accountability, fiscal responsibility, administrative efficiency and, in the migration area, international comity.

The courts, charged with responsibility for the rule of law, are clearly not in a position to weigh the relative influence of these values in the refugee determination system. In part this is because, as McMillan has observed, the judiciary believes that it has a special duty to protect individual rights - or at least, to protect individual rights as portrayed in the circumstances of the case before the court. It is also because, as Lee J acknowledged in\textit{ Minister for Immigration and Multicultural Affairs v Amani},\textsuperscript{51} the courts are ill-suited to consider the sensitive political issues that arise in some aspects of the refugee determination system. The final reason for the courts’ inability to balance the forces at play in the refugee determination system is that they are constitutionally barred from doing so.

Lest it be thought that only LNP politicians attack the courts, consider the following report of remarks made by then PM Julia Gillard in relation to the High Court’s decision in\textit{ M70/2011 v Minister for Immigration and Citizenship},\textsuperscript{52} popularly known as the ‘Malaysia Solution Case’:\textsuperscript{53}

In Brisbane, Ms Gillard said the High Court had missed an opportunity to enhance the nation’s response to ‘the evil of people-smuggling’ and to make a ‘real and important contribution’ to a regional approach to transnational crime. ‘It is a missed opportunity … to send a message to asylum-seekers not to risk their lives at sea and get into boats.’

Ms Gillard, a former lawyer, said the High Court’s decision ‘basically turns on its head the understanding of the law in this country prior to yesterday’s decision’. She added that some commentators ‘are saying that they find the decision incomprehensible, beyond understanding’.

\textsuperscript{50} Margaret Allars, \textit{Introduction to Australian Administrative Law}, Butterworths (1990), Chapter 1.
\textsuperscript{51} (1999) FCA 1040 at paragraph 23.
\textsuperscript{52} (2011) HCA 32.
Referring to Chief Justice French, Ms Gillard said: ‘His honour … considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one that the High Court made yesterday’. 54

[Treasurer] Wayne Swan backed the attack, saying the court had ‘struck out in a completely different direction’ in a judgment that surprised the government.

That is, a court’s sole role is held to be the adjudication of the rights of an individual (or corporation) that comes before it, and it is simply not capable of thinking in terms of wider government policy and responsibilities, such as ‘send[ing] a message to asylum-seekers not to risk their lives at sea and get into boats’. Mary Crock and Laurie Berg are critical of successive governments on this point, stating that ‘the central problem is that Parliament and the executive have come to see the courts as political subversives which preference the rights of individuals over the policy objectives of those elected to govern’. 55 Could the clash between the government and the courts simply be a result of the different roles that these two arms of government play? One could point to the constantly changing laws in relation to development in NSW, and in particular the rise of Ministerial ‘call-in’ powers, 56 to support the proposition that all polycentric policy will eventually lead to a clash between the executive and the judiciary.

Similar arguments about the effects of judicial system on polycentric policy like immigration have been made in Canada about the Supreme Court’s decision in Singh (Harbhajan) v Minister of Employment and Immigration, which found that applicants for refugee status always reacquire an oral hearing. Peter Hogg QC has argued that the Supreme Court simply had no idea of the administration and financial burden it was placing on the Federal government. 57 The financial implications of a decision are not something that a court should take into account, but this may be Hogg’s point. Further, polycentricity in decision-making has always been a ground on which a Canadian court will show ‘deference’ to a decision maker, and impose a standard of review of reasonableness rather than correctness, 58 so Minister Ruddock may actually have had some overseas

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54 This is a reference to Patto v Minister for Immigration and Multicultural Affairs (2000) FCA 1554, where French J found at paragraph 37 that a person could obtain effective protection in a third country even if that country was not a signatory to the Refugees Convention.
56 See Part 4, Division 4.1 of the Environmental Planning and Assessment Act 2011 (NSW).
57 Peter Hogg, Constitutional Law of Canada (Student edition 2009), Carswell, 2009 Part 47.4(b), pp 1075–76.
58 See for example Bell Canada v Bell Aliant Regional Communications (2009) 2 SCR 764.
jurisprudence on his side in this argument. However, the Supreme Court of Canada has generally regarded immigration decision-making in individual cases as an example of simple polar and not polycentric adjudication.59

The moral panic over loss of sovereignty

While it is tempting to see the clash between the government and the courts on immigration matters as inevitable to all polycentric decision-making, this cannot be the sole explanation for the scope of the attack by governments on courts in the immigration field. While one does see government Ministers criticise court decisions in land development cases, for example, the real vituperation seems to be reserved for immigration.

It is instructive to look at Parliamentary speeches, made 16 years apart, in relation to Bills amending the character provisions of the Migration Act. The Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 was introduced into Parliament in 1997, and amended s 501 to create the more objective ‘character test’ that we have previously examined. The Minister, Mr Ruddock stated in his second reading speech as follows:60

The fact is that there has been a considerable weakening in recent years of the way in which our provisions operate … [O]ne of the reasons that we have a concern is not the large numbers of cases in which ministerial decisions and departmental decisions have been overturned by the AAT. I recognise that the cases where the AAT have acted to effectively degrade the quality of decision making have occurred not because of the numbers but because essentially of their precedential character.

Every decision that is made by an AAT member, every decision that have been made at that level, becomes a basis upon which officers of my department when they seek then to apply the law are bound to take into account. They have not been made by the parliament; they have not been made by a minister. Essentially the framework of law under which character decisions are reached are degraded because AAT members are substituting their own judgment at times for that of a minister elected by the people.

It is the view of the government that in these matters the final responsibility rests with the government of the day, not with unelected officials, to determine who shall be able to come and remain here permanently or temporarily in Australia.

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60 House of Representatives Hansard, 18 November 1997 at 10692.
Compare this to the second reading speech by the current Minister, Mr Morrison, for the *Migration Amendment (Character and General Visa Cancellation) Bill 2014*:\(^61\)

Consistent with community views and expectations, the Australian government has a low tolerance for criminal, noncompliant or fraudulent behaviour by noncitizens. Entry and stay in Australia by noncitizens is a privilege, not a right, and the Australian community expects that the Australian government can and should refuse entry to noncitizens, or cancel their visas, if they do not abide by Australian laws. Those who choose to break the law, fail to uphold the standards of behaviour expected by the Australian community or try to intentionally mislead or defraud the Australian government should expect to have that privilege removed. To meet this expectation the government must not only have the ability to act decisively and effectively, wherever necessary, to deal with unlawful, fraudulent or criminal behaviour by noncitizens, but also have the legislative basis to effect a visa cancellation or refusal for those noncitizens.

While Mr Morrison’s speech does not mention the courts or the AAT by name, the similarities are obvious – the government *must* be able to act ‘quickly and decisively’, presumably without any ‘interference’ by review bodies. A similar disdain for independent review of migration decisions can be found in the current Minister’s second reading speech for the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*:\(^62\)

The government is of the view that a ‘one size fits all’ approach to responding to the spectrum of asylum claims made under Australia’s protection framework is inconsistent with a robust protection system that promotes efficiency and integrity. It limits the government’s capacity to address and remove those found to have unmeritorious claims quickly while diverting resources away from those individuals with more complex claims. The government has no truck with people who want to game the system. A new approach is warranted in the Australian context. The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority – to be known as the IAA. These measures are specifically aimed at

\(^{61}\) House of Representatives Hansard, 24 September 2014 at 10325.  
\(^{62}\) House of Representatives Hansard, 25 September 2014 at 10545.
addressing the backlog of IMAs—some 30,000—and will ensure their cases progress towards timely immigration outcomes, either positive or negative.

All fast-track applicants will have their protection claims fully assessed by my department under the Migration Act. However, it is the government’s policy that, if fast-tracked applicants present unmeritorious claims or have protection elsewhere, their cases will be channelled towards a direct immigration outcome rather than accessing the broader merits review process to prolong their stay in Australia. Such fast-track applicants will be known as ‘excluded fast-track review applicants’ and will not have access to those broader forms of merits review.

The IAA will be established as a separate office of the Refugee Review Tribunal. Eligible fast-track review applicants will have their refusal cases automatically referred to the IAA and will not have to apply for a review by it. The IAA’s primary function will be to conduct a review ‘on the papers’, only considering the material which was before my department when it made its refusal decision under section 65 of the Migration Act.

... [T]he Immigration Assessment Authority will not accept or consider any new information presented at review by a fast-track review applicant unless exceptional circumstances apply and the IAA is satisfied that the new information was not, and could not have been, provided to the department before the section 65 decision was made.

This new approach to review will discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims only after they learn why they were found not to be refugees by the department. This behaviour has on numerous occasions led to considerable delay while new claims are explored.

It might be noted that at the time of writing these amendments, although passed by both Houses of Parliament, have not yet been proclaimed and have therefore yet to come into effect. So much for urgency!

Many authors have commented on the perception on the part of many governments – not just Australia’s – that absolute control over that country’s immigration intake is a necessary element of a government’s sovereignty. One reason for this may be that increasing globalisation has in many ways diminished the sovereignty of nation-states, and control over immigration is one of the

63 Illegal Maritime Arrivals.
64 This, of course, is not a true merits review – see Huang v Secretary of State for the Home Department (2007) 2 AC 167 and Huruglica v Minister of Citizenship and Immigration (2014) FC 799.
few clear controls that they have left. It is almost an example of *Yes Minister’s* ‘Politician’s Syllogism’ — ‘something must be done, this is something, therefore we must do it’.\(^{65}\) Catherine Dauvergne, for example, has written as follows:\(^{66}\)

Control over migration is interpreted, therefore, as being somehow intrinsic to what is it to be a nation, to ‘stateness’ and to the core of membership and national identity. Images which convey this run from the Statue of Liberty to crack SAS troops boarding the MV Tampa. In the law, the strong links between migration provisions and the notion of sovereignty have lead to courts showing remarkable deference to executives in areas of immigration rule making and to an international definition of a state which includes a defined population as an essential element.

The Prime Minister at the time of the *Tampa* incident, John Howard, drew an explicit link between the notion of sovereignty and control over immigration (including asylum seekers) when he stated in Parliament that ‘[w]e are not a soft touch and we are not a nation whose sovereign rights, in relation to who comes here, are going to be trampled on’.\(^{67}\) The then Minister, Phillip Ruddock, said much the same thing when he also stated in Parliament that ‘[t]he protection of our sovereignty, including Australia’s sovereign right to determine who shall enter Australia, is a matter for the Australian government and this Parliament’,\(^{68}\) presumably as opposed to those seeking to enter it. More recently, the *Sydney Morning Herald* reported the current Prime Minister as stating that ‘the sign of a sovereign country is secure borders’ — *the* sign, not *a* sign.\(^{69}\) So much has been written on the tactic used by both major parties in Australia, but particularly the LNP coalition, to demonise unlawful arrivals to Australia as a vote-winning tactic that it is really not possible to add to it, other than to refer to the concept of the ‘other’ as it has been applied particularly to unlawful boat arrivals to Australia.\(^{70}\)

\(^{65}\) *Yes, Prime Minister*, ‘Power to the People’, first broadcast on the BBC 7 January 1988.


\(^{67}\) *Commonwealth of Australia Parliamentary Debates*, House of Representatives, 29 August 2001 at 30235.


Part 3 – Major cases and legislative response

A frequent feature of Australian immigration law is the reaction of the Commonwealth Parliament to court decisions that are adverse to the government. Much has been written in other jurisdictions about a concept of ‘dialogue’ between the courts and the legislature,71 but this does not seem to be a concept that has ever been significantly explored in Australia. Instead, Australian governments tend to simply react, and sometimes strongly, to adverse court decisions, rather than engage in anything approaching a dialogue.

It is notable that an adverse court decision – or even sometimes decisions such as Lim,72 where the government was largely successful – frequently results in a quick amendment to the Act in order to ‘rectify’ the situation. Sometimes a court decision is not even necessary. For example, the *Migration Amendment (Detention Arrangements) Act 2005*, was introduced to head off a revolt by some backbench Coalition MPs in relation to the situation of children in immigration detention. Regardless, the frequency of amending legislation, and the swiftness with which it often follows adverse court decisions, shows the desire of successive governments for control of the immigration program.

Part 4 – Is a separate regime for judicial review of migration decisions necessary?

The purpose of successive amendments made to Part 8 of the Act since 1994 demonstrate an attempt by successive governments to reduce the scope for judicial review of migration decisions. However, the judgment in *S157*73 made it clear that s 474 of the *Migration Act* will not protect a decision affected by a ‘jurisdictional error’. The question now is what that term means.

It is well-known that the distinction between jurisdictional and non-jurisdictional errors of law has been abolished in the UK.74 That is, all errors of law are regarded as going to the decision maker’s jurisdiction. In Canada, the Supreme Court has not quite been able to bring itself to abolish the distinction altogether, but the possibility has been canvassed. In particular, in *Alberta (Information and

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73 Supra n2.
Privacy Commissioner) v Alberta Teachers’ Association, Rothstein J, writing for the majority, stated ‘it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review’.75 Regardless, not one Supreme Court decision since the crucial case of Dunsmuir v New Brunswick76 has turned on whether a decision maker has committed a jurisdictional error or has simply made an unreasonable decision.

The elusive distinction between jurisdictional and non-jurisdictional errors of law

Australian courts, however, maintain that there is still a difference between jurisdictional and non-jurisdictional errors, but that nearly all errors of law will be jurisdictional errors. Keifel J attempted to explain the difference between jurisdictional and non-jurisdictional errors in Linett v Australian Education Union as follows:77

The distinction between jurisdictional error and a ‘mere error of law’ is maintained, the latter being one which has been arrived at on an issue that has been entrusted to the inferior court or tribunal to decide for itself, even if the decision is wrong.

Despite this reasoning, there does not seem to have been a case in Australia decided since S157, at any judicial level, that has turned on whether an identified error of law is jurisdictional or not. That is, there has not been a decision since S157 that has found the existence of an error of law, but has found that it is not a jurisdictional error.78 It is notable that Yusuf79 gave only an expressly non-exhaustive list of jurisdictional errors, and more recently, in Kirk v Industrial Relations Commission (NSW) the High Court has stated that ‘it is neither necessary, nor possible, to mark the metes and bounds of jurisdictional error’.80 That is, a jurisdictional error is whatever a court says it is. Further, if s 474 of the Migration Act 1958 does not demonstrate that a ‘migration decision’ is an ‘issue that has been entrusted to the inferior court or tribunal to decide for itself’, what on earth does?

75 Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association (2011) SCR 61 at paragraph 42.
76 (2008) 1 SCR 190.
78 Interestingly, Robert French, now French CJ of the High Court, came to a similar conclusion as far back as 1993, when he wrote that ‘[w]hatever the proper interpretation of Anisminic it is clear that the High Court has maintained the distinction between jurisdictional error and error within jurisdiction. The distinction seems to have little work to do in the cases relating to the operation of privative clauses’. See Robert S French, ‘The Rise and Rise of Judicial Review’, (1993) 23 Western Australian Law Review 120 at 128.
79 Supra n28 at paragraph 82.
80 (2010) 239 CLR 531 at paragraph 71.
It appears that the closest that a court has come to making such a finding was in *Ratumaiwai v Minister for Immigration and Multicultural Affairs*. This was a case involving judicial review of a decision to refuse to find that a visa applicant was a ‘special needs relative’, and Hill J found as follows:

[27] It is clear from the transcript that the Tribunal considered, and rejected, the claim of the applicant that the giving of financial assistance qualified him as a ‘special need relative’ within the meaning of that expression. Even although the Tribunal Member did not deal with the issue of financial assistance in the reasons for decision, as he was obliged to do under s 430(1)(b) of the Act, it is clear that the Member did not fail to consider the question. He did consider it and rejected it. So, it cannot be said that the Tribunal Member failed to take into account financial assistance as a relevant consideration …

[28] The distinction between error of fact and error of law is a fine one. While it is true that the ordinary English meaning of a word is a question of fact, so that a Tribunal which defines the word wrongly does not make an error of law, what was involved in the present case was whether it was open to the Tribunal to find that a person who gave financial assistance to a nominator came within the expression ‘special need relative’ …

[29] In my view, once it is seen that the Tribunal has addressed the issue of financial assistance, however, even if in so doing it has made an error of law, that error is not, in my opinion, a jurisdictional error.

Even Hill J was equivocal in his conclusion, and did not explain why the error of law in question, assuming that one had been made, was not a jurisdictional error. A number of cases since this decision was handed down have stated that making an error of fact is not a jurisdictional error, but do not make it clear whether that error is a non-jurisdictional error of law.82

Another case that might have come close to making a distinction between a jurisdictional and non-jurisdictional error, but ultimately did not do so, was *Minister for Immigration and Citizenship v SZIZO*. Where the court distinguished between ‘mandatory’ and ‘facilitative’ provisions of the RRT Code of Procedure, and found that the RRT had not committed a jurisdictional error despite an apparent breach of s 441G of the Act. If the High Court continues

81 (2002) FCA 311. This was one of the cases considered in *NAAV v MIMIA* (2002) FCAFC 228.
83 (2009) HCA 37.
to find ‘core’ and ‘non-core’ provisions in the Codes of Procedure, this may be a way to relax the strict compliance approach to the codes without actually distinguishing between jurisdictional and non-jurisdictional errors.

A recent attempt at an explanation – *Minister for Immigration and Citizenship v MZYZA*

In 2013 a brave attempt to distinguish between jurisdictional and non-jurisdictional errors was made by the Federal Court in *Minister for Immigration and Citizenship v MZYZA*. In this case, a Department of Immigration and Citizenship (DIAC) decision to refuse a Protection Visa was upheld by the Refugee Review Tribunal (RRT), which had been concerned with the authenticity of certain documents. The RRT had put to the applicant that it was ‘very easy to obtain false documents in India’, but made no explicit finding that the specific documents in question, which appeared to support the applicant’s case, were fraudulent. As a result, the Federal Magistrates Court found that the RRT had made a jurisdictional error. The Minister had argued that the ‘weight’ to be given to the letter was a matter for the RRT, and that the RRT had implicitly decided to give it little or no weight. However, the Federal Magistrate found as follows: do not accept the submission that the Tribunal implicitly decided to give the letter little or no weight. There is no indication in the Tribunal’s reasons for decision of any cognisance of the letter in the part of the Tribunal’s reasons that records its reasons for decision, as opposed to its summary of the background. It seems to me that the Tribunal overlooked the letter while weighing up the evidence and formulating its decision, as opposed to setting out the background to the case.

The Federal Magistrate went on to find that the letter was a crucial piece of evidence, and that the RRT may have reached a different conclusion had it turned its mind to the matter. The RRT decision was therefore set aside.

Tracey J upheld the Minister’s appeal in the Federal Court. His Honour did so primarily on the basis that a mere defect in the reasons for a decision is not a ground of jurisdictional error, and that it was clear from the RRT’s reasons that it rejected the applicant’s claim to be a member of a certain political party. Tracey J summed up as follows:

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84 (2013) FCA 572.
85 Ibid at paragraph 15.
86 MZYZA v Minister for Immigration and Citizenship (2013) FMCA 15 at paragraph 23.
87 Ibid at paragraph 32.
88 Supra n85 at paragraphs 31 and 32.
89 Ibid at paragraph 42.
90 Ibid at paragraph 68.
Even if it is accepted that the Tribunal failed to have regard to the contents of the letter, I do not consider that such a failure constituted jurisdictional error. The Tribunal was bound to have regard to and assess the first respondent’s claim to have been persecuted because of the political and religious beliefs attributed to him ... It did so. It was not suggested that the failure (if there was one) to refer to the contents of the letter occurred because the Tribunal had misdirected itself as to the proper scope of its deliberations or by failing to identify the relevant claims and integers of the claims raised by the first respondent. It was not bound to consider each and every piece of evidence which related to those claims.

His Honour added that the letter ‘did not, in my view, amount to evidence of pivotal importance, or as being so fundamental to the first respondent’s claim, that a failure to give consideration to its contents caused jurisdictional error’.91

The analysis given by Tracey J is very thorough, but he himself admits that ‘value judgments are involved in determining whether material can be regarded as so ‘fundamental’ or so ‘important’ or so ‘overwhelming’ that a failure to have regard to it constitutes jurisdictional error’.92 It still seems apparent that courts have a lot of discretion in determining whether something is a ‘jurisdictional error’ or not, and MZYZA still does not provide an example of a decision turning on a classification of something found to be an error of law as jurisdictional or not.

Has migration jurisprudence returned to the ADJR grounds of review?

As discussed previously, s 5(1) of the ADJR Act provides as follows:

A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

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91 Ibid.
92 Ibid at paragraph 60.
(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorised by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(i) that the decision was otherwise contrary to law.

If we look at ss 5(1) and 5(2) of the ADJR Act, it would appear that most of the grounds of review specified in those sections have been found to be jurisdictional errors by the courts. Paragraphs 5(1)(b)–(e) are jurisdictional errors in even the Hickman sense, while in relation to s 5(1)(g) the High Court has found in SZFDE v Minister for Immigration and Citizenship\(^93\) that a fraud committed against the tribunal by the applicant’s migration agent, where the applicant and the tribunal itself were innocent of any fraud, can result in a jurisdictional error. Much of s 5(1)(h) appears to have been subsumed by the finding in Minister for Immigration and Citizenship v SZMDS\(^94\) that ‘irrationality’ on the part of an administrative decision maker can result in a jurisdictional error (although no such error was found in that case). Errors of the kind described by s 5(1)(f) would appear not to apply to review of immigration decisions, although it of course depends on the classification by a court of an error as ‘jurisdictional’ or ‘non-jurisdictional’, an argument that the courts are loath to have.

Paragraph 5(1)(j) could be enlivened in a situation where the decision maker lacked the delegation to make the decision, which is also a jurisdictional error even on Hickman principles. There has been very little jurisprudence on the kinds of errors that could be encompassed by s 5(1)(j). In Scott v Human Rights and Equal Opportunity Commission the applicants argued that an alleged failure to make certain inquiries on the part of the Commission fell within s 5(1)(j), but North J in the Federal Court rejected this submission.\(^95\) It could also be argued

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\(^93\) (2007) 232 CLR 189.
\(^94\) (2010) HCA 16.
\(^95\) (2010) FCA 1323 at paragraphs 117 and 175–76.
that s 5(1)(j) could be relevant where a decision maker misinterprets relevant legislation, as was argued in French v Gray, Special Minister of State,\(^{96}\) but again the court found that no such error had been made, without elaborating on the meaning of s 5(1)(j).

It could be argued that the errors described by s 5(1)(a) of the ADJR Act have been excluded from judicial review by means of a combination of s 474 and ss 359A and 422B of the Migration Act. However, Australian courts have been quite creative in incorporating common law requirements of procedural fairness into judicial review of immigration decisions. For example, in Minister for Immigration and Citizenship v Li,\(^{97}\) the Full Federal Court found that a refusal to adjourn a Migration Review Tribunal (MRT) hearing amounted to a jurisdictional error, despite the existence of s 359A. The decision of the Full Federal Court was upheld on appeal by the High Court,\(^{98}\) which had nothing at all to say about s 359A, and affirmed the decision primarily on the basis of a breach of s 363 by the MRT.

The notion that, by failing to comply with the requirements of natural justice, the MRT or RRT would not in fact offer a hearing and would fail to fulfill their core function, resurfaced in SZJSS v Minister for Immigration and Citizenship.\(^{99}\) The Full Federal Court in this case ignored s 422B, and found that apprehended bias on behalf of the decision maker had the effect that the RRT had constructively failed to exercise its jurisdiction and effectively failed to provide the applicant with a hearing.\(^{100}\) On appeal, the High Court also did not address s 422B – instead, it assumed that apprehended bias would amount to a jurisdictional error but found none existed in the case at hand.\(^{101}\) It would appear, then, that Australian courts have decided that ss 359A and 422B have as much practical effect as s 474, and that if a tribunal breaches the common law rules of natural justice it will have failed to exercise its duty to undertake a review, and set the decision aside on that basis.\(^{102}\)

The question must then be asked – what is the point of continuing to have a separate regime for judicial review of immigration decisions? By introducing s 474 and related provisions, the Parliament left itself open to the High Court overturning the Hickman approach to privative clauses, which it duly did. All that was achieved was the highly unintended result of returning judicial review of migration decisions, in effect, to the same basis as under the ADJR Act. The de facto return to ADJR Act review might as well be made de jure.

\(^{96}\) French v Gray, Special Minister of State (2013) FCA 263.
\(^{97}\) Minister for Immigration and Citizenship v Li (2013) HCA 18.
\(^{99}\) SZJSS v Minister for Immigration and Citizenship (2009) FCA 1577 at paragraph 64.
\(^{100}\) Ibid at paragraph 64.
\(^{102}\) See also SZBEL v MIMIA (2006) HCA 63 for a similar decision.