

THE APPROACH OF THE COURTS TO THE CONSTRUCTION AND APPLICATION OF TIME LIMIT PRIVATIVE CLAUSES

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Introduction

Privative clauses¹ in statutes are fraught with difficulties, and by no means have the courts been consistent in their interpretation and construction of them over the years despite the fact that such clauses have frequently fallen for consideration by the courts. The purpose of this article is to explore disparate approaches to the construction of one type of privative clause that is particularly common in state enactments, especially in New South Wales, namely, the time limit privative clause. Much of what will be said is also applicable to the construction of other types of privative clauses, especially the “no certiorari” clause.²

A time limit privative clause is in many ways quite different from other types of privative clauses in that it is analogous to a statute of limitations. By its very nature, this type of privative clause does not constitute an absolute bar to challenges to the validity of decisions. Thus, most reviewing courts have taken the view that there is not the same compulsion to construe the clause as strictly

¹ Also known as ouster clauses or preclusive clauses.

² A “no certiorari” (or “shall not be questioned”) clause can take various forms and may be used in combination with other types of privative clauses but in essence provides that a court may not make an order for removing to the court or quashing any decision or proceeding made or conducted by the original decision maker in connection with the exercise of its functions. In its simplest form such a clause provides that the decision sought to be reviewed “shall not be quashed or called into question”, but may and usually does go further and provide that the decision (or even a purported decision) may not be challenged, reviewed, quashed or called into question before any court in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of certiorari, prohibition, mandamus or otherwise.

as one would other types of privative clauses.³ Subject to at one important qualification, a time limit privative clause in a statute passed by a state legislature ordinarily will be effective to preclude judicial review once the time period has expired. Here are four time limit privative clauses. The first two are contained in the *Environmental Planning and Assessment Act 1979* (NSW) [the “EPA Act”], and the last two are from the *Local Government Act 1993* (NSW) [the “LG Act”]:

35. Validity of instruments

The validity of an environmental planning instrument shall not be questioned in any legal proceedings except those commenced in the Court by any person within 3 months of the date of its publication in the Gazette.

101. Validity of development consents and complying development certificates

If public notice of the granting of a consent or a complying development certificate is given in accordance with the regulations by a consent authority or an accredited certifier, the validity of the consent or certificate cannot be questioned in any legal proceedings except those commenced in the Court by any person at any time before the expiration of 3 months from the date on which public notice was so given.

675. Time limit on proceedings questioning the validity of approvals

Proceedings questioning the validity of an approval under Part 1 of Chapter 7 may not, if the council has given public notice of the granting of the approval in the manner and form prescribed by the regulations, be commenced more than 3 months after the date on which the notice was given.

729. Proceedings alleging non-compliance with a procedural requirement

The validity or effectiveness of a decision of a council may not be questioned in any legal proceedings on the ground that, in making or purporting to make the decision, the council failed to comply with a procedural requirement of this Act or the regulations (including a requirement as to the giving of notice) unless the proceedings are commenced within 3 months after the date of the decision.

The general principle

In *Woolworths Ltd v Pallas Newco Pty Ltd*⁴ in which the NSW Court of Appeal

³ See eg *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288. As to time limit privative clauses generally, see NP Gravells, "Time Limit Clauses and Judicial Review - Some Second Thoughts" (1980) 43 *Modern Law Review* 173, and LH Leigh, "Time Limit Clauses and Jurisdictional Error" [1980] *Public Law* 34.

⁴ (2004) 61 NSWLR 707.

had to consider the construction of s 101 of the EPA Act, the court reiterated the general principle that privative clauses are to be strictly construed, meaning that they ought to be construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied: see eg *Clancy v Butchers' Shop Employees Union*,⁵ *Anisminic Ltd v Foreign Compensation Commission*,⁶ *Hockey v Yelland*.⁷

In the 1980s and early 1990s NSW superior courts were in a state of considerable confusion with respect to the construction and operation of privative clauses. Different judges adopted different approaches, and it was extremely difficult to predict the approach that would be taken in a particular case. Fortunately, in more recent years the NSW courts, for the most part, adopted a fairly consistent approach with respect to the construction and operation of privative clauses with the preponderance of recent judicial authority being in the direction of the approach traditionally adopted by federal courts, in particular, the High Court of Australia. That approach had been based on the judicial application of a rule of construction known as the *Hickman* principle,⁸ regardless of the alleged ground of invalidity (whether denial of procedural fairness, ultra vires or jurisdictional error).⁹ In *Hickman* Dixon J (as he then was) enunciated the following principle:

⁵ (1904) 1 CLR 181 per O'Connor J at 204.

⁶ [1969] 2 AC 147 per Lord Reid at 170.

⁷ (1984) 157 CLR 124 per Gibbs CJ at 130, and per Wilson J at 142.

⁸ See *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 per Dixon J at 615. The rule of construction is sometimes also referred to as the *Hickman* test.

⁹ See, however, *Breitkopf v Wyong Council* (1996) 90 LGERA 269 in which Bignold J gave the privative clause in question (viz then s 104A (now s 101) of the EPA Act) full effect, stating that, contrary to some earlier decisions of the Land and Environment Court such as *Woolworths Ltd v Bathurst City Council*, in his opinion there was no justification for reading down the plain meaning of the provision to allow for any implied exceptions. His Honour expressed the same view in *Vanmeld Pty Ltd v Fairfield City Council* (L & E Ct, Bignold J, No 40032/95, 28 June 1996, unreported). In the NSW Court of Appeal decision of *North Sydney Municipal Council v Lycenko & Associates Pty Ltd* (1988) 67 LGRA 247 Mahoney JA (at 269) was of the view that it was "beyond question" that the privative clause in question (viz s 35 of the EPA Act) precluded any challenge after the expiration of the stipulated time period; in that regard, there was "no distinction between defects of form and defects of substance". Lord Denning MR adopted a very similar approach in *R v Secretary of State for the Environment; Ex parte Ostler* [1977] QB 122. See also *Smith v East Elloe Rural District Council* [1950] AC 736.

Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.¹⁰

Insofar as privative clauses in State enactments are concerned, in *Darling Casino Limited v New South Wales Casino Control Authority*¹¹ Gaudron and Gummow JJ stated:

However and provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle.¹²

However, over time the point was reached both at the federal level and in New South Wales where ordinarily more is required than just compliance with the *Hickman* principle. A provision containing a restriction or requirement may, on the proper construction of the statute as a whole including the privative provision, be construed as being of such significance in the legislative scheme that it constitutes a limitation or requirement that is, as variously expressed in the authorities, "essential", "indispensable", "imperative" or "inviolable".¹³ As

¹⁰ 70 CLR 615. His Honour appeared to prefer his subsequent formulation of the same threefold principle in *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 398: see *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Limited* (1960) 104 CLR 437 at 442-443.

¹¹ (1997) 191 CLR 602.

¹² (1997) 191 CLR 602 at 634. In New South Wales and other Australian states the *Hickman* operates by a process of statutory construction without a constitutional overlay. As regards privative clauses in Commonwealth enactments, the position is more complex: first, in addition to the operation of the *Hickman* principle, no privative clause in a federal enactment can oust the jurisdiction conferred on the High Court of Australia by s 75(v) of the Constitution, and that applies privative clauses relating to decisions made by both administrative tribunals and inferior courts; secondly, as regards federal administrative tribunals (but not inferior courts), any privative clause in a federal enactment that purported to confer exclusive jurisdiction on any such tribunal to determine the limits of its own jurisdiction without recourse to a court of law (and that would occur if purported decisions were declared to be judicially unreviewable) would be tantamount to a conferral of the judicial power of the Commonwealth on that tribunal, which is unconstitutional.

¹³ See *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248; referred to with approval in *R v Coldham; Ex parte Australian Workers' Union* at 419; *Darling Casino* at 632). Other formulations include the following: "a final and definitive limitation" (*R v Central Reference Board; Ex parte Thiess*

Spigelman CJ pointed out in *Mitchforce v Industrial Relations Commission*¹⁴ this proposition is well established in the judicial authorities. Brennan J described it as the "fourth condition" of the *Hickman* principle, if not inherent in the threefold *Hickman* formulation.¹⁵ Be that as it may, Dixon J refers to the threefold expression of the *Hickman* principle as a "first step" and the "inviolable restriction" point as "a second step".¹⁶

Manifest ultra vires and jurisdictional error

The NSW Court of Appeal in *Woolworths Ltd v Pallas Newco Pty Ltd*¹⁷ stated that a privative clause which sought to protect a "decision" or a "determination" was to be read down so it did not have the effect of protecting a decision or determination affected by jurisdictional error. Such an approach is consistent with the general approach ordinarily taken by the courts over the years pursuant to which privative clauses of various kinds have been interpreted so as not to protect the original tribunal from review for jurisdictional error (except in the case of a privative clause that is legally effective to prevent review even for jurisdictional error): see eg *Clancy v Butchers' Shop Employees Union*;¹⁸ *Baxter v New South Wales Clickers' Association*;¹⁹ see also the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002 v Commonwealth*.²⁰ In the last mentioned case the High Court affirmed that the particular privative clause in that case (which, incidentally, was not a time limit clause but rather a combination of a "finality" and a "no certiorari" clause) did not protect decisions which involved a failure to exercise jurisdiction or an excess of

(*Repairs*) Pty Ltd (1948) 77 CLR 123 at 140); "essential to valid action" (*R v Murray; Ex Parte Proctor* at 400) and where statutory powers "definitely ... are not exercisable in other cases" (*R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361 at 369.

¹⁴ (2003) 57 NSWLR 212.

¹⁵ See *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 274.

¹⁶ See *R v Murray Ex parte Proctor* at 399-400, adopted in *Plaintiff S157* (2003) 211 CLR 476 at 488 per Gleeson CJ.

¹⁷ (2004) 61 NSWLR 707.

¹⁸ (1904) 1 CLR 181.

¹⁹ (1909) 10 CLR 114.

²⁰ (2003) 211 CLR 476 at 500 and 505.

jurisdiction. To eliminate all possibility of judicial review would be to abandon altogether the rule of law.

Many years earlier, time limit privative clauses had been considered by New South Wales superior courts on numerous occasions: see eg *Woolworths Ltd v Bathurst City Council*;²¹ *Macksville & District Hospital v Mayze*;²² *North Sydney Municipal Council v Lycenko & Associates Pty Ltd*;²³ *Shoalhaven City Council v PG Cooke*;²⁴ *Calkovics v Minister for Local Government & Planning*;²⁵ *North Sydney Municipal Council v RTA of NSW*;²⁶ *Worimi Local Aboriginal Land Council v Minister Administering Crown Lands Act*;²⁷ *Yadle Investments Pty Ltd v RTA of NSW*; *RTA of NSW v Minister for Planning*;²⁸ *Breitkopf v Wyong Council*;²⁹ *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning*.³⁰ (See also *Darkingung Local Aboriginal Land Council v Minister for Natural Resources*³¹ and *Darkingung Local Aboriginal Land Council v Minister for Natural Resources [No 2]*³² as to the approach of the Land and Environment Court to privative clauses generally during the above period.)

By the early 2000s, if not earlier, the preponderance of the judicial authorities referred to above, together with more recent judicial authorities referred to below, was to the effect that a time limit privative clause in a NSW statute:

- *would* preclude a challenge after the expiration of the stipulated time period³³ on the ground that the original decision maker took into account irrelevant matters, failed to take into account relevant matters, reached a

²¹ (1987) 63 LGRA 55.

²² (1987) 10 NSWLR 708.

²³ (1988) 67 LGRA 247.

²⁴ (L & E Ct, Cripps J, No 40216/87, 26 July 1988, unreported).

²⁵ (1989) 72 LGRA 269.

²⁶ (1990) 70 LGRA 440.

²⁷ (1991) 72 LGRA 149.

²⁸ (1991) 72 LGRA 409.

²⁹ (1996) 90 LGRA 269.

³⁰ (1996) 90 LGRA 341.

³¹ (1985) 58 LGRA 298.

³² (1987) 61 LGRA 218.

³³ Ordinarily 3 months in New South Wales enactments.

decision not reasonably open to it in the relevant sense, or acted manifestly unreasonably (unless they happen to be material to bad faith);

- *would not* preclude a challenge after the expiration of the stipulated time period where the approval is manifestly ultra vires or in excess of jurisdiction; and
- *would not* preclude a challenge after the expiration of the stipulated time period on the ground that the original decision maker acted in bad faith.

In *Woolworths Ltd v Bathurst City Council* Cripps J (as he then was) was of the view that then s 104A (now s 101) of the EPA *might not* preclude a challenge after the expiration of the stipulated time period where the consent is manifestly ultra vires or in excess of jurisdiction. However, in *Yadle Investments* Stein J (as he then was) was clearly of the view that s 35 of the EPA Act did *not* preclude a challenge after the expiration of the stipulated time period if the basis of the challenge was manifest jurisdictional error or ultra vires. In *Yadle Investments* Stein J had this to say concerning the meaning of the words "manifest jurisdictional error or ultra vires":

I understand manifest jurisdictional error or ultra vires to mean one which is readily understood or perceived by the eye. Such error must be evident and obvious. It must appear plainly on the face of the instrument.³⁴

Presumably what Stein J meant by "manifest jurisdictional error or ultra vires" is any error of law that would not satisfy the *Hickman* principle. With respect, the more restrained view expressed by Cripps J did not sit at all well with what was, by the early 2000s, the preponderance of judicial authority on the application of the *Hickman* principle.

³⁴ 72 LGRA 409 at 413. See also *Darkingung Local Aboriginal Land Council v Minister for Natural Resources [No 2]* (1987) 61 LGRA 218 at 228-231 wherein Stein J cited *Church of Scientology v Woodward* (1984) 154 CLR 25 per Mason J (as he then was) at 55-6 who referred to "manifest jurisdictional errors or ultra vires acts" traditionally not being protected by privative clauses.

There were, however, some later developments that changed the legal position considerably. While it was ordinarily the case that a privative clause expressed to protect a “decision” would not preclude judicial review in respect of a purported decision, that is, a decision that is a nullity, it was held by the NSW Court of Appeal in *Woolworths Ltd v Pallas Newco Pty Ltd*³⁵ that, in the case of a privative clause expressed to prevent the questioning of “validity” of a decision, such wording, read in conjunction with the fact that the clause did not constitute an absolute bar to the institution of judicial review proceedings, evinced a legislative intention that the clause was intended to protect decisions from jurisdictional error.

In a rather novel approach the Court of Appeal concluded that such a privative clause (using the word “validity”) extended to “purported decisions” as well as “decisions”.³⁶ What that appeared to mean was that a privative clause of that kind would protect decisions from jurisdictional error in the wider (ie broad or extended or *Anisminic*) sense, subject, once again, to compliance with the *Hickman* principle which, in any event, had been held in the past to apply to “purported” decisions as well as “decisions”.³⁷

By the early 2000s it was virtually beyond doubt that a failure to observe “inviolable limitations or restraints” was a jurisdictional error and, accordingly, not a “decision” under the relevant enactment.³⁸

³⁵ (2004) 61 NSWLR 707.

³⁶ See *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; cf *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78. Spigelman CJ, in *Woolworths*, modified some of the views he had expressed previously in *Vanmeld* to the effect that, relevantly, s 35 of the EPA Act did not extend to the questioning of a “purported” instrument.

³⁷ See *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 285-287. A privative clause that is expressed or otherwise operates so as to render immune from judicial review a “purported decision” will be construed so as not to protect from judicial review any purported decision which fails to satisfy either the threefold *Hickman* principle or some relevantly applicable inviolable restriction or restraint. However, jurisdictional error that cannot be so categorised will be immune from judicial review: see *Lesnewski v Mosman Municipal Council* (2005) 138 LGERA 207.

³⁸ See *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476.

Denial or breach of the rules of procedural fairness

By the early 2000s one could safely say that the preponderance of current judicial authority was to the effect that a time limit privative clause almost certainly *would not* preclude a challenge after the expiration of the stipulated time period based on a breach of the rules of procedural fairness, unless the breach was extremely minor or technical. Although it was not originally so, by the early 2000s a breach of the requirement of procedural fairness had generally been assimilated with traditional jurisdictional error.³⁹

In *Vanmeld Pty Ltd v Fairfield City Council*⁴⁰ Spigelman CJ opined⁴¹ that a denial or breach of the rules of procedural fairness might be actionable despite the privative clause on any one or more of the following bases. First, it might fall within the *Hickman* principle, as that principle had come to be interpreted and extended beyond the original threefold formulation of Dixon J. Indeed, by 2003 the preponderance of recent judicial authority was to the effect that the requirements of procedural fairness otherwise fell within the scope of the general description of the *Hickman* principle.⁴² Secondly, in *O'Toole v Charles David Pty Ltd*⁴³ Deane, Gaudron and McHugh JJ contemplated that the rules of procedural fairness could be encompassed within the third *Hickman* principle, that is, “reasonably capable of being referred to the power”. Thirdly, Dawson J in *O'Toole* suggested that some aspects of procedural fairness fell within the concept of good faith.

However, that had not always been the view of all judges. For example, in *Darkingung [No 2]* Stein J, in referring to the grounds which would not preclude a judicial review challenge, did not include review on the basis of a breach of the

³⁹ See eg *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238; *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476.

⁴⁰ (1999) 46 NSWLR 78.

⁴¹ At 46 NSWLR 111.

⁴² See eg *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476 and the various cases referred to therein. Subject to express words of plain intendment procedural fairness can be described as an “inviolable limitation or restraint”.

⁴³ (1991) 171 CLR 232.

rules of natural justice.⁴⁴ In addition, although Kirby P (as he then was) in *Macksville & District Hospital v Mayze*⁴⁵ was of the opinion that since the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission*⁴⁶ it had generally been considered both in England and Australia that a denial or breach of the rules of procedural fairness was a jurisdictional error which rendered the impugned decision null and void, in *Coles Supermarkets Australia Pty Ltd v Minister for Urban Affairs and Planning*⁴⁷ the then Chief Judge of the Land and Environment Court, Pearlman J, relying on the approach of the High Court in *R v Hickman; Ex parte Fox and Clinton*⁴⁸ and various other authorities, and distinguishing such cases as *Woolworths Ltd v Bathurst City Council*⁴⁹ and *Worimi Local Aboriginal Land Council v Minister Administering Crown Lands Act*,⁵⁰ held that a time limit privative clause operated to exclude a judicial challenge on the ground of denial or breach of the rules of procedural fairness, except where the tests enunciated in *Hickman* were not satisfied.⁵¹

In the years 2004 and 2005 the NSW Court of Appeal held that a time limit privative clause would not protect against breach of, or non-compliance with, a restriction or requirement which was construed as being of such significance in the legislative scheme that it constituted an essential, "indispensable", "imperative" or "inviolable" limitation or requirement.⁵² That would be particularly so where, for example, there had been a "complete" denial of procedural

⁴⁴ See (1987) 61 LGRA 218 at 230. However, in *Calkovics v Minister for Local Government & Planning* (1989) 72 LGRA 269 at 273 his Honour held that a time limit privative clause did not prevent a judicial review challenge on the basis of a breach of the rules of procedural fairness. Later, on the Court of Appeal, his Honour (then Stein JA) expressly left the matter open in *Londish v Knox Grammar School* (1997) 97 LGERA 1. Cripps J in *Woolworths Ltd v Bathurst City Council* was of the opinion that a denial or breach of the rules of procedural fairness *may not* preclude a challenge after the expiration of the stipulated time period. Both judges nevertheless agreed that the privative clause in question would *not* preclude a challenge on the ground of bad faith (a ground of broad or extended ultra vires).

⁴⁵ (1987) 10 NSWLR 708 at 713.

⁴⁶ [1969] 2 AC 147.

⁴⁷ (1996) 90 LGERA 341.

⁴⁸ (1945) 70 CLR 598.

⁴⁹ (1987) 63 LGRA 55.

⁵⁰ (1991) 72 LGRA 149.

⁵¹ See *Lesnewski v Mosman Municipal Council* (2005) 138 LGERA 207 per Tobias JA at 213 who so construed her Honour's judgment.

⁵² See eg *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288; *Lesnewski v Mosman Municipal Council* (2005) 138 LGERA 207.

fairness,⁵³ for the law had by then developed to a point where the obligation to afford procedural fairness was a doctrine of the common law which attached to the exercise of public power, subject to any statutory modification of the common law in that regard.⁵⁴

In *Darling Casino Limited v New South Wales Casino Control Authority*⁵⁵ Brennan CJ, Dawson and Toohey J observed:

It should not be assumed that the exercise of a power conferred in general terms cannot be confined by the procedures adopted by a repository. If the power must be exercised in conformity with the rules of natural justice, a failure by the repository to adhere to a declared procedure may constitute or result in a failure to accord natural justice to a person whose interests are liable to affection by the exercise of the power.⁵⁶

However, it was held that a non-compliance with or a breach of, relevantly, a statutory requirement aimed at ensuring public notification or consultation would not necessarily lead to the conclusion that there had been a denial of procedural fairness where the non-compliance or breach is minor.⁵⁷

Where the reviewing court concluded in a particular case that there had been a denial or breach of the rules of procedural fairness, the court would then decide whether the privative clause, properly construed, excluded a challenge so based. In other words, the court would have to consider whether the words of the particular privative clause reflected a “plain intendment” to impinge on the fundamental principle reflected in the requirements of procedural fairness, in light of the general presumption that the legislature did not ordinarily intend to abrogate the common law duty to accord procedural fairness in the exercise of public power.

⁵³ See *Lesnewski v Mosman Municipal Council* (2005) 138 LGERA 207.

⁵⁴ See *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at 91.

⁵⁵ (1997) 191 CLR 602.

⁵⁶ (1997) 191 CLR 602 at 609.

⁵⁷ See *Lesnewski v Mosman Municipal Council* (2005) 138 LGERA 207 at 221.

Other requirements

Many time limit privative clauses (see eg s 101 of the EPA Act and s 675 of the LG Act) require that, for a decision to obtain the "benefit" of the clause, even in the absence of manifest ultra vires or jurisdictional error and so forth, the original decision maker must have given "public notice" of the making of the original decision in, ordinarily, the manner and form prescribed by the regulations.

Arguably, such a provision does not depend for its effectual operation on a prescription by the regulations of the manner and form of public notice.⁵⁸ Thus, the original decision arguably could give public notice in any appropriate manner and form. Of course, the decision maker must also ensure that the information in the public notice is accurate, sufficient, intelligible and not misleading or otherwise defective.⁵⁹

The High Court in *Kirk* speaks with clarity

The construction of State privative clauses changed dramatically with the decision of the High Court of Australia in the landmark case of *Kirk v Industrial Relations Commission*.⁶⁰ The appeals before the High Court arose from certain convictions in the Industrial Court of New South Wales for offences against the now repealed *Occupational Health and Safety Act 1983* (NSW).⁶¹ The convicted appellants (a corporation and its director) had applied to the NSW Court of

⁵⁸ See eg *Downey v Pryor* (1960) 103 CLR 353 353 per Kitto J at 362 and Windeyer J at 364; *Hornsby Shire Council v Porter & Ors* (1990) 70 LGRA 175.

⁵⁹ See eg *Scurr v Brisbane City Council* (1973) 28 LGRA 50; *Davenport v Waverley Municipal Council* (1981) 46 LGRA 97; *Leighton Contractors Pty Ltd v Greater Lithgow City Council* (L & E Ct, Perrignon J, No 10359/84, 5 December 1985, unreported); *CSR Ltd v The Readimix Group v Yarrolumla Shire Council* (L & E Ct, Cripps J, No 40054/85, 2 August 1985, unreported); *Shoalhaven City Council v PG Cooke* (L & E Ct, Cripps J, No 40216/87, 26 July 1988, unreported); *Canterbury District and Ratepayers Association Inc v Canterbury Municipal Council* (1991) 73 LGRA 317. See also, and generally, *Helman v Byron Shire Council* (1995) 87LGERA 349.

⁶⁰ [2010] HCA 1; (2010) 239 CLR 531.

⁶¹ See now the *Work Health and Safety Act 2011* (NSW).

Appeal for relief in the nature of certiorari to quash the convictions on the basis that the Industrial Court had fallen into jurisdictional error.

The privative clause in issue was contained in s.179 of the *Industrial Relations Act 1996* (NSW). Subsection (1) of that section provided that a decision of the Industrial Court was "final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal". The NSW Court of Appeal had held that there was no jurisdictional error affecting the Industrial Court's decision and, thus, questions concerning the operation of the privative clause did not arise.

On appeal to the High Court, the Court made some very useful observations on the grounds that can be relied upon when seeking certiorari, the "two principal grounds" being error of law on the face of the record and jurisdictional error. The High Court recognised that there was some uncertainty in relation to those concepts, particularly as respects what constitutes "the record" and what is meant by "jurisdictional error".

Adopting a fairly pragmatic but not altogether helpful approach, the High Court appeared to equate or identify (as opposed to define, describe or enumerate) "jurisdictional error" with those errors which warranted judicial intervention. There is something disturbingly circular and tautological in such an approach, but that is the judicial reality when it comes to the subject of jurisdictional error. Further, the Court reiterated that the English position that *any* error of law will render a decision ultra vires was not the Australian position. Further, in *Craig v South Australia*⁶² the High Court had applied the distinction between jurisdictional and

⁶² (1995) 184 CLR 163. The High Court decision in *Craig* was the first occasion on which that court displayed an almost unambiguous openness towards the *Anisminic* doctrine of broad or extended jurisdictional error (cf *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147). It was held in *Craig* that the traditional distinction between jurisdictional errors of law and non-jurisdictional errors of law still existed, at least as regards inferior courts and analogous quasi-judicial tribunals. However, even as regards inferior courts and analogous tribunals, the Court held that there was still the *possibility* that such a body *may* be held to have committed a reviewable jurisdictional error of the *Anisminic* type (eg failure to take into account some matter which ought to have been taken into account) but that would not ordinarily be the case. It seems

non-jurisdictional errors differently as between an administrative tribunal and an inferior court. However, as the Court recognised, there is no clear distinction between tribunals and courts at the State level and, thus, the question is further complicated. It was clear that the Court was ready for a different approach as respects the construction of privative clauses in State statutes.

Their Honours referred, with apparent approval, to statements in *Craig* identifying the following errors by inferior courts as giving rise to jurisdictional error:

- where the court mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or power; and
- where the court purports to act outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision which lies outside its functions and powers.

Three examples of this second kind of jurisdictional error were given: first, the absence of a jurisdictional fact; second, disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction; and third, misconstruction of the relevant statute thereby misconceiving the nature of the function being performed or the extent of powers.

In the case at hand, the High Court proceeded to find two jurisdictional errors. The first such error was that the Industrial Court had heard the charges and convicted the appellants despite a failure at any point during the proceedings to identify the particular act or omission alleged to have constituted a contravention of the Act. This, it was said by the Court, resulted from a misconstruction of the relevant offence provision and led to a misapprehension of the limits of the Industrial Court's functions and powers, being an error of the kind identified in the

that much would depend upon whether the error in question may be said to be one on which the decision in the case depends (*cf Pearlman v Keepers and Governors of Harrow School* [1979] QB 56 per Lord Denning MR).

third example above. The second jurisdictional error fell into the same category: the Industrial Court had allowed, in contravention of the *Evidence Act 1995* (NSW), the prosecution to call the appellant to give evidence. Again, in the Court's view, this was a misapprehension of the limits of that court's powers to try charges of a criminal offence. Subject to the privative clause, these were jurisdictional errors that attracted certiorari.

As already indicated, the State legislation contained a privative clause stating that a "decision" of the Industrial Court was "final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal". The provision extends to proceedings for an order in the nature of prohibition, certiorari, mandamus, injunctions and declarations.

In the *Plaintiff S157* case,⁶³ the High Court had held that a similar provision in Commonwealth legislation could not be applied to prevent the High Court from determining whether a Commonwealth officer's decision was affected by jurisdictional error and issued relief under section 75(v) of the Australian Constitution. In *Kirk*, the Court applied that same reasoning and principle to State privative clauses in their application to State superior courts. In essence, so the High Court held in *Kirk*, State legislatures cannot alter the constitution or character of their superior courts so that they cease to meet the constitutional description of a "Supreme Court of a State". The High Court held that the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition, mandamus and certiorari on the grounds of jurisdictional error was a "defining characteristic of State Supreme Courts" which cannot be removed by State Parliaments.

In short, it was held that s.179 of the *Industrial Relations Act 1996* (NSW) could not exclude the jurisdiction of the NSW Supreme Court to grant certiorari for jurisdictional error. A "decision" affected by jurisdictional error is not one to which

⁶³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

the privative clause applies. Such a “decision” is a purported decision, that is, a nullity. The Court proceeded to allow the appeal and ordered that the Industrial Court's orders be quashed.

The High Court justices in *Kirk* had a few words to say about judicial review for error of law on the face of the record. After noting that "constitutional considerations" explained why the distinction between relief in the nature of certiorari for jurisdictional error and relief in the nature of certiorari for error of law on the face of the record should be maintained, the Court made it clear that while State legislatures could not prevent State superior courts from granting relief because of jurisdictional error, they could deny relief for non-jurisdictional error appearing on the face of the record. At least that option remains for State legislatures post-*Kirk*.

Post-*Kirk* cases as respects time limit privative clauses

To recapitulate, before the High Court's decision in *Kirk*, a privative clause such as s 101 of the EPA Act did not protect a development consent from judicial review for certain types of jurisdictional error. These were the three errors identified in *Hickman*, namely, the decision not being a bona fide attempt to exercise power, not relating to the subject matter of the legislation, and not being reasonably capable of reference to the power given to the decision-maker, as well as a breach of a requirement "of such significance in the legislative scheme that it constitutes a limitation or requirement that is variously expressed in the authorities as 'essential', 'indispensable', 'imperative' or 'inviolable'".⁶⁴

After the High Court's decision in *Kirk*, the full range of jurisdictional error remains subject to judicial review, notwithstanding a privative clause. Post-*Kirk*, a privative clause in State legislation cannot validly compromise the capacity of a State superior court to exercise its supervisory jurisdiction (which is

⁶⁴ *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99; (2005) 138 LGERA 207 at [76].

constitutionally entrenched) for review for jurisdictional error. The supervisory jurisdiction of the State of New South Wales' Supreme Court is divided between the Supreme Court of New South Wales and the Land and Environment Court, depending on the statute under which powers and functions have been exercised and are subject to review.

The reasoning in *Kirk* and the various constitutional principles articulated in the case have been held in numerous NSW Land and Environment Court cases⁶⁵ to be equally applicable to time limit protective clauses of the kinds contained in ss 35 and 101 of the EPA Act and ss 675 and 729 of the LG Act. In other words, a privative clause, such as s 101 of the EPA Act, may remain valid but it will be read down so as to preserve the supervisory jurisdiction to review for jurisdictional error. Some of the more important of these Land and Environment Court cases will now be discussed.

In *Hoxton Park Residents Action Group Inc v Liverpool City Council*,⁶⁶ a decision of Biscoe J of the NSW land and Environment Court, in reply to public notice defence (cf s 101 EPA Act), the applicant contended that s 101 did not bar the proceedings for two reasons. First, it was argued that the s 101 notice was defective because it did not comply with cl 124 of the *Environmental Planning and Assessment Regulation 2000*. The notice contained a statement that the development consent was available for public inspection, free of charge, at the respondent council's principal office but did not state that inspection was "during ordinary office hours". Secondly, it was argued that failure to take into account relevant considerations mandated by s 79C of the EPA Act constituted a

⁶⁵ See eg *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242 (26 November 2010) *Brown v Randwick City Council* [2011] NSWLEC 172 (14 September 2011); *Director-General, NSW Department of Industry & Investment v Mato Investments Pty Limited (No 4)* [2011] NSWLEC 227 (1 December 2011); *Community Association DP 270253 v Woollahra Municipal Council* [2013] NSWLEC 184 (31 October 2013).

⁶⁶ [2010] NSWLEC 242 (26 November 2010).

jurisdictional error in the nature of a “constructive failure to exercise jurisdiction”⁶⁷ and s 101 of the EPA Act did not preclude relief for jurisdictional error.

The respondents submitted that:

- s 101 of the EPA Act precluded any challenge to the validity of a consent in only two circumstances, neither of which were alleged to be absent in this case -- first, the three *Hickman* conditions must be satisfied, namely, where it is manifest that the decision is not a bona fide attempt to exercise the power, where it does not relate to the subject matter of the legislation, and where it is not reasonably capable of reference to the power given to the decision-maker; secondly, the consent must not be granted in breach of an essential, indispensable, imperative or inviolable limit or restraint in the EPA Act.⁶⁸
- the decision in *Hastings Co-operative Ltd v Port Macquarie Hastings Council*⁶⁹ was precisely in point, was correct and in any case should be followed as a matter of judicial comity;
- alternatively, even if the s 101 notice was defective, it would still be valid in accordance with the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, 194 CLR 355;⁷⁰

⁶⁷ Cf *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, 206 CLR 323 at [41] per Gaudron J;

⁶⁸ *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422, 61 NSWLR 707 at [81]; *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99, 138 LGERA 207 at [76]; *Maitland City Council v Anambah Homes Pty Ltd* [2005] NSWCA 455, 64 NSWLR 695 at [112].

⁶⁹ [2009] NSWCA 400, 171 LGERA 152. Lloyd J, after holding that a development consent was valid and that the s 101 public notice was ineffective because of failure to accurately describe the land, stated: “I note that the applicant relies upon a further ground of invalidity, namely that the notice does not state that the development consent is available for public inspection during ordinary office hours. The notice does state, however, that it is available for inspection at the Council’s Development and Environment Division, Burrawan Street, Port Macquarie. It is self evident that the office would be open during ordinary office hours. I would not uphold the challenge to the validity of the notice on this ground.”

⁷⁰ In the *Project Blue Sky* case the High Court rejected the usefulness of the distinction between directory and mandatory procedural requirements and stated that a better test for determining the

- alternatively, if the notice were to be interpreted as contemplating inspection outside ordinary office hours, then those times could be ascertained as the times that the Council was open for forums and meetings, as stated elsewhere in the Council newsletter in which the notice was incorporated.

Biscoe J proceeded to dismiss the applicant's 'defective [s 101] notice' reply. Before the constitutional reply can be heard, it was necessary to give notice to the Attorneys-General under s 78B of the *Judiciary Act 1903* (Cth). Having upheld the applicant's substantive challenge to the validity of the development consent, observed that its claim was prima facie time barred under s 101 of the EPA Act, and rejected the applicant's reply that the s 101 notice was defective, his Honour, being under the impression that such course corresponded with the parties' wishes, then adjourned the proceedings for the purpose of hearing the second and third respondents' application for an order for conditional validity application for an order of conditional validity under s 25B of the *Land and Environment Court Act 1979* (NSW). Subsequently, the second and third respondents submitted that the preferable course was to hear the applicant's constitutional reply to the s 101 time bar defence first. However, the applicant unexpectedly informed the Court that it no longer pressed its constitutional reply. Accordingly, as the s 101 time bar defence had succeeded, the application was dismissed.⁷¹

In *Brown v Randwick City Council*,⁷² a decision of the Chief Judge of the NSW Land and Environment Court, it was held that s 101 of the EPA Act did not protect a development consent because the council, by its delegate, had already determined the development application by refusing consent to the application

validity of the exercise of a statutory power was to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.

⁷¹ See *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* [2010] NSWLEC 259 (14 December 2010).

⁷² [2011] NSWLEC 172 (14 September 2011).

and the council had not rescinded or reviewed the original determination refusing consent before purporting to make the later determination granting “consent” to the application. Lack of power was an error of the third kind in *Hickman*. Preston CJ noted that a further ground of challenge (viz failure to provide notice in accordance with the public notification requirements of a development control plan) may fall into the inviolable restraint category of error.

In *Community Association DP 270253 v Woollahra Municipal Council*,⁷³ another decision of the NSW Land and Environment Court, Pain J held that public notice of the grant of development consent made in reliance on s 101 of the EPA Act did not prevent the applicant from making a collateral attack on the subject development consent as the grounds of challenge relied on jurisdictional error, namely whether the respondent council had power to impose the disputed conditions. That was an error of the third kind identified in *Hickman*.⁷⁴ Accordingly, her Honour held that the applicant could mount a collateral challenge to the validity of the development consent conditions in the appeal.⁷⁵

One thing is clear. Privative clauses will continue to be the subject of judicial scrutiny for so long as there is judicial review.

⁷³ [2013] NSWLEC 184 (31 October 2013).

⁷⁴ See *Brown v Randwick City Council* [2011] NSWLEC 172 (14 September 2011) per Preston CJ at [37]-[38].

⁷⁵ The respondent council had issued an order to the applicant under s 121B of the EPA Act requiring compliance with a condition of development consent imposed by the council in a 2001 development consent. The substantive appeal to the Court was against the terms of the order, as enabled by s 121ZK of the EPA Act.