

The Current State of Judicial Review of Decisions made under the Migration Act 1958 (Cth)

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“Under the law applicable at the time the MRT made its decision, as the Minister's representative conceded, the MRT failed to ask the correct question. Had the MRT asked that question it is not easy to see how the answer could have been unfavourable to the applicant. Yet, unless the High Court takes a different view as to the validity or operation of [s 474\(1\)](#), this Court (or any other court) is powerless to intervene. **It is not apparent to me how this result is consistent with the ideals underlying the concept of the rule of law, let alone the dictates of fairness.**” (emphasis added) Sackville J¹

Introduction

The comments of Sackville J of the Federal Court should cause us great concern in relation to the present state of judicial review of decisions made under the **Migration Act 1958** (Cth) ('the Act'). In order to understand how such a flawed decision made by the Migration Review Tribunal can be protected from judicial review, it is necessary to understand how s474 of the Act operates.

The Privative Clause: Section 474 of the Act

In an attempt to limit the increasing number of applications for judicial review of decisions made under the Act², the Act was amended so that the previous statutory grounds of review contained in Part 8 of the Act³ were replaced by s474.⁴ Section 474 is a privative clause. It commenced operation on 2 October 2001.

Section 474(1) states:

474(1) A privative clause decision

(a) is final and conclusive;

(b) must not be challenged, appealed against, reviewed, quashed or called into question in any Court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

¹ **Zahid v MIMIA** [2002] FCA 1108, at para 87.

² The Hon Philip Ruddock MP, Hansard, House of Representatives, 25 June 1997 at 6284.

³ See Annexure A.

⁴ Migration Legislation Amendment (Judicial Review) Act (2001).

Privative clause decisions are defined in s474(2).⁵

Apparent inconsistency of s474 with s75(v) of the Constitution

If a literal reading of s474 is adopted, s474 makes final and conclusive any privative clause decision, and purports to prevent judicial review of a privative clause decision in any court, including in the High Court. This is despite s75(v) of the Constitution, which states that the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. If s474 seeks to oust the original jurisdiction of the High Court, it is invalid.

The validity and the scope of operation of s474 was considered by a Full Court of the Federal Court in **NAAV v MIMIA**⁶.

By a majority, the Full Court ruled that s474 was valid and that it operates to expand the powers of decision makers, with the effect that a decision that would otherwise be null and void as a result of a jurisdictional error,⁷ is validated as long as the **Hickman**⁸ conditions are satisfied and as long as there has not been a breach of an inviolable condition, jurisdictional factor or structural element in the Act⁹. In *Zahid's* case, Sackville J summarized NAAV as follows¹⁰:

33 There is some common ground in the five judgments. A number of principles appear to be accepted, explicitly or implicitly, by all members of the Court.

34 First, a privative clause such as [s 474\(1\)](#) of the [Migration Act](#) is to be interpreted in accordance with the principles of construction enunciated by Dixon J in *Hickman* and consistently applied thereafter by the High Court: at [9], per Black CJ; at [99]-[101], per Beaumont J; at [280]-[281], per Wilcox J; at [499], per French J; at [617], per von Doussa J.

35 Secondly, [s 474\(1\)](#) is not to be read literally, since to do so would result in it purporting to oust the entrenched jurisdiction of the High Court under [s 75\(v\)](#) of the Constitution: at [21], per Black CJ; at [354], per Wilcox J; at [505], [540] [541], per French J. A privative clause (such as [s 474\(1\)](#)) says nothing about the scope of this Court's jurisdiction under [s 39B\(1\)](#) of the [Judiciary Act](#) (which is co-extensive with that of the High Court under [s 75\(v\)](#) of the Constitution) and therefore does not seek to preclude judicial review of invalid decisions: at [515], per French J; at [611], [642], per von Doussa J.

36 Thirdly, s 474(1) operates to insulate the decision-maker against what would otherwise be unlawfulness in the decision-making process: at [11], per Black CJ; at [481], per French J; at [291]-[297], per Wilcox J, at [611], per von Doussa J. In the language of Dixon J in *Hickman* itself, at 614-615, a privative 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

⁵ See Annexure B.

⁶ **NAAV v MIMIA** [2002] FCAFC 228

⁷ See Annexure C in relation to what constitutes jurisdictional error: **MIMA v Yusuf** [2001] HCA 30.

⁸ **The King v Hickman; Ex parte Fox and Clinton** (1945) [70 CLR 498](#), at 615, per Dixon J

⁹ Above 6, at paras 499, 537, 619 and 625.

¹⁰ Above 1 at paras 33-38 and at para 84. See also: **NANJ of 2002 v MIMIA** [2002] FCA 1138 at paras 36-39; **NABM of 2001 v MIMIA** [2002] FCAFC 294, at para 25.

requirements governing its proceedings or the exercise of its authority or has not confined its act within the limits laid down by the instruments giving it authority".

In consequence of the process of statutory construction referred to earlier, this principle is subject to the three Hickman provisos. That is, the decision must be

" a bona fide attempt to exercise its power, ...relate to the subject matter of the legislation, and...[be] reasonably capable of reference to the power given to the body".

See at [11], per Black CJ; at [100], [104], per Beaumont J; at [281], per Wilcox J; at [537], per French J; at [630], per von Doussa J.

37 Fourthly, in addition to the Hickman provisos, there is another limitation on the validating effect of a privative clause. The purported exercise of power by the decision-maker must not be one that contravenes a "final limitation upon the powers, duties and functions of the decision-maker" (at [619], per von Doussa J), an "inviolable limitation or restraint" (at [12], per Black CJ; at [499], [537] per French J), or a "structural" element in the operation of the [Migration Act](#) (at [37], per Black CJ). It follows that what is involved in applying a privative clause is a process of statutory construction, whereby apparently inconsistent statutory provisions are to be reconciled: that is, one statutory provision that seems to limit the powers of the decision-maker must be reconciled with another, the privative clause, which seems to contemplate that the decision-maker's order is to operate free from any restriction: at [11], per Black CJ (citing *R v Coldham*; *Ex parte The Australian Workers Union* (1983) [153 CLR 415](#), at 418, per Mason ACJ and Brennan J); at [500], per French J.

38 Fifthly, [s 474\(1\)](#) of the [Migration Act](#) is constitutionally valid. Read in the way already indicated, [s 474\(1\)](#) does not deprive the Court of jurisdiction to grant relief in respect of decisions made in excess of power. Rather, a provision such as [s 474\(1\)](#) is treated as having an implicit effect on the substantive law, by extending the lawful authority and powers of the decision maker. Nor does [s 474\(1\)](#) confer judicial power on non-judicial bodies in contravention of Ch III of the Constitution. See at [20]-[21], per Black CJ; at [105], at Beaumont J; at [308], per Wilcox J; at [538]-[546], per French J at [640]-[646], per von Doussa J.

...

84 In these circumstances, there is a clear majority view in *NAAV v Minister* that [s 424\(1\)](#) protects a decision from invalidity, where the alleged invalidity flows from a failure on the part of the decision maker to ask the correct question. Provided that the "jurisdictional factors" or inviolable limitations are not infringed and the three Hickman provisos are satisfied, [s 474\(1\)](#) expands the authority and powers of the decision maker to render the decision lawful, notwithstanding that the failure to ask the correct question would otherwise have constituted jurisdictional error.

The approach taken by the Federal Court in the light of *NAAV v MIMIA*

As a result of the repealing of s476 of the Act, judicial review in the Federal Court¹¹ is limited to the grounds set out in s39B of the **Judiciary Act 1903**. Section 39B states:

39B(1)

The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

However, even if a 'jurisdictional error' in a privative clause decision can be established, *NAAV* makes it clear that s474 expands the powers of the decision maker to protect the decision from review by the Federal Court as long as:

¹¹ To be taken to include the Federal Magistrates Court.

1. **the decision maker has made a bona fide attempt to exercise its power; and**
2. **that it relates to the subject matter of the legislation; and**
3. **it is reasonably capable of reference to the power given to the decision-maker; and**
4. **there has been no breach of an inviolable condition, jurisdictional factor or structural element of the Act.**

The result is that nearly all decisions made under the Act will be immune from review by the Federal Court, even where what would otherwise have been considered to be a jurisdictional error pre-s474 is established, as long as conditions 1-4 are satisfied.

The following are some examples of where the Federal Court has been unable to declare the decision null and void, because of the application of s474 and the consequential expansion of the decision maker's jurisdiction.¹²

- The Migration Review Tribunal failed to ask the question whether or not the visa applicant was a remaining relative. If it had done so, it would probably have been compelled to find that the visa applicant was a remaining relative.¹³
- The Refugee Review Tribunal did not ask itself the right question in determining whether or not the visa applicant was a refugee.¹⁴

It is not certain that the Federal Court will continue to make findings in relation to whether or not there has been jurisdictional error of the kind set out in **MIMA v Yusuf**.¹⁵ It will turn on the individual approach of the judge deciding the matter; for example, even if the decision maker has made such a jurisdictional error, the Federal Court might not feel the need to determine that point, as NAAV has limited what needs to be considered¹⁶.

Challenging a Privative Clause Decision

Any challenge in the Federal Court of a privative clause decision will be limited to showing that the decision failed to satisfy at least one of the four conditions mentioned above.

It would be a rare case where conditions 2 and 3 are not satisfied. It is not proposed to discuss those conditions. However, there is limited review in relation to conditions 1 and 4.

¹² **SBAZ v MIMIA** [2002] FCA 1280, at para 15.

¹³ Above 1, at para 87.

¹⁴ **NABM of 2001 v MIMIA** [2002] FCAFC 294.

¹⁵ Above 7, at para 82 per McHugh, Gummow and Hayne JJ.

¹⁶ **Qi v MIMIA** [2002] FCA 1300, at para 8 per Whitlam J.

Condition 1: The decision maker has made a bona fide attempt to exercise its power

The Full Court of the Federal Court has determined that this condition is satisfied where there has been an honest attempt to exercise its powers:¹⁷

...In *Wu v Minister for Immigration & Multicultural Affairs* [2002] FCA 1242, Sackville J summarised the approach taken in *NAAV v Minister* to the first of the Hickman conditions, in terms (at [59]) with which we agree:

"the touchstone that emerges from the judgment in *NAAV v Minister* is that a decision of the MRT will satisfy the first Hickman condition if it is the consequence of an honest attempt to act in pursuance of the powers of the tribunal. There may be cases where the disregard of statutory requirements or, indeed, of the evidence, is so 'blatant' (to use von Doussa J's word) that an inference can be drawn that the decision-maker has not honestly attempted to exercise the relevant statutory power. There may also be cases where the decision-maker has knowingly exercised a power for an improper purpose: *Daihatsu Australia Pty Ltd v Federal Commissioner of Taxation* (2001) 184 ALR 576, at 587, per Finn J. But the fact that the tribunal has misconstrued the legislation or committed procedural errors will not, of itself, ordinarily establish that it has not honestly attempted to exercise its power: *Daihatsu v FCT*, at 590."

28 There is no basis, in our view, for concluding that the RRT did not make a bona fide attempt to exercise its powers. The fact that the RRT may have misconstrued the Convention definition of "refugee" does not demonstrate either bias or lack of good faith. The RRT plainly attempted to discharge its functions honestly and it did not attempt to exercise its powers for any improper purpose.

In **WABZ v MIMA**¹⁸, the question of what a bona fide attempt means was considered. Carr J held that:

42.... In considering the question of what was meant by a bona fide attempt to exercise powers, Allsop J in *NAAG of 2002 v Minister for Immigration and Multicultural Affairs* [2002] FCA 713 at [24], in a passage quoted with approval by Beaumont J in *NAAV* at [107], said:

"Dixon J in *R v Murray; Ex parte Proctor*, supra at 400, made it clear that the phrase involves an 'honest' attempt to deal with the subject matter conferred to the executive. Bad faith is not just a matter of poor execution or poor decision-making involving error. It is a lack of an honest or genuine attempt to undertake the task in a way meriting personal criticism of the Tribunal or officer in question. Finn J in *Daihatsu Australia v Federal Commissioner of Taxation* (2001) 184 ALR 576 at [36] referred, by way of exemplification, to the exercise of a power knowingly for an improper purpose or where no attempt is made, knowingly, to act conformably with duty. Heerey J in *SBAP v Refugee Review Tribunal* [2002] FCA 590 at [47] said that the phrase 'bona fide' involved a serious question involving personal fault on the part of the decision-maker going beyond error of fact or law. It must be clearly identified and proved."

43 I agree, respectfully, with the observation of Mansfield J in *SBAU v Minister for Immigration and Multicultural Affairs* [2002] FCA 1076 at [31] that:

¹⁷ **NAGT v MIMIA** [2002] FCAFC 319, at paras 27-28.

¹⁸ **WABZ v MIMA** [2002] FCA 1345.

"Errors of fact or law apparent in [the Tribunal's] reasons will not of themselves demonstrate a lack of good faith on [the Tribunal's] part, at least other than in exceptional circumstances."

The above cases establish that unless you can show that the decision maker has not made an honest and genuine attempt to decide the application in question, any appeal based solely on the failure of the decision maker to satisfy that condition will fail. Such cases are not common. A decision maker generally makes an honest and genuine effort to decide the application before it.

Factors to consider when determining whether or not there has been a bona fide attempt include:

- where the power was knowingly exercised for an improper purpose.¹⁹
- where no attempt is made to exercise a power, knowingly, to act conformably with duty.²⁰
- where there was personal fault on the part of the decision-maker going beyond error of fact or law.²¹
- where there has been a failure to accord procedural fairness, combined with a blatant disregard of statutory rights.²²
- where there is an exercise of power that was reckless as to whether it was in a manner required by law.²³
- where there is an exercise of power arbitrarily or capriciously.²⁴
- where there is actual bias on the part of the decision maker.²⁵
- where there is a deliberate effort to find evidence or manipulate evidence to defeat an applicant's claim.²⁶

Condition 4 Has there has been a breach of an inviolable condition, jurisdictional factor or structural element of the Act

A decision will not be immune from review if there has been a breach of an inviolable condition, jurisdictional factor or structural element of the Act:²⁷

Under the Act the jurisdictional factors which attract the authority and powers of decision makers in the sense described in a particular case will be few....Unless these conditions arise, there cannot be a lawful exercise of decision-making power under [the Act](#), and no occasion for the operation of [s 474](#) of [the Act](#) arises.

...A privative clause decision will exceed the lawful authority and powers of a decision-maker only where jurisdictional factors essential to the enlivenment of the

¹⁹ Above 18, at para 42.

²⁰ Above 18, at para 42.

²¹ Above 18, at para 42.

²² Above 18, at para 43.

²³ **SCAZ v MIMIA** [2002] FCA 1377, at para 32 per von Doussa J.

²⁴ Above 23, at para 32.

²⁵ **WAEJ v MIMIA** [2002] FCA 1180, at para 31 per French J.

²⁶ **Wu v MIMIA** [2002] FCA 1242, at para 63 per Sackville J.

²⁷ Above 6, at paras 625 and 626 per von Doussa J; Above 1, at para 37 and 84. See also **NANJ of 2002 v MIMIA** [2002] FCA 1138, at para 37 per Jacobsen J.

authority and powers of the decision-maker are absent. In that situation the jurisdiction of the High Court under s75(5) of the Constitution, and of the Federal Court under s39B of the Judiciary Act, is intact and may be invoked to remedy the unlawful exercise of power".²⁸

In NAAV, the Federal Court held that where the satisfaction of the decision maker is a ground for cancelling a visa, it is a requirement that the decision maker must be lawfully or validly satisfied:

A statutory formula requiring an official to be 'satisfied' of something, before exercising a power adversely to the interests of a particular individual, means lawfully, or validly, satisfied...[as the delegate had misconstrued the law] she was not 'satisfied' within the meaning of s128(a) of the Act.²⁹

However, the inviolable conditions, jurisdictional factors or structural elements of the Act that must be satisfied before a decision is protected by s474 are few.³⁰

Jurisdiction of the High Court

The privative clause will apply to decisions reviewable by the High Court under s75(v) of the Constitution only if the High Court makes a ruling that s474 is invalid because it is inconsistent with the Constitution. That question is presently before the High Court.³¹ A decision is expected to be made by the High Court by February 2003.

In the event that the High Court finds that s474 is invalid, decisions made under the Act will be able to be reviewed by the High Court and the Federal Court. The grounds of review would be those relating to jurisdictional error.

Judicial review pending a decision by the High Court on the validity of s474

Legal representatives will need to advise their clients in relation to the effect of s474, as it presently stands. This will generally mean that an application for judicial review of a privative clause decision is likely to fail. However, applicants might wish to proceed with judicial review in the hope that the High Court will find that s474 is invalid. The Federal Court and the High Court would then be able to declare such decisions to be null and void. The decision under review would then have to be reconsidered according to law.

²⁸ Above 6, at paras 625 and 624.

²⁹ Above 6, at para 366, per Wilcox J.

³⁰ Above 6, at para 625, per von Doussa J.

³¹ Plaintiff S157 of 2002 v The Commonwealth of Australia; Applicant S134 of 2002 v The Commonwealth of Australia.

Conclusion

The present state of judicial review of decisions made under the Act sits uncomfortably with the rule of law in Australia and the Australian notion of a 'fair go'. Unless the High Court decides otherwise, a privative clause decision made under the Act will, in most cases be final, despite 'jurisdictional errors' made by the decision maker.

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Annexure A

Section 476 of the Act, as at 1 October 2001, provided the following grounds for judicial review by the Federal Court and the Federal Magistrates Court of a decision made under the Act:

- 476(1) Subject to subsection (2), application may be made for review by the Federal Court or the Federal Magistrates 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.
- (3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:
- (a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
 - (b) an exercise of a personal discretionary power at the direction or behest of another person; and
 - (c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- but not as including a reference to:
- (d) taking an irrelevant consideration into account in the exercise of a power; or
 - (e) failing to take a relevant consideration into account in the exercise of a power; or
 - (f) an exercise of a discretionary power in bad faith; or
 - (g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).
- (4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

- (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

Section 477. Applications in respect of failures to make decisions

477. (1) If:

- (a) a person, other than a tribunal, has a duty to make a judicially-reviewable decision; and
- (b) there is no provision that specifies a period within which the person is required to make the decision; and
- (c) the person has failed to make the decision;
application may be made to the Federal Court or the Federal Magistrates Court for an order of review in respect of the failure to make the decision on the ground that there has been an unreasonable delay in making the decision.

(2) If:

- (a) a person, other than a tribunal, has a duty to make a judicially-reviewable decision; and
- (b) there is a provision that specifies a period within which the person is required to make the decision; and
- (c) the person has failed to make the decision before the expiration of that period;
application may be made to the Federal Court or the Federal Magistrates Court for an order of review in respect of the failure to make the decision within that period on the ground that the person has a duty to make the decision in spite of the expiration of that period.

Section 478. Application for review by Federal Court

TRANSITIONAL PROVISION

478.(1) An application made to the Federal Court under section 476 or 477 must:

- (a) be made in such manner as is specified in the Rules of Court made under the Federal Court of Australia Act 1976; and
- (b) be lodged with a Registry of the Federal Court within 28 days of the applicant being notified of the decision.

(2) The Federal Court must not make an order allowing, or which has the effect of allowing, an applicant to lodge an application outside the period specified in paragraph (1)(b).

Annexure B

What constitutes a Privative clause decision is set out in s474(2) of the Act. It provides:

474(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).

- (3) A reference in this section to a decision includes a reference to the following:
 - (a) granting, making, suspending, cancelling, revoking or refusing to make an order or determination;
 - (b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);
 - (c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;
 - (d) imposing, or refusing to remove, a condition or restriction;
 - (e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article;
 - (g) doing or refusing to do any other act or thing;
 - (h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;
 - (i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;
 - (j) a failure or refusal to make a decision.

Annexure C

Jurisdictional Error

A helpful summary of what constitutes jurisdictional error can be found in the joint judgment of McHugh, Gummow and Hayne JJ in **Minister for Immigration and Multicultural Affairs v Yusuf**³²

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*[\[50\]](#), 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 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 exhaustive[\[51\]](#). Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, 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. Nothing in [the Act](#) suggests that the Tribunal is given authority to authoritatively determine question

³² Above 7, at para 82.