Chapter 1
Introduction

Introduction
This text seeks to explain how a privative clause works; it is not therefore seeking to provide a full statement of the law on privative clauses especially the Byzantine constitutional law that the High Court has created on the subject. There is some necessary background to explaining how a privative clause works that involves the powers of Australian legislatures, some basic concepts concerning the interpretation of statutes and the concept of legal anatomy or legal structure. Against this background the text turns to privative clauses. It outlines the anatomy of a privative clause and in this way indicates the various forms that a privative clause can take. Then it explains each of these forms in more detail, at the same time providing illustrations and comments.

Terminology

Official
Privative clauses apply to decisions. Those who make these decisions may be an official or a tribunal. For convenience ‘official’ is used as a general term to cover both tribunal and an official in the strict sense of the term.

Decision and Action
Judicial review is available for a decision or action that an official makes or takes or does not make or take. For convenience in this discussion, all of these possibilities are generally bundled into a generic reference such as action or decision.

Plaintiff S157/2002
To illustrate the structure and operation of a privative clause this text uses several illustrations. Many of these illustrations are taken from Plaintiff S157/2002 v Commonwealth of Australia, which was a major case before the
High Court of Australia on privative clauses. It will therefore assist the reader to provide an outline of this case at the outset.

The plaintiff, S157, had sought and was refused a protection visa under s36 of the Migration Act 1958 (Cth). The plaintiff appealed to the Refugee Review Tribunal but was unsuccessful.

In response, the plaintiff then took their case to the High Court for review before Justice Gummow in exercise of the jurisdiction conferred on the Court by s75(v) of the Constitution. The plaintiff sought judicial review in the form of writs of prohibition and mandamus against the tribunal along with certiorari by way of ancillary relief.

This action for judicial review was based upon the ground of a denial of natural justice ‘in that [the Tribunal] took into account material directly relevant and adverse to [the plaintiff’s claim of refugee status] without giving him notice of the material or any opportunity to address it’. However, standing in the way of the plaintiff’s action for judicial review were, as the respondent Commonwealth alleged, two privative clauses in ss 474 and 486A of the Migration Act 1958. These were framed in a very restrictive way. As s474 reads on the surface (without being read down) it sought to disable judicial review of some decisions, while s486A imposed a time limit for instituting review of a mere 35 days. In response the plaintiff argued that these clauses were constitutionally invalid.

Consequently, at the plaintiff’s request Justice Gummow stated a case for the Full Court to determine the constitutional validity of these privative clauses.

The case was heard before a full bench of seven judges. Five judges – Justices Gaudron, McHugh, Gummow, Kirby, and Hayne – gave a joint judgment. Gleeson CJ and Callinan J gave individual judgments.

In the outcome, the judges found as follows. The five judges who gave the joint judgment found that the proper construction of s474 and s486A involved reading down their operation. On this basis neither privative clause barred nor limited the exercise of jurisdiction that the applicant sought. Gleeson CJ agreed with this. Callinan J agreed with the other judges on the broad effect of s474 but

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1. Plaintiff S157 v Commonwealth [2003] HCA 2. The plaintiff is referred to by number and year because s91X of the Migration Act 1958 provided that their name cannot be published.
found that the time limit provision in s486A was constitutionally invalid in respect of the plaintiff’s application.

**Analysing Law**

It will assist readers to say something about my approach to analysing law. My introduction to a good method for legal analysis occurred in my first year working as a solicitor, an experience that I have recounted in several places because of its central relevance to legal analysis. The start of the story is that I wanted to purchase a house. I found an old house that was delightful but needed some repair. I hired a builder to advise me on the feasibility and cost of repair. We looked at an internal brick wall that had a large crack near the top. I pointed to the crack and said: ‘There is a problem there.’ The builder, however, pointed to the foundations of the wall and said: ‘That is where the problem is.’ A crack appears in a brick wall because the foundations move – so to fix the crack one first needs to stabilise the foundations. Then it is possible to patch the crack.

A common way for writers to analyse and appraise common law is to start with the actual words of the judges, the *verba ipsissima* as the Latin puts it. In building terms, writers treat these as bedrock and build their analysis from there. In literal terms writers assume that the words in the judgment embody a coherent principle then seek to discover that principle (and with respect this assumption is sometimes at least, not justified). Sometimes they find it easily while at other times they do not and then have to speculate as to what the judges really meant. This is one reason that parts of common law are a mess.

An alternative method of analysis is to go right back to taws. Start with the problem that the court faced. Consider all of the possible solutions. Then examine what the court has said, using the possible solutions as tools for analysing and appraising the law. In other words, identify all the options then analyse and appraise judicial choice against that background.

This approach is necessary when the law is in a messy state, as is the situation with privative clauses, but it is worth doing in other situations as well because it provides a deeper and broader analysis. The point is that it is necessary to break out and break up before you break through.

This text adopts this wider approach. It does not seek to sort out privative clauses by examining, manipulating and shaking about the texts of the cases on privative clauses then attempting as best one might to transform the whole lot into some principles that put the findings of the case into a rational and coherent
body of law. (In any event a significant part of the case law is creaky.) Instead it seeks to examine the possibilities as a matter of reason, as distinct from a matter of mere judicial assertion, to see what makes good sense and for that reason could make good law.

How does this approach apply to privative clauses? The author goes back to first principles and does so in two phases. First, the text considers the anatomy of legal rules in general and the anatomy in particular of the legal rules that underpin litigation. Second, the text considers the anatomy of a privative clause, something that is rather light on in the academic and judicial commentary on this area of law. These two dissections of the law provide the foundation for an analysis of privative clauses in a way that enhances understanding of them, while at the same time providing a yardstick for measuring judicial performance in cases.