

PUBLIC LAW REVIEW

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ARTICLE

The entrenched minimum provision of judicial review and the rule of law – *Leighton McDonald*

In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, the High Court held that s 75(v) of the *Constitution* entrenches a “minimum provision of judicial review” which limits the effectiveness of statutory attempts to impair the judicial review of Commonwealth administrative action and constitutes a “textual reinforcement” of the “rule of law”. This article identifies two possible ways in which the rule of law might give content to the idea of the minimum provision of judicial review. The article proceeds primarily through an analysis of the High Court’s reasons in *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 and argues that neither of the suggested approaches to thinking about the rule of law is likely to generate a clearly demarcated minimum provision of judicial review applicable to all statutory contexts. The article analyses two distinct statutory techniques aimed at restricting judicial review – privative clauses and no-invalidity clauses – and identifies and discusses the particular challenge posed by no-invalidity clauses to the rule-of-law purpose the High Court has attributed to s 75(v). 14

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