Constitutionalising supervisory review at State level: The end of Hickman?

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In Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531, the High Court has made a strong statement setting out a clear Ch III basis for supervisory judicial review of inferior courts and tribunals acting under State legislation. The corollary is that privative clauses will be of limited effect, being unable to validly exclude review for jurisdictional error. This welcome simplification effectively equates the position in relation to Commonwealth and State privative clauses and casts further doubt upon the continued utility of the Hickman formula. In all Australian jurisdictions, the determinant of reviewability will be the presence or absence of "jurisdictional" error. The decision also contains significant discussion of the twin concepts of jurisdictional error and error on the face of the record, and questions the courts' previously narrow approach to these grounds in Craig v South Australia (1995) 184 CLR 163. Importantly, the decision breathes fresh life into Ch III jurisprudence, establishing that Chapter as a clear foundation for the constitutional role and protection of the State Supreme Courts.

Background to the High Court decision

The litigation in *Kirk v Industrial Relations Commission (NSW)* (*Kirk*)[1] arose from a workplace fatality in March 2001, which occurred on a farm in New South Wales (NSW) owned by the Kirk company. The farm manager was using an all terrain vehicle (ATV). For reasons unknown, he left a formed road and, in actions later to be described as "inexplicably reckless",[2] drove the ATV down a steep slope. The ATV overturned and he received fatal injuries.

The Kirk company was subsequently prosecuted for breaches of ss 15 and 16 of the *Occupational Health and Safety Act 1983* (NSW) (the OH&S Act).[3] Mr Kirk, the company director, was also prosecuted for a deemed breach of the Act, by virtue of s 50(1). Both were convicted in the NSW Industrial Court in 2004[4] and financial penalties were imposed.[5] There followed appeal proceedings in the NSW Court of Appeal and Court of Criminal Appeal,[6] an appeal to the Full Bench of the Industrial Court[7] and further proceedings in the Court of Appeal in 2008.[8] Special leave applications to the High Court were heard in May 2009 and the eventual hearing in September and October of 2009.

In a strong judgment, the High Court unanimously quashed the convictions and WorkCover NSW was required to pay the costs of the judicial review proceedings. Jurisdictional errors were identified in the decision of the Industrial Court, and the presence of a strong privative clause did not protect those errors from review. Six members of the court, French CJ, Gummow, Hayne, Crennan, Kiefel and

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[1] *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 (*Kirk*).

[2] *Kirk* (2010) 239 CLR 531 at [125] (Heydon J).

[3] The Act has now been replaced by the *Occupational Health and Safety Act 2000* (NSW). However, the relevant provisions (ss 15 and 16) are in substantially identical terms. A uniform national occupational health and safety regime is expected to come into force in 2011.

[4] *WorkCover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166.

[5] *WorkCover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462.

[6] *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151. The Court of Appeal and Court of Criminal Appeal sat together.

[7] *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (Inspector Childs)* (2006) 158 IR 281.

[8] *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465.

Bell JJ, delivered a joint judgment. Heydon J delivered a separate judgment, which agreed in substance with the rest of the court, dissenting only in relation to the form of the orders.

EMPLOYER LIABILITY AND DEFENCES

Sections 15 and 16 of the OH&S Act placed onerous duties upon employers.[9] Under s 15(1):

> Every employer shall ensure the health, safety and welfare at work of all the employer's employees.

Under s 16(1):

> Every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.

The duties thereby placed upon employers are stringent ones.[10] They "shall ensure" the health, safety and welfare of their employees while at work, and they "shall ensure" that other persons are not exposed to risks arising from the conduct of the employer's undertaking. On the plain terms of these provisions, an employer would be hard pressed to escape prima facie liability *whenever* a workplace injury occurred. By definition, they would seem to have failed in their duty to ensure safety.

This apparently strict liability was tempered only by the defences made available in s 53,[11] which provided that:

> It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:
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> (a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, or
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> (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

The charges laid against Mr Kirk and the Kirk company, including the "particulars" of those charges, largely recited the statutory terms of ss 15 and 16, without identifying any specific actions or omissions which constituted the breach of those statutory duties. The charges did not indicate what the defendants had allegedly done nor failed to do that constituted a breach of their duties. They did not indicate what should have been done differently. They did not identify specific actions the defendants might have taken to prevent injury. For example, a "particular" to the effect that the defendants had "failed to maintain safe systems of work", did not identify the specific nature of that failing. Nothing was stated as to the nature of the "safe systems of work" that should have been provided or maintained, or of the instruction, training and supervision that should have been provided.

As the joint judgment pointed out, this lack of specific content to the allegations rendered it very difficult to prepare a defence to them. Effectively, the defendants were required to negate all possible actions that might conceivably be taken by them, rather than just establish that any specific measures pleaded by the prosecution were beyond the scope of that reasonably practicable. The language of the majority in discussing this matter resonates strongly with the requirements of procedural fairness, specifically in relation to the right to notice of adequately specified allegations in order that the right to respond to those allegations can be effectively exercised.[12] The joint judgment observed that:

[9] These provisions are at variance with the normal practice in other Australian jurisdictions of imposing a duty upon employers to take "reasonable care" to avoid workplace injury. The joint judgment referred to the *Occupational Health and Safety Act 1985* (Vic), ss 21, 22; *Occupational Health, Safety and Welfare Act 1986* (SA), ss 19, 22; *Workplace Health and Safety Act 1995* (Qld), ss 26, 27; *Occupational Safety and Health Act 1984* (WA), ss 19, 21, 22; *Workplace Health and Safety Act 1995* (Tas), s 9; *Work Health Act* (NT), s 29; *Occupational Health and Safety Act 1989* (ACT), ss 27, 28; *Occupational Health and Safety Act 2004* (Vic), ss 21, 22, 23; *Workplace Health and Safety Act* (NT), ss 55, 56, 57; *Work Safety Act 2008* (ACT), ss 14, 15, 21.

[10] Sections 15(2) and 16(2) provide some examples of what may constitute a breach of these two duties.

[11] These defences are now mirrored in s 28 of the *Occupational Health and Safety Act 2000* (NSW), s 28.

[12] See *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576; *Johnson v Miller* (1937) 59 CLR 467.

> The common law requirement is that an information, or an application containing a statement of offences, "must at the least condescend to identifying the essential factual ingredients of the actual offence".[13]

Their Honours continued:

> The statements of the offences as particularised do not identify what measures the Kirk company could have taken but did not take. They do not identify an act or omission which constitutes a contravention of ss 15(1) and 16(1) … Needless to say, the appellants could not have known what measures they were required to prove were not reasonably practicable.[14]

All members of the court agreed that this defect was a sufficient basis for the convictions to be quashed. This was an error in the construction of ss 15 and 16, and hence a "wrong understanding of what constituted an offence … and how the defence under s 53(a) was to be applied".[15]

Breach of the rules of evidence

Both judgments[16] noted that a significant breach of the rules of evidence had taken place in the Industrial Court. Although s 163(2) of the *Industrial Relations Act 1996* (NSW) (the IR Act) made it clear that the rules of evidence, including the *Evidence Act 1995* (NSW) were to apply to those proceedings, the Industrial Court allowed Mr Kirk, the defendant, to be called as a witness for the prosecution. This course was taken without apparent objection,[17] although it was plainly in breach of s 17(2) of the *Evidence Act*, which provides that a defendant is not a competent witness for the prosecution. Section 17(3) additionally provides that an associated defendant is not a compellable witness for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately.

Heydon J described the rule that an accused is not a competent or compellable witness for the prosecution as "an absolutely fundamental rule underpinning the whole accusatorial and adversarial system of criminal trial".[18] Both judgments noted that, while some provisions of the *Evidence Act* could be dispensed with by a trial judge with the consent of the parties, s 17 was not amongst them.

Jurisdictional error

The High Court had thus identified two significant errors made by the NSW Industrial Court and left unremedied by the Court of Appeal. These were the misconstruction of ss 15 and 16, and the breach of the rules of evidence. Standing in the way of the grant of certiorari was the court's previous decision in *Craig v South Australia* (*Craig*),[19] which set out a quite restricted doctrine of jurisdictional error for inferior courts, such as the Industrial Court, and an equally restricted definition of "the record" for the purposes of certiorari. A further significant obstacle came in the form of the strong privative clause present in s 179 of the IR Act.

The joint judgment turned first to a discussion of "jurisdictional error". This is interesting for a number of reasons. Perhaps the first of these is the frank admission within the judgment that this label is conclusory. While this view will not surprise many academic commentators, it is unusual to see such a direct recognition of this reality from the court. The joint judgment referred to a number of academic authorities and quoted, with evident approval, the statement of Jaffe to the effect that denominating some questions as "jurisdictional":

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[13] *Kirk* (2010) 239 CLR 531 at [26], citing *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 520 for this proposition.

[14] *Kirk* (2010) 239 CLR 531 at [28].

[15] *Kirk* (2010) 239 CLR 531 at [37].

[16] *Kirk* (2010) 239 CLR 531 at [50]-[53] (joint judgment), [114]-[117] (Heydon J).

[17] It was only in the actual hearings before the High Court that this breach was brought to the attention of counsel by the members of the court themselves: *Kirk v Industrial Relations Commission (NSW)* [2009] HCATrans 237; *Kirk v Industrial Relations Commission (NSW)* [2009] HCATrans 238.

[18] *Kirk* (2010) 239 CLR 531 at [115].

[19] *Craig v South Australia* (1995) 184 CLR 163 (*Craig*).

> is almost entirely functional: it is used to validate review when review is felt to be necessary … If it is understood that the word "jurisdiction" is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified.[20]

The reliance placed upon this quotation suggests the court is expressly endorsing the view that "jurisdictional" is very much a post hoc label attached to an error that a reviewing court has decided is sufficiently significant to warrant its intervention, rather than an analytic term that can be applied prospectively to provide a definition of, or a test for, such errors.

The joint judgment followed this with a discussion of jurisdictional error in Australia, and in particular of its previous decision in *Craig*. While this discussion is strictly obiter and is in some respects inconclusive, it does throw new light on that decision, both "explaining" and, in part, questioning aspects of it.

Craig, it will be remembered, erected a strong distinction between jurisdictional error for administrative tribunals and jurisdictional error for "inferior courts". That distinction, based both upon the separation of powers and upon assumed differences in legal expertise,[21] has been the subject of some criticism.[22] In *Kirk*, the strategy was to question the "assumptions" behind the decision in *Craig*.

The joint judgment commented that:

> behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the *Constitution*.[23]

The evident doubt that the assumed distinction can always be clearly drawn, particularly in the State constitutional context, necessarily throws doubt upon the bifurcated approach to jurisdictional error that has been seen as flowing from, and based upon, that distinction. In short, the court would seem less willing to rely upon that distinction in the future and to be more prepared to engage in a frank assessment of the seriousness of the error made by the body under review, whether that body is a "court" or a "tribunal".

The joint judgment also commented that:

> behind the conclusions expressed in *Craig* lie premises about what is meant by jurisdictional error. Unexpressed premises about what is meant by jurisdictional error give content to the notion of "authoritative" when it is said, as it was in *Craig*, that tribunals cannot "authoritatively" determine questions of law, but that courts can.
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> When certiorari is sought, there is often an issue about whether the decision is open to review. If "authoritative" is used in the sense of "final", a decision could be described as "authoritative" only if certiorari will not lie to correct error in the decision. To observe that inferior courts generally have authority to decide questions of law "authoritatively" is not to conclude that the determination of any particular question is not open to review by a superior court. Whether a particular decision reached is open to review is a question that remains unanswered. The "authoritative" decisions of inferior courts are those decisions which are not attended by jurisdictional error. That directs attention to what is meant in this context by "jurisdiction" and "jurisdictional". It suggests that the observation that inferior courts have authority to decide questions of law "authoritatively" is at least unhelpful.[24]

In thus explaining *Craig*, the joint judgment again seems to move away from a doctrinaire classification of decision-making bodies upon which the "jurisdictional" status of any legal errors they

[20] Jaffe L, "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70 Harv L Rev 953, cited in *Kirk* (2010) 239 CLR 531 at [64].

[21] *Craig* (1995) 184 CLR 163 at 176-180.

[22] Finn C, "Casenote on Craig" (1996) 3 AJ Admin L 177 at 180; Cane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) p 166. Aronson and Dyer expressed concern that *Craig* might lead to a resurgence in what they termed "dysfunctional classification exercises": Aronson M and Dyer B, *Judicial Review of Administrative Action* (LBC Information Services, 1996) p 12.

[23] *Kirk* (2010) 239 CLR 531 at [69].

[24] *Kirk* (2010) 239 CLR 531 at [69]-[70].

make could be said to depend. The statement in *Craig* to the effect that inferior courts are able to determine questions of law "authoritatively" is no longer, if it ever was, to be taken as entailing that those determinations are therefore beyond review. Indeed that statement is described as being "at least unhelpful".

It would be going too far to say that the strong distinction made in *Craig* between jurisdictional error for inferior courts and for administrative tribunals has now been discarded. However, that distinction has been seriously weakened. It is unlikely to be as significant for outcomes in the future as it may have been in the years since *Craig* was decided. As becomes evident in the judgment, the emphasis now appears to be on the correction of "distorted positions", whether bodies classified as "inferior courts" or as "tribunals" adopt those positions.

Having reviewed the categories of jurisdictional error for an inferior court as set out in *Craig*, the joint judgment commented as follows:

> As this case demonstrates, it is important to recognise that the reasoning in *Craig* that has just been summarised is not to be seen as providing a rigid taxonomy of jurisdictional error. The three examples given in further explanation of the ambit of jurisdictional error by an inferior court are just that – examples. They are not to be taken as marking the boundaries of the relevant field. So much is apparent from the reference in *Craig* to the difficulties that are encountered in cases of the kind described in the third example.[25]

It would appear then that the categories of "jurisdictional error" for an inferior court are not closed. This places the distinction between "inferior courts" and "administrative tribunals" under further pressure. That distinction would seem to be less of a bright line than previously thought. It is a line that may well become increasingly blurred over time as reviewing courts respond to the facts of the particular cases that come before them, rather than relying upon the relatively rigid taxonomy set out in *Craig*.

The joint judgment then went on to consider the specific errors in the instant case. Both were held to be jurisdictional in nature.

The first error, in the construction of ss 15 and 16 of the OH&S Act, was said to be an instance of the Industrial Court "misapprehending the limits of its functions and powers". This placed it in the third of the categories identified in *Craig*. The misapprehension was at base a misconstruction of ss 15 and 16 and the manner in which those provisions were intended to interact with the defences provided by s 53. This led to a misapprehension as to the level of particularity required in order to identify offences under the Act. That misapprehension had led the Industrial Court to convict Mr Kirk and the Kirk company despite the fact that:

> no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk company were convicted and for which they were sentenced … By misconstruing s 15 of the OH&S Act, the Industrial Court convicted Mr Kirk and the Kirk company of offences when what was alleged and what was established did not identify offending conduct.[26]

This was something the Industrial Court simply lacked the power to do. On construction, those acts or omissions had to be identified, and the failure to do so in the charges meant that they were invalid and that there was no power to proceed to a conviction.

The decision of the Industrial Court to allow Mr Kirk, the defendant, to be called by the prosecution as a witness against himself was also held to involve jurisdictional error. This was described by the joint judgment as an instance of the Industrial Court "misapprehending a limit on its powers", which were relevantly to conduct a trial in accordance with the rules of evidence.[27]

[25] *Kirk* (2010) 239 CLR 531 at [73].

[26] *Kirk* (2010) 239 CLR 531 at [74].

[27] It is instructive to compare this error with that claimed to have been made in *Craig*, said to be an error in understanding the court's previous decision in *Dietrich v The Queen* (1992) 177 CLR 292, on the meaning of the phrase "unrepresented through no fault of their own". The court in *Craig* dismissed this, saying simply that if there was an error (which was not decided) it was one made within jurisdiction.

It is notable that neither of these identified errors is a clear extension of the categories previously identified in *Craig* as applicable to an inferior court. Both are quite fundamental in nature. Both would seem to fall within the third category set out in *Craig*. It is for this reason that the preceding remarks in the joint judgment seemingly doubting the distinction between inferior courts and tribunals for the purposes of jurisdictional error must be strictly obiter. Nonetheless, those remarks do seem to signal a more pragmatic approach to be taken in the future.

It is also worth observing how flexible the third category of jurisdictional error for inferior courts in *Craig* is. The third category of error listed in that case is "misconstruction of the relevant statute". This would be broad in the extreme if it extended to any such error and were not limited by the requirement that the decision-making body thereby misconceives "the nature of the function it is performing or the extent of its powers in the circumstances of the particular case". While this would rule out review for "mere" legal error, without more, in the interpretation and exercise of statutory powers, it would seem to be a flexible category capable of considerable expansion or contraction as a reviewing court deems appropriate.

Error on the face of the record

The joint judgment then turned to a discussion of error on the face of the record. There was little difficulty in concluding that both the identified errors were indeed apparent "on the face" as, in contradistinction to the common law position set out in *Craig*, the record is quite broadly defined by s 69 of the *Supreme Court Act 1970* (NSW).[28] Section 69(3) of that Act provides that the jurisdiction of the Supreme Court to grant relief in the nature of certiorari includes jurisdiction to quash for error of law on the face of the record. Section 69(4) then provides that "the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination".

Given these legislative provisions, and the fact that the reasons of Walton J in the Industrial Court clearly disclosed both of the errors identified by the High Court, it was evident that both those errors were to be found "on the record" for the purposes of certiorari. It also followed from those legislative provisions that the definition of the record in *Craig* did not apply.

Although this conclusion was easily reached, the joint judgment nevertheless paused to cast some further question marks over *Craig*. In commenting on the common law doctrine of review for error on the record, it was noted that the stated purpose of the rejection in *Craig* of a more expansive approach was that such an approach would go "a long way towards transforming certiorari into a discretionary general appeal for error of law".[29] This had been seen in *Craig* as a step "best left to legislation".[30] The joint judgment in *Kirk* commented:

> But the need for and the desirability of effecting that purpose depend first upon there not being any other process for correction of error of law, and secondly, upon the conclusion that primacy should be given to finality rather than compelling inferior tribunals to observe the law.[31]

That second conclusion, that "primacy should be given to finality", was one which was to be emphatically rejected in *Kirk*. While the court noted that "no application in the present proceedings was made to reconsider the decision in *Craig*",[32] these obiter remarks suggest a willingness to reconsider that decision should the occasion arise.

The joint judgment concluded that, but for the privative clause, certiorari would be available both for jurisdictional error and for error of law on the face of the record. Attention then turned to that clause.

[28] As amended by the *Courts Legislation Amendment Act 1996* (NSW), Sch 1.8 at [8], to overcome the effect of the decision in *Craig*. See also *Administrative Law Act 1978* (Vic), s 10.

[29] *Craig* (1995) 184 CLR 163 at 181.

[30] *Craig* (1995) 184 CLR 163 at 181.

[31] *Kirk* (2010) 239 CLR 531 at [85].

[32] *Kirk* (2010) 239 CLR 531 at [85].

THE PRIVATIVE CLAUSE

Section 179 of the IR Act provided as follows:

> 179 Finality of decisions
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> (1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.
>
> (2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.
>
> (3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.
>
> (4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:
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> (a) the Full Bench of the Commission in Court Session, or
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> (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.
>
> (5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.
>
> (6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.
>
> (7) In this section:
>
> *decision* includes any award or order.

This privative clause had been the subject of repeated previous litigation, as had its statutory predecessors.[33]

The discussion in the joint judgment began conventionally with references to *R v Hickman; Ex parte Fox* (*Hickman*)[34] and *Plaintiff S157 v Commonwealth* (*Plaintiff S157*),[35] but the focus quickly turned to Ch III of the Australian *Constitution*:

> In considering State legislation, it is necessary to take account of the requirement of Ch III of the *Constitution* that there be a body fitting the description "the Supreme Court of a State", and the constitutional corollary that "it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description".[36]

So, there must be State Supreme Courts, and they must *truly* be State Supreme Courts in that they must continue to meet the "constitutional description" of such courts. Legislation which purported to alter their constitution or character would to that extent be invalid. Chapter III of the *Constitution* requires that there be State Supreme Courts. This is the "constitutional bedrock" of the decision in *Kirk*.[37] The passage quoted above, drawing upon previous Ch III cases, is virtually the full extent of the joint judgment's discussion of this issue. The role of Ch III in reaching these conclusions would appear to be regarded as settled.

The joint judgment continued:

> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial

[33] See, eg *Mitchforce v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212; *Powercoal Pty Ltd v Industrial Relations Commission (NSW)* (2005) 64 NSWLR 406. Section 179 was also, somewhat tangentially, at issue in the High Court decisions in *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180; *Batterham v QSR Ltd* (2006) 225 CLR 237 and *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274.

[34] *R v Hickman; Ex parte Fox* (1945) 70 CLR 598.

[35] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

[36] *Kirk* (2010) 239 CLR 531 at [96], citing *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45 at [63].

[37] The expression is taken from the submissions made by the Commonwealth Solicitor-General: *Kirk v Industrial Relations Commission (NSW)* [2009] HCATrans 239.

> power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts.[38]

This passage sets out the second premise of the reasoning in *Kirk*. The ability to conduct supervisory review and to grant the prerogative writs is "a defining characteristic" of such courts. Therefore, it cannot be removed by legislation. This reasoning is deceptively simple.

Is this reasoning open to challenge? The first premise, that constitutionally there must be State Supreme Courts, now seems beyond doubt.[39] It draws upon the terms of s 73 of the *Constitution*, and in particular s 73(ii), which provides for the appellate jurisdiction of the High Court from, amongst others, "the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies from such Supreme court to the Queen in Council". Section 73 indicates that the Commonwealth Parliament may prescribe "exceptions and regulations" in relation to this appellate jurisdiction of the High Court, but not so as to remove that jurisdiction. Thus, while in strict terms it is the High Court's appellate jurisdiction which is expressly constitutionally preserved by s 73, the court has made it clear that it regards this as implicitly preserving the existence of the State Supreme Courts from which those appeals might come. This premise seems solid.

This directs our attention to the second step in the argument, the claim that the ability to conduct supervisory review is a "defining characteristic" of the various State Supreme Courts. The joint judgment noted that "at federation, each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England".[40] In the view of the joint judgment, this entailed that each had power to issue certiorari to an inferior court.[41] The judgment cited the 1874 decision of the Privy Council in *Colonial Bank of Australasia v Willan* for the proposition that:

> there are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari … in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.[42]

In short, the High Court position is that the Court of Queens Bench historically always possessed at common law the power to conduct supervisory review, at least for jurisdictional error, notwithstanding the existence of a privative clause. That power was a "defining characteristic" of that court, and it was mirrored in the Colonial Supreme Courts when those courts were created. The continuation of those Supreme Courts, taken as they were found, was provided for by Ch III of the Australian *Constitution*. Hence, the State Supreme Courts continue to have that power as a defining characteristic, now constitutionally entrenched.

The lynchpin of the argument is the assertion that the Court of Queens Bench always had this power. Viewed in that light, the power to conduct supervisory review was always a power claimed and asserted by the English courts, and ultimately *Kirk* is a contemporary reassertion of this claimed judicial right, power and indeed duty to conduct supervisory review. The role of Ch III is to constitutionally entrench or "freeze" the "defining characteristics" of the State Supreme Courts as being those long asserted, thus constitutionally reinforcing the original common law base upon which those "defining characteristics" were historically claimed.

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[38] *Kirk* (2010) 239 CLR 531 at [98].

[39] *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45; see also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[40] *Kirk* (2010) 239 CLR 531 at [97], citing the *Australian Courts Act 1828* (IMP) (9 Geo 4 c 83), s 3, which conferred jurisdiction on the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land; *Supreme Court Act 1890* (Vic), s 18; *Supreme Court Act 1867* (Qld), ss 21, 34; Act No 31 of 1855-1856 (SA), s 7; *Supreme Court Act 1880* (WA), s 5, picking up *Supreme Court Ordinance 1861* (WA), s 4.

[41] *Kirk* (2010) 239 CLR 531 at [97], citing *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 440.

[42] *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442, cited in *Kirk* (2010) 239 CLR 531 at [97].

Only one authority to the contrary was cited to the High Court in argument,[43] although the court was also taken to obiter statements suggesting that review could be totally excluded by a Parliament sufficiently clear as to that intent.[44] Those authorities must now be doubted, given the strength of the High Court's statements in *Kirk*.

The court reinforced its position by what is, in the end, a policy argument. It noted its own appellate jurisdiction under s 73 of the *Constitution* in relation to the decisions of the State Supreme Courts, with the joint judgment reiterating that "there is but one common law of Australia", from which it followed that "the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court".[45] At the apex of the unified court system sits the High Court.

The joint judgment continued:

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions".[46]

This concern with the development of "distorted positions" and unsupervised "islands of power", lies at the heart of the decision in *Kirk*. The earlier discussion of jurisdictional error in the joint judgment had noted what it described, somewhat awkwardly, as "two opposing purposes" for the grant of certiorari. These were the keeping of inferior tribunals within their jurisdiction and the need for finality in decision-making. The joint judgment noted that "these two purposes pull in opposite directions",[47] and quoted with evident approval the conclusion of Sawer that "it is plain enough that the question is at bottom one of policy, not of logic".[48]

In *Kirk*, the court has made a clear policy choice in favour of keeping administrative tribunals and inferior courts within the limits of their allotted jurisdictions. The joint judgment endorsed the view expressed by Jaffe who "rightly pointed out"[49] that "a tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction".[50]

The joint judgment described Jaffe as having "expressed the danger" that:

> a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned.[51]

The court concluded that "what is important is that the development of distorted positions is to be avoided".[52] These remarks were echoed by Heydon J, commenting that:

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[43] *Re Biel* (1893) 18 VLR 456, where, despite the authority of *Willan*, a strong privative clause denying certiorari "for any want or alleged want of jurisdiction, or for any error of form or substance, or on any ground whatsoever" was held to block the grant of the remedy. Higinbotham CJ commented (at 459): "This Court has not to struggle against the plain meaning of an Act of Parliament, it has to obey it and to carry it out."

[44] For example, in *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181 at 204, O'Connor J said: "It is within the power of the legislature, if it thinks fit, to make the Arbitration Court the sole judge of the extent of its own jurisdiction."

[45] *Kirk* (2010) 239 CLR 531 at [99], citing *Lipohar v The Queen* (1999) 200 CLR 485 at [43].

[46] *Kirk* (2010) 239 CLR 531 at [99].

[47] *Kirk* (2010) 239 CLR 531 at [57]. It is actually rather difficult to describe "finality" as a purpose for the grant of certiorari. It is rather a reason not to grant the remedy.

[48] *Kirk* (2010) 239 CLR 531 at [57], quoting Sawer G, "Error of Law on the Face of an Administrative Record" (1956) 3 UWALR 24 at 34.

[49] *Kirk* (2010) 239 CLR 531 at [64].

[50] Jaffe, n 20 at 962-963.

[51] *Kirk* (2010) 239 CLR 531 at [64], citing Jaffe, n 20 at 963.

[52] *Kirk* (2010) 239 CLR 531 at [64].

> specialist courts … tend to become over-enthusiastic about vindicating the purposes for which they were set up … [C]ourts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way.[53]

The message from the High Court is clear. State Supreme Courts have always had and continue to have the inherent power to conduct supervisory review for jurisdictional error and to grant the remedy of certiorari or other remedies as are appropriate. That power should be exercised to correct an inferior body which travels beyond the limits of its jurisdiction. A privative clause cannot oust this "defining characteristic" of the Supreme Courts. In the strong words of the joint judgment, the distinction between "jurisdictional" and "non-jurisdictional" error:

> marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.[54]

What then of privative clauses? The effect of the decision in *Kirk* is not simply to render all such clauses invalid. But they are subject to a significant constitutional limit in that they cannot validly exclude review for "jurisdictional" error. Given that, at common law, a court does not normally review on the basis of "non-jurisdictional" error of law in any event, this means that the practical effect of the privative clause appears limited to excluding review for such an error in the exceptional case where the error is evident on the face of the record. In most cases, reviewability will turn upon whether an error is to be classified as "jurisdictional" or not. This issue will be discussed further below.

The joint judgment turned finally to s 179 of the IR Act, the privative clause in question. As in *Plaintiff S157*, the provision was not invalidated, but was read down so as to preserve its constitutional validity. Thus, the expression "a decision of the Commission" found in s 179(1) was to be read as meaning "a decision of the Industrial Court that was made within the limits of the powers given to the Industrial Court to decide questions".[55] This reading was based squarely upon the "constitutional considerations" previously discussed. The joint judgment also noted that "designation of the Industrial Court as a 'superior court of record' does not alter the conclusions stated about the availability of certiorari".[56]

The result was that neither of the two errors previously identified as having been made by the Industrial Court were protected from review. Both errors were "jurisdictional", and indeed both were found "on the face of the record" as statutorily defined in NSW.

The joint judgment left for another day the validity of s 179(4) which, in some cases, extends the protection literally provided by s 179 to "purported" decisions:

> This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:
>
> (a) the Full Bench of the Commission in Court Session, or
>
> (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

Section 179(4) was not brought into play in *Kirk* as the Industrial Court had not made a purported decision on an issue of jurisdiction. Given the earlier remarks of the court, however, it is hard to see how the review of "purported decisions" could be validly excluded as these are by definition those infected by jurisdictional error.[57] Any redoubling of the efforts of those drafting privative clauses to broaden and strengthen them further may only take them closer to the brink of invalidity.

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[53] *Kirk* (2010) 239 CLR 531 at [122].

[54] *Kirk* (2010) 239 CLR 531 at [100].

[55] *Kirk* (2010) 239 CLR 531 at [105]. Note that the Industrial Commission became the Industrial Court during the course of these proceedings.

[56] *Kirk* (2010) 239 CLR 531 at [106], citing *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375, 393-394; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [49]-[53], [136]-[140], [214]-[216], [329].

[57] In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [75], Gaudron, McHugh, Gummow, Kirby and Hayne JJ commented that had s 474(1)(c) of the *Migration Act 1958* (Cth) been interpreted as extending to "decisions purportedly made under this Act" it "would be in direct conflict with s 75(v) of the *Constitution* and, thus, invalid". It was the reading of "decision made under this Act" as only extending to "decisions validly made" that preserved the constitutional validity of s 474. In

It would appear to follow that the earlier decision of the NSW Court of Appeal in *Mitchforce v Industrial Relations Commission (NSW)* (*Mitchforce*)[58] is likely to be seen as having been wrongly decided. In that case, Spigelman CJ held that the Industrial Relations Commission, as it then was, had acted without jurisdiction, lacking the jurisdictional fact of "a contract whereby work was performed in an industry".[59] Nevertheless, his Honour felt that the literal intent of the privative clause[60] to prevent review of "purported decisions" must be given weight in the process of statutory reconciliation. This led Spigelman CJ to conclude that the action of the commission in excess of jurisdiction was not a breach of an "inviolable limit on power" and was therefore unreviewable.[61] In the light of *Kirk* this reasoning now seems unnecessarily complex. With the benefit of hindsight one can now say that once it is accepted that the commission was acting beyond jurisdiction, the conclusion that its decision cannot be validly protected from review must follow.

IMPLICATIONS OF KIRK

Reduced effectiveness of State privative clauses

Privative clauses in State legislation will henceforth be of greatly reduced effectiveness. They will continue to validly exclude review for legal error on the face of the record if that is the legislative intent. However, they cannot validly exclude review for jurisdictional error, nor the grant of certiorari or equivalent remedies, to correct such error. Given the strength and clarity of the statements made to this effect in the joint judgment, and agreed with by Heydon J, and the constitutional basis on which they are firmly placed, it will be difficult for a future High Court to depart from this position.

Thus, and contrary to the previously accepted view, it appears that privative clauses in State legislation will henceforth be seen as no more effective than their counterparts in Commonwealth Acts. The constitutional preservation of judicial review of Commonwealth decisions, provided for by s 75(v) of the *Constitution*, now finds its counterpart in relation to State decisions in s 73(ii). The constitutional bases for the entrenchment of supervisory review differ but, consistently with the avowed commitment to "one Australian common law", the outcome is the same. In both cases, privative clauses will be read down to preserve constitutional validity, thus not preventing review of "jurisdictional" errors, if that reading is reasonably open. In the rare case where such a reading is not open, the privative clause will not succeed, but may be struck down for invalidity.

Hickman provisos now in doubt

The continued utility of the hallowed "*Hickman* provisos" must now be in doubt. *Hickman* was ritually cited by the joint judgment in *Kirk*, but only for the notion of "reconciliation" between a statutory provision conferring an apparently limited jurisdiction and the concurrent presence of a privative clause that purports to prevent a reviewing court from enforcing that limit.[62] However, the joint judgment moved immediately to a discussion of the "constitutional considerations" which limit the effect of privative clauses at both Commonwealth and State levels. No further reference was made to *Hickman*. Further, the power to enforce jurisdictional limits, and thereby to correct "distorted positions", was decisively emphasised by the court, leaving only limited room for any reconciliation process. The key point, however, is the court's clear statement that "jurisdictional" errors cannot be validly excluded from review. So, the criterion for review of a State administrative decision in the face of a strong privative clause is no longer a failure to comply with one or more of the *Hickman* provisos,

Batterham v QSR Ltd (2006) 225 CLR 237 at [26], Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ commented somewhat cryptically that "the reference in s 179 to 'purported' decisions of the Commission is properly seen as inserted for more abundant caution".

[58] *Mitchforce v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212.

[59] See *Industrial Relations Act 1996* (NSW), s 106.

[60] *Industrial Relations Act 1996* (NSW), s 179(1), as it then was. The section was subsequently amended to take the form in force during the *Kirk* litigation: see *Industrial Relations Amendment Act 2005* (NSW), Sch 1 at [5].

[61] *Mitchforce v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212 at [92], [105]-[106].

[62] *Kirk* (2010) 239 CLR 531 at [94].

however these may be interpreted. It is simply jurisdictional error. There was no attempt to even consider the applicability of the *Hickman* formula in *Kirk*. Subject to one possibility discussed below, it is submitted that any future utility in the so-called "*Hickman* provisos" will lie in their role as one indicator amongst many of the presence of some of the more egregious forms of jurisdictional error. However, they will in no sense "cover the field". As *Kirk* itself illustrates, "jurisdictional error" will be a considerably broader category.

Boundary of reviewability marked out by "jurisdictional error"

As a result of *Kirk*, it seems that the boundary of reviewability will be marked out, wholly and solely, by the notion of "jurisdictional error". This remains a difficult notion.[63]

First, the court has evidently endorsed the long-held suspicion that labelling an error as "jurisdictional" is simply a functional post hoc classification. It reflects the court's view that the identified error or errors, the "distorted positions" as identified in *Kirk*, are sufficiently serious to warrant intervention.

This means that the predictive power of that label is limited. It will be difficult, or perhaps more difficult, to formulate in advance clear analytic categories of jurisdictional error. At best, intuitive assessments will need to be made of the extent to which a decision-making body is straying from its statutorily assigned functions or beyond its associated powers.

The distinction drawn in *Craig* between inferior courts and administrative tribunals now seems less significant. It has been made clear that the narrow list of "jurisdictional" errors for inferior courts provided in that case is not to be taken as exhaustive. This would come as something of a surprise to many, including the NSW Court of Appeal and the South Australian Supreme Court, both of whom have carefully applied that list in the evident belief that it was indeed exhaustive. In the proceedings below in the Court of Appeal, Spigelman CJ had referred to "the authoritative statement in the joint judgment of the High Court as to the circumstances in which supervisory jurisdiction can be exercised with respect to a court".[64] His Honour concluded: "I can see no relevant jurisdictional error in accordance with the formulation in *Craig*."[65] A similarly faithful application of *Craig*, led Doyle CJ in *Police (SA) v Lymberopoulos*[66] to resist an argument that a denial of procedural fairness was a jurisdictional error for an inferior court, it not being expressly listed as such. That argument, in the light of the comments in *Kirk*, might now receive a more positive response. Given that the categories of jurisdictional error for an inferior court are now not closed, it would be surprising if denial of procedural fairness were not to be recognised as amongst them.

This is not to say that the categories of "jurisdictional error" for an inferior court will necessarily expand to match those for an administrative tribunal. For the latter, *Craig* indicated that errors of law are, at least, presumptively or ordinarily jurisdictional. There is nothing in *Kirk* which carries any implication that any expansion of jurisdictional error for inferior courts will travel this far. There may also be an opposite tendency. The presumption that legal errors made by tribunals are jurisdictional may also be weakened if the central distinction between "courts" and "tribunals" is now to be blurred. The focus, in *both* cases, may well shift to the *seriousness* of the purported error.

Courts have long avoided attempts at defining the distinction between "jurisdictional" and "non-jurisdictional" errors. McDonald has described the distinction as "notoriously slippery",[67] while Aronson describes such distinctions as "conclusory" and suggests that the "excess of angst starts when

[63] In the course of argument before the High Court, Gummow J referred to "the unfathomable distinction between jurisdiction and non jurisdiction which we have to grapple with in this case": *Kirk v Industrial Relations Commission (NSW)* [2009] HCATrans 239.

[64] *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465 at [22].

[65] *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465 at [59], with Hodgson J (at [61]) and Handley JA (at [63]) agreeing.

[66] *Police (SA) v Lymberopoulos* (2007) 98 SASR 433.

[67] McDonald L, "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" (2010) 21 PLR 14 at 18.

their conclusory nature is overlooked, leading one on a search for their fixed and essentialist nature".[68] At a metaphysical level, it is hard to doubt this proposition. On the other hand, courts, in deciding cases, and lawyers, in advising their clients and formulating their arguments, are required to operate at a rather more pragmatic level. Thus, it is likely that the search will continue. It may not be a search for the "fixed and essentialist nature" of jurisdictional error, but it may be a more frankly pragmatic search. Such a search might focus on the commonalities between the occurrences of "jurisdictional error" in the decided cases and the indicia to be drawn from those cases of the level of seriousness which is seen by a superior court as requiring its intervention by means of supervisory review. Aronson's own listing of "categories" of jurisdictional error[69] may be one starting point for this more pragmatic search. Another may be McDonald's suggestion[70] that one touchstone for judicial intervention may be interference with long-established and deep-rooted common law rights, such as property rights, and perhaps procedural fairness requirements, or with rights which can be shown to have some constitutional basis. These are suggestions that deserve lengthier examination than this article can provide.

What can be said about the notion of jurisdictional error is that, viewed pragmatically, it is a species of self-restraint imposed by the judiciary upon itself. One of the most significant aspects of *Kirk* is that it represents a clear shift away from the judicial acceptance of externally imposed restraints upon supervisory review, at least in the form of conventional privative clauses. In place of that external restraint, the courts may now more openly determine for themselves the limits of their capacity to undertake supervisory review, deploying the flexible distinction between "jurisdictional" and "non-jurisdictional" errors to demarcate the limits of that self-restraint.

Can a Parliament determine what is a "jurisdictional" error?

This is a large topic, and one that will inevitably be explored in the wake *Kirk* by legislative drafters and Crown lawyers. There are at least three ways in which statute may be argued to shape the boundaries of a decision-maker's jurisdiction. First, it may be suggested that there is still room to argue that a conventional privative clause, appropriately "reconciled" with other provisions of the relevant statute, is capable of broadening what would otherwise appear to be the relevant jurisdictional limits. Secondly, can a legislature "expand" a jurisdiction by the conferral of open-ended discretions? Or, thirdly, can "no invalidity" clauses effectively shift the goal posts?

The first suggestion – that the boundaries of jurisdiction may themselves, to some extent at least, be altered by the inclusion of a conventional privative clause within the relevant legislative scheme – now appears to be in very poor health.[71] At the Commonwealth level, *Plaintiff S157* expressly rejected that "expansion of jurisdiction" interpretation of *Hickman*, which had been relied on in that case by the Commonwealth. The joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ commented that "it is inaccurate to describe the outcome in a situation where the provisos are satisfied as an 'expansion' or 'extension' of the powers of the decision-makers in question".[72] It might be thought that this was sufficient to settle the issue. However, on one reading, the High Court's endorsement of the broad notion of "reconciliation" in *Plaintiff S157* may have been seen as still leaving the door open to arguments that a strong privative clause, protecting even "purported" decisions, remained a factor to be taken into account in determining whether an inferior body had exceeded the "inviolable limits" on its power, or failed to perform an "imperative duty". Indeed, it was the presence of just such a clause that led Spigelman CJ to the somewhat reluctant conclusion in *Mitchforce* that a prima facie excess of jurisdiction by the NSW Industrial Relations Commission was

[68] Aronson M, "Commentary on 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law'" (2010) 21 PLR 35 at 36-37.

[69] Aronson M, "Jurisdictional Error Without the Tears" in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007).

[70] McDonald, n 67 at 32.

[71] Argument to this effect was put to the High Court by the State of Victoria, seemingly without gaining much traction: *Kirk v Industrial Relations Commission (NSW)* [2009] HCATrans 239.

[72] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [64].

protected from review by that clause, as not involving a breach of an "inviolable limit".[73] The decision in *Kirk*, which made no reference to *Mitchforce*, gave no support to this approach, and there was no attempt at any such reconciliation by the court. Backdoor "reconciliation" approaches may still have a pulse after *Kirk* but their prognosis is not positive. While it would be a surprise if there were no final attempts to resuscitate them, it is submitted that the better view is that the trend of authority, from *Hickman* to *Plaintiff S157* to *Kirk*, is steadily away from giving a privative clause any such decisive weight. It may be that all that now remains of the reconciliation process is the simple recognition that a privative clause remains capable of excluding review for non-jurisdictional error of law on the face of the record. This view is strengthened when it is recognised that the older "Hickmanesque" reconciliation approaches were formulated in a different constitutional environment, before the significance of Ch III to State as well as Commonwealth legislative power was recognised.

The second way in which a legislature may arguably influence the scope of jurisdictional error, via the conferral of broad "open-ended" discretions, was discussed briefly in *Plaintiff S157*.[74] That discussion would not have provided great encouragement to legislative drafters. The joint judgment in *Plaintiff S157* commented that such provisions "might well be ineffective".[75] If those provisions were drawn *too* broadly, they might fail to meet the constitutional description of an exercise of legislative power in that they might fail to "determine the content of a law as a rule of conduct or a declaration as to power, right or duty".[76] Of course, a discretion would have to be conferred in very broad and general terms indeed for this limit to be reached. This would require something more than the "broad discretions" which are an administrative commonplace.

Those broad and open-ended discretionary powers with which administrative lawyers are familiar are of course by no means beyond supervisory review. Purposes and relevant matters are capable of being implied into such broad discretions, and fair hearing requirements are equally relevant to their exercise. A power conferred in such broad and general terms as to escape these implicit requirements would be likely to encounter the limit adverted to in *Plaintiff S157*.

The final way in which statute might have a say in determining the jurisdictional limits of an exercise of power is via a "no-invalidity" clause. A clause of this nature was discussed by the High Court in *Federal Commissioner of Taxation v Futuris Corp* (*Futuris*),[77] and these clauses have been closely analysed by McDonald[78] in the context of Commonwealth judicial review.

McDonald notes a key difference between a "traditional" privative clause, which purports to remove review jurisdiction and the associated power to grant remedies, and a "no-invalidity" clause which, on its face, does no such thing. Such a clause is not expressly directed to the review powers of the court.[79] It purports simply to change the law which must be applied by the courts, by providing that various administrative failings are not to lead to the invalidity of any resultant decision. However, McDonald also observes the pragmatic similarities between these differing statutory devices. Both have the practical effect of limiting or avoiding successful judicial review. McDonald suggests that the result in *Futuris*, which appeared to give effect to a "no-invalidity" clause, can be explained in terms

[73] See *Mitchforce v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212; nn 64-66 and surrounding text. Curiously, in the same case, Mason P (at [142]) cited both *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 193-195 and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [19], [56]-[60], [64] as authorities for the now rejected "expansion of jurisdiction" interpretation of *Hickman*.

[74] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

[75] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[76] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), citing *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

[77] *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146.

[78] McDonald, n 67.

[79] McDonald, n 67 at 20.

of the presence of the sophisticated system of alternative remedies which was available to the taxpayer in that case. He concludes that "there are serious doubts about the constitutionality of no-invalidity clauses purporting to have general application".[80]

It is submitted that this approach is correct. A "no-invalidity" clause *does* have a practical effect very similar to that intended by a more conventional privative clause. Most importantly, such a clause shares the same fundamental defect as a traditional privative clause, in that it impermissibly intrudes upon the constitutional role of the courts to *independently* supervise the exercise of governmental power. The assessment of validity and the determination of "jurisdictional" error lie at the heart of that constitutional role. For the legislature to purport to definitively do either risks intruding into the core of the judicial task. It is one thing for the legislature to confer power, even a broad power, which may be validly exercised. It is quite another thing for the legislature to purport itself to determine, in advance, whether that power has been validly exercised. Government cannot determine the validity of its own actions. That is the judicial role. It may be that in *Kirk* we see the beginning of a coalescence of concepts such as validity, jurisdictional error and the exercise of judicial power, as the High Court continues to clarify its conception of that power and of the defining characteristics of a superior court carrying out its constitutional role.

In one key respect, a "no-invalidity" clause also appears to resurrect the now discredited "Hickmanesque" attempts to expand the prima facie limits of a jurisdiction. It is an attempt to argue that, as a matter of construction, "inviolable limits" upon power are not in fact inviolable, at least in the sense that exceeding those limits does not lead to invalidity. It is an argument that those prima facie limits have therefore been "expanded" by the presence of the "no-invalidity" clause in the relevant legislation. It is submitted that a "no invalidity" clause is therefore in practical effect merely another form of privative clause and should be given the same limited legal effect. Where the court determines that there is "jurisdictional" error present, a "no-invalidity" clause should not be able to exclude supervisory review on the basis of that error.

The implication for Ch III jurisprudence

In this field, any prediction of future developments is particularly speculative. The attempt to find some form of constitutional guarantees in Ch III has had a patchy record. In the immediate wake of *Kable v Director of Public Prosecutions (NSW)* (*Kable*),[81] there was almost a stampede to test the limits of the principle espoused in that case. That enthusiasm encountered a series of rebuffs[82] as the High Court made it plain that Ch III was not to provide an open slather for the implication of new rights, or indeed the defence of those common law rights perhaps hitherto assumed. Indeed, it was beginning to seem that *Kable* was to be remembered only as a classic example of a case confined to its facts, until the 2009 decision in *International Finance Trust Co Ltd v NSW Crime Commission*[83] where a 4:3 majority narrowly invalidated s 10 of the *Criminal Assets Recovery Act 1990* (NSW), a provision which allowed for ex parte restraining orders preventing dealings with property suspected of being the proceeds of crime and possibly liable to subsequent confiscation under the same legislation.

What is particularly interesting about the decision in *Kirk* is that it is *not* a direct application of the "incompatibility" doctrine flowing from *Kable*.[84] As discussed above, the argument to the conclusion that a privative clause cannot validly exclude review for jurisdictional error proceeds in two simple steps. First, the right of appeal to the High Court provided by s 73(ii) of the *Constitution*, and Ch III more generally, assumes and therefore requires that there be State Supreme Courts.

[80] McDonald, n 67 at 20.

[81] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[82] Including *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

[83] *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 84 ALJR 31. See also *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 Qd R 40.

[84] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, is not cited in the judgment, but was referred to at length in argument before the court.

Secondly, it is an essential aspect, a defining characteristic, of a Supreme Court that it retains the inherent ability to issue the prerogative writs, or remedies of that nature, and to restrain inferior courts and tribunals from jurisdictional error. Ergo, supervisory judicial review on that basis of State decision-making bodies is just as much required by and protected by the *Constitution* as is the case with supervisory review of Commonwealth bodies. The mechanism is different, with s 73(ii) playing the role in relation to State privative clauses as that played by s 75(5) in entrenching Commonwealth judicial review, but the substantive outcome is the same. Review for jurisdictional error cannot be validly excluded.

The principle that State Supreme Courts are preserved and entrenched by the *Constitution* now seems unexceptional. The issue is now the "defining characteristics" of those courts. We know from *Kable* that the *Constitution* prevents a State legislature from conferring upon a State court functions which are incompatible with the "defining characteristics" of a Ch III court. We now know from *Kirk* that Ch III also prevents a State legislature from removing any of the "defining characteristics" of a State Supreme Court. *Kirk* holds that these "defining characteristics" include at least the ability to conduct supervisory review for jurisdictional error. The fascinating question is what other, if any, "defining characteristics" of a State Supreme Court may also be held to be constitutionally protected.

As indicated earlier, answers to this question can only be speculative. Other, separate, "defining characteristics" may be discovered, or the ability to conduct "supervisory" review may be seen as an umbrella under which other inherent powers, such as a constitutional duty to ensure a fair trial, can take shelter. However such arguments are developed, it is likely that the court will be slow to respond to arguments that a wide range of powers or matters can be listed as "defining characteristics" of Supreme Courts.[85] Too broad an expansion would, for example, be hard to reconcile with the recent holdings of the court that a Supreme Court may permit the conduct of matters in a fashion which departs from accepted standards of judicial fairness, as in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* and *K-Generation Pty Ltd v Liquor Licensing Court*.[86]

However, there remains another intriguing potential answer to the question "what is a defining characteristic?" It may be that the power to conduct supervisory review is itself related to more fundamental, "defining characteristics" of a superior court. The *independence* of such a court may fall into this category. That independence may require that while State and Territory Supreme Courts now all have a statutory base, there remain constitutional limits upon the extent to which a legislature can validly impinge upon their jurisdiction. Only the courts themselves can ultimately determine those limits, and in that sense their jurisdiction, albeit now finding statutory support, remains inherent and self-determined. This necessarily includes the jurisdiction to conduct supervisory review. The reason this jurisdiction is essential to, or defining of, a superior court is that it is central to the carrying out of its constitutional "core functions".

Those constitutional "core functions" would seem to include, at least, the protection of individual rights and freedoms, and the concurrent legitimation of government action. Both functions are achieved via the mechanism of independent supervisory review. The independence of the courts when performing these functions is central to their effective performance. It is, in turn, central to that independence that the courts retain their capacity to determine for themselves the limits of their supervisory review capacity. Thus, they cannot ultimately cede the determination of those limits to the legislature, whether by conventional privative clauses, "no-invalidity" clauses or otherwise.

It is well understood that the superior courts, staffed by judges independent of government, play an essential role in our constitutional arrangements in protecting individual rights and liberties. What is more commonly overlooked is that the superior courts also play a central legitimating function within the *Constitution*. They function within the constitutional consensus to legitimate the actions of the legislature and the executive by conducting independent supervisory review of those actions.

[85] Counsel before the court in argument eschewed the opportunity to identify what those "defining characteristics" might be.

[86] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. For an interesting discussion of these issues, see Gray A, "Due Process, Natural Justice, Kable and Organisation Control Legislation" (2009) 20 PLR 290.

Supervisory review performs that legitimating function precisely because it is, and is perceived to be, independent of government. It is the very fact that a court will invalidate governmental action when the facts and circumstances demand this outcome that serves to validate the vast majority of governmental action as lawful and legitimate.

It follows that the independence of the superior courts, carrying with it their constitutionally protected supervisory review jurisdiction, may be crucial and perhaps "defining". If the superior courts lost, or were perceived to have lost, their independence from government they would be regarded as mere administrative functionaries. They would be disabled from performing their critical function of constitutional legitimation.

A constitutional road to the rule of law?

In their special leave applications, heard concurrently, the appellants in *Kirk* asked whether the lack of specificity in the charges laid against them made the duties imposed by ss 15 and 16 of the OH&S Act "incapable of compliance" and whether an affirmative answer meant that this was therefore "contrary to the rule of law".[87] The High Court, though critical of the previous interpretation of those provisions, did not go so far as to say that the rule of law was thereby breached. Rather than rely upon such inchoate notions, the court turned to the *Constitution*, and in particular to s 73(ii). As a result, the outcome is potentially of much broader application than a direct affirmative response to the appellants' arguments might have been, based as they were in a specific factual and legislative context. The effect of the decision in *Kirk* is that "the rule of law", or at least the self-regulating rule of the superior courts, is now placed on a comparable substantive constitutional footing in both Commonwealth and State jurisdictions. While the effect of s 75(v) in entrenching at least a minimum standard of supervisory judicial review is well established in relation to Commonwealth decisions, the effect of *Kirk* is that supervisory review is now equally well entrenched in relation to State decisions by virtue of s 73(ii). This closes what has been an extraordinary gap between the State and Commonwealth constitutional regimes.

At the same time, and in the face of more than a decade of legislative "expansionism" at both Commonwealth and State levels, the High Court has continued in *Kirk* the process it began in *Plaintiff S157* of strongly reasserting the role of an independent judiciary in the constitutional framework. This reassertion resonates with McDonald's articulation of what he terms an "institutional approach" to understanding the rule of law.[88] That institutional approach provides a further way of understanding the decision in *Kirk*. There must be an institution whose constitutional role it is to independently check, and thereby validate, the actions of government. In our evolving system of government, that role is currently performed by the superior courts, staffed by an independent judiciary.[89] Absent another independent institution capable of performing this constitutional role, it falls to the superior courts to do so. In *Kirk*, the High Court reaffirmed that constitutional responsibility.

[87] The special leave applications were in fact dismissed, in view of the success of the appeal proceedings from the Court of Appeal.

[88] McDonald, n 67 at 29.

[89] It would be a mistake to take too essentialist a view of our particular constitutional framework, and the particular forms currently taken by the courts. These have evolved historically and will necessarily continue to evolve. What is at issue here, however, is the functional importance of independent supervisory review of government action. The superior courts are simply the mechanism to hand for that purpose at the current time.