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The constitutionalisation of State administrative law – *Ronald Sackville QC AO*

The decision in Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531, is of profound importance. It has constitutionally entrenched the jurisdiction of State Supreme Courts to review State administrative action, including decisions of inferior courts and tribunals. In this way, the High Court has achieved symmetry with its own constitutionally entrenched jurisdiction to review federal administrative action. Kirk rests on fragile constitutional foundations, but it is authoritative. The decision has elevated the vague and uncertain concept of jurisdictional error to a constitutional norm. The potential width of the constitutional norm is likely to prompt State legislatures to adopt techniques other than privative clauses to protect decisions of State tribunals and inferior courts from judicial review. There is no shortage of techniques available. 127

Revisiting the purposes of judicial review: Can there be a minimum content to jurisdictional error? – *Zach Meyers*

The last several years have seen the High Court emphasise the scope of its supervisory jurisdiction in judicial review proceedings. Yet the court has also insisted that the underlying purpose of judicial review is to protect parliamentary sovereignty, which has led to judicial review becoming primarily an exercise in statutory interpretation. There is therefore a tension between courts' jurisdiction to address jurisdictional error, and Parliament's ability to expand decision makers' jurisdiction (for example, through privative clauses). This article considers this tension, and whether there is a minimum entrenched content to the concept of jurisdictional error which Parliament cannot exclude. The article concludes that, although the High Court has hinted that various grounds of judicial review may be entrenched, this would require a significant rethinking of the accepted purposes of judicial review. 138

The Hardiman principle: Revisited – *Nicholas Gouliaditis*

R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13 stands for the proposition that, other than in exceptional cases, a tribunal should not take an active role in judicial review proceedings challenging its decisions. Once thought to be limited to quasi-judicial tribunals exercising adjudicatory functions between parties, more recently the Hardiman principle has been extended to tribunals and other decision-makers exercising regulatory or administrative functions. And, contrary to previous assumptions, there is now authority to the effect that the rule applies also to proceedings before merits review tribunals. This article examines these developments and the difficulties they pose for government decision-makers and lawyers. The author questions whether the underlying rationale for the Hardiman principle, a concern that court-like tribunals maintain the appearance of impartiality, is applicable in the context of decision-makers exercising more traditional administrative functions or regulatory agencies charged with promoting and implementing the objects of their enabling legislation. The author argues that there are cogent reasons for permitting such decision-makers to take a more active role in proceedings challenging their decisions, especially with respect to matters that relate to the decision-maker's jurisdiction, powers and procedures. 152

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