

# PUBLIC LAW REVIEW

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**The impact of uncertain constitutional norms on government policy: Tribunal design after Kirk** – *Gabrielle Appleby and Anna Olijnyk*

The High Court’s Ch III jurisprudence is technical, complex and uncertain. In this article, we consider the extent to which the nature of recent High Court Ch III jurisprudence has affected State responses in the area of tribunal design, and particularly the role of courts in supervising tribunals. Uncertainty around this issue has been caused by the intersection of the general principle set down in *Mellifont v Attorney-General (Qld)* and the High Court’s landmark decision in *Kirk v Industrial Court (NSW)*. In short, while *Kirk* says that “islands of power immune from supervision and restraint” are to be avoided, the general principle in *Mellifont* provides that exercises of non-judicial power by a State appellate court are not subject to appeal to the High Court. More recent High Court statements in *Momcilovic* and *Kable (No 2)* confirm that the possible effect of the general principle in *Mellifont* is to create the islands warned of in *Kirk*. Through a recent South Australian case study, we explore whether this uncertainty is circumscribing State experimentation with institutional design. .... 91

**An alternative (partial) justification for the holding in Kirk** – *Oscar I Roos*

In *Kirk v Industrial Court (NSW)*, the High Court determined that, based on “accepted doctrine at the time of Federation”, s 73 of the Constitution entrenched the jurisdiction of the State Supreme Courts to review the decisions of State decision-makers on the grounds of jurisdictional error. In an earlier article, the author argued that this reasoning was seriously flawed. This article propounds an alternative, partial justification for the holding in *Kirk*, based on features inherent in the text and structure of Ch III of the Constitution at Federation and the preservation of those features in the face of the post-Federation dismantling of the imperial legal system. It argues that an implication can be inserted into s 73 which entrenches the jurisdiction of the State Supreme Courts to review the decisions of “Lower State Courts”, but not “State Administrators”. .... 111

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