

CASE NOTE

KIRK v INDUSTRIAL COURT OF NEW SOUTH WALES*

BREATHING LIFE INTO KABLE

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[The High Court's decision in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 follows the 2009 decision in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; both decisions breathing new life into the principle from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. Whereas the 2009 case involved a relatively straightforward application of *Kable* (as developed and re-articulated in subsequent cases), the decision in *Kirk* is far-reaching. The High Court has effectively extended the reach of ch III of the Constitution, holding that the supervisory jurisdiction of the state supreme courts is a defining characteristic of those courts and cannot therefore be removed. The implications of the decision will be played out over time, in cases where jurisdictional error is alleged and where state privative clauses come under closer scrutiny by the courts. However, the wider significance of *Kirk* lies in the High Court's defiant stance with respect to preserving its own supervisory role in reviewing the fundamental errors of inferior courts and tribunals. In this respect, the impact of *Kirk* may not be completely felt until the matters which the Court was ultimately able to sidestep in *Kirk*, but which absorbed the parties and interveners in their submissions, arise for determination in a future case.]

CONTENTS

I	Introduction.....	642
II	The Factual and Statutory Background	643
III	The Procedural History and the Issues Raised in the High Court Proceedings.....	646
IV	The Principal Elements of the High Court's Judgment	648
V	The Jurisdictional Errors.....	651
	A The First Jurisdictional Error: Misconstruction of Section 15.....	651
	B The Second Jurisdictional Error: Permitting the Prosecution to Call Kirk as a Witness.....	654
VI	The Constitutional Issues and the Requirements of Chapter III.....	655
VII	The Privative Clause in Section 179(1) of the <i>Industrial Relations Act 1996</i> (NSW).....	657
VIII	Certiorari, Jurisdictional Error and Inferior Courts	658
IX	The Unanswered Questions in <i>Kirk</i>	661
X	The Intervenors' Submissions.....	663
XI	Conclusion	667

* (2010) 239 CLR 531.

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I INTRODUCTION

Two recent judgments of the High Court on ch III of the *Constitution* stand out from much of the recent case law on that topic on the basis that they involved the application of the principle from *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')¹ to invalidate a state statutory provision and to quash a decision of the New South Wales Court of Appeal. The decisions in *International Finance Trust Co Ltd v New South Wales Crime Commission* ('*International Finance*')² and *Kirk v Industrial Court of New South Wales* ('*Kirk*')³ are thus unique for the simple reason that they both involved the positive application of ch III principles to quash and invalidate, contrasting with the majority of cases where *Kable* has been invoked.⁴ However, only in the former case was the *Constitution* considered to have been breached. In *Kirk*, the Court upheld the validity of New South Wales legislation but held that a Court of Appeal decision should be quashed on the basis that jurisdictional error had occurred, thereby affecting the validity of the *decision* under review. The original decision of the trial judge should, therefore, have been corrected by the Court of Appeal. The significance of *Kirk* lies in the extension of the *Kable* principle on the basis that the integrated court system and the unified common law necessitate the entrenchment of the supervisory jurisdiction of the supreme courts. The effect is to entrench judicial review for jurisdictional error at the state level, with a concordant effect on the scope and operation of state privative clauses. *Kirk* is thus the state equivalent of *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157*'),⁵ which affected the scope and operation of Commonwealth privative clauses.

Notwithstanding its significance, the decision in *Kirk* was relatively conventional in two respects. First, the decision did not answer the more contentious aspects of the appellants' case, but rather limited itself to answering the more conservative appeal question. Second, the legislative and factual background in *Kirk* involved the potential removal of legal questions from the High Court's ultimate control and, as such, was more likely to provoke the court's intervention. In other words, *Kirk* raised a legislative scenario which, if not constrained by the requirements of ch III, would have allowed state Parliaments to remove legal questions from the supervisory jurisdiction of the supreme courts and, ultimately, from the High Court. The implications for ch III related to the potential for the integrated court system and the unified common law to be undermined. The case also has obvious consequences for the rule of law in Australia, a fact which was reflected in the submissions of the parties and interveners, though not expressly in the final reasons of the Court.

International Finance, however, was an entirely different type of case, involving the conferral of powers upon a Supreme Court that were considered to

¹ (1996) 189 CLR 51.

² (2009) 240 CLR 319.

³ (2010) 239 CLR 531.

⁴ See the cases referred to in below n 7.

⁵ (2003) 211 CLR 476. See J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 81.

impermissibly undermine the institutional integrity of that Court. This case represents the first instance since *Kable* itself where the High Court has applied the *Kable* principle to invalidate state legislation; the only other case in which that had occurred was a decision of the Queensland Court of Appeal.⁶ Following a series of decisions in which challenges to state legislation had failed in the High Court,⁷ *International Finance* is thus a significant milestone. However, when viewed in the context of previous ch III jurisprudence, the decision did not come as a surprise. From the judges' perspective, the legislation left insufficient leeway for judicial choice and consequently the capacity of the judges to protect the integrity of the judicial process had been removed. For the majority, the discretionary powers of the court had been impermissibly constrained and the legislation could not be read down to ameliorate its effect. The significance of the decision in *Kirk* is all the more apparent when juxtaposed with the decision in *International Finance*; viewed together, the cases demonstrate the resilience of the *Kable* principle. This case note will focus solely on the decision in *Kirk*.

II THE FACTUAL AND STATUTORY BACKGROUND

The proceedings in the High Court involved three different matters: an appeal from a decision of the New South Wales Court of Appeal which had dismissed an appeal against conviction by the Industrial Court of New South Wales (S106 of 2009); and two special leave applications to appeal directly to the High Court under s 73(ii) of the *Constitution* from decisions of the Full Bench of the Industrial Court (S347 of 2008 and S348 of 2008). The High Court allowed the first appeal. In doing so, it was not necessary for the Court to engage with the more controversial aspects of the two special leave applications. Those applications had rested on a number of wideranging arguments about the scope of s 73(ii) and substantive conceptions about the rule of law and ch III. Whilst the High Court was not required to answer those questions, the unanswered questions are outlined and discussed below for two reasons: the issues raised were significant in prompting four Attorneys-General to intervene; and the scope of s 73(ii) may arise for determination in a future case.

Graeme Kirk was a director of the company Kirk Group Holdings Pty Ltd ('the Kirk company'), which owned a farm near Picton in New South Wales.⁸ The company had employed a manager, Graham Palmer, to run the day-to-day operations at the farm. Palmer was an experienced farm manager, who had previously run a large property of his own. On the other hand, Kirk, a friend of Palmer, had no farming experience and was suffering from poor health. In June 1998 the company purchased an All Terrain Vehicle ('ATV') on the

⁶ *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40. Cf *Totani v South Australia* (2009) 105 SASR 244, 266–7 [76], where Bleby J suggested that 'that case must be now regarded as of doubtful authority'.

⁷ See, eg, *Baker v The Queen* (2004) 223 CLR 513; *Fardon v A-G (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.

⁸ This summary of the facts is drawn from *Kirk* (2010) 239 CLR 531, 550 [5]–[6] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

recommendation of Palmer. On 28 March 2001, Palmer used the ATV to carry three lengths of steel (secured to carry racks on the back of the ATV) to fencing contractors who were working on the property in a far paddock. Instead of using a formed road which led to the paddock where the contractors were working, Palmer left the road and proceeded to drive down a steep hill. The ATV overturned as a consequence and Palmer was killed.

Kirk and the Kirk company were charged with offences under ss 15 and 16 of the *Occupational Health and Safety Act 1983* (NSW) ('*OH&S Act*'). Section 50(1) provided that, where a corporation contravenes any provision of the Act, whether by act or omission, each director of the corporation, and each person concerned in its management, shall be deemed to have contravened the same provision unless the Industrial Court is satisfied that the person was not in a position to influence the conduct of the corporation, had used all due diligence to prevent the contravention, or that the corporation contravened the provision without the person's knowledge. Sections 15 and 16 provide as follows:

Section 15

- (1) Every employer shall ensure the health, safety and welfare at work of all the employer's employees.
- (2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails:
 - (a) to provide or maintain plant and systems of work that are safe and without risks to health;
 - (b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;
 - (c) to provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of the employer's employees;
 - (d) as regards any place of work under the employer's control:
 - (i) to maintain it in a condition that is safe and without risks to health; or
 - (ii) to provide or maintain means of access to and egress from it that are safe and without any such risks;
 - (e) to provide or maintain a working environment for the employer's employees that is safe and without risks to health and adequate as regards facilities for their welfare at work; or
 - (f) to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information:
 - (i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health; or
 - (ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure

that the substance will be safe and without risks to health when properly used.

Section 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.

Defences were provided in s 53:

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:

- (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
- (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.

As the High Court stated, the provisions in the New South Wales legislation are distinct from those which operate in other states:

In other States the employer's obligation, to take measures for the health and safety of employees and others, was limited to the taking of such measures as were practicable. This Court has held that such a provision places the onus upon the prosecution to show that the means which should have been employed to remove or mitigate a risk were practicable. A feature of the legislation here in question is that where an employer is charged with an act or omission which is a contravention of s 15 or s 16, it will be necessary for the employer to establish one of the defences available under s 53 in order to avoid conviction. Where reliance is placed by the employer on s 53(a), it would be necessary for the employer to satisfy the Industrial Court, to the civil standard of proof, that it was not reasonably practicable to take the measure in question. Such a defence can only address particular measures identified as necessary to have been taken in the statement of offence.⁹

Herein lies the key to the Court's interpretation of the relevant sections of the *OH&S Act*; the sections were not to be taken 'as requiring an employer to negate the general provisions of ss 15 and 16 and to establish that every possible risk was obviated. It requires that regard be had to the breach of the provision which it is alleged constituted the offences.'¹⁰ Thus, the employer's act or omission in respect of measures which were reasonably practicable had to be identified in the statement of the offence and the particulars provided with it. This construction of the relevant sections enabled the Court to reject the arguments of the appellants on this point, an issue considered in further detail below.

⁹ Ibid 554 [16] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

¹⁰ Ibid 554 [17].

III THE PROCEDURAL HISTORY AND THE ISSUES RAISED IN THE HIGH COURT PROCEEDINGS

Following convictions by Walton J in the Industrial Court for offences under ss 15 and 16 of the *OH&S Act*¹¹ and the imposition of penalties totalling \$121,000,¹² Kirk and the Kirk company appealed against the convictions in the New South Wales Court of Appeal.¹³ In the Court of Appeal, while Basten JA noted the significant constitutional questions raised by the case,¹⁴ the Court declined to intervene until the Full Bench of the Industrial Court had decided the issue of jurisdiction or refused leave to appeal from the decision of Walton J.¹⁵ It is significant that the privative clause contained in s 179(1) of the *Industrial Relations Act 1996* (NSW) does not apply to appeals to the Full Bench of the Industrial Court, but the right of appeal is by leave of the Full Bench of that Court.

Due to the time taken on the appeal to the Court of Appeal, the appellants were required to obtain an order from the Full Bench of the Industrial Court granting leave to appeal out of time. Although leave was granted, the Full Bench limited the question to be heard on appeal to whether Walton J had addressed the submission that the Kirk company had fulfilled its duty through Palmer who, rather than Kirk, had been chosen by the company to meet its legal obligations.¹⁶ The Full Bench justified this limited ground on the basis that the applicants were responsible for the delay in bringing the appeal (as a consequence of ‘forum shopping’)¹⁷ and were challenging a settled body of the Industrial Court’s jurisprudence.¹⁸ The Full Bench heard the limited appeal and dismissed it.¹⁹

An application was then made for orders in the nature of certiorari quashing the decisions of the Industrial Court at first instance and the two decisions of the Full Bench. All parties accepted the capacity of the Court of Appeal to exercise supervisory jurisdiction for jurisdictional error.²⁰ The Court of Appeal focused on three errors alleged by the claimant in their submissions: that the Industrial Court had improperly interpreted s 15; that the defence in s 53 was too narrowly applied, thus rendering it ineffective; and that questions of corporate responsibil-

¹¹ See *WorkCover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166.

¹² See *WorkCover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462.

¹³ See *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151. Under s 196(3) of the *Industrial Relations Act 1996* (NSW), a reference in the *Criminal Appeal Act 1912* (NSW) to the Court of Criminal Appeal is to be taken to refer to the Full Bench of the Industrial Court. Sections 196(1) and (2) provide that the *Criminal Appeal Act 1912* (NSW) applies to an appeal to the Full Bench in the same way as it applies to the Court of Criminal Appeal.

¹⁴ *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151, 171–2 [90]–[95].

¹⁵ *Ibid* 159 [34] (Spigelman CJ), 162 [52] (Beazley JA), 169–70 [83], 185 [156] (Basten JA).

¹⁶ *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 158 IR 281, 297 [57] (Wright, Boland and Backman JJ).

¹⁷ *Ibid* 293 [40], 295 [47].

¹⁸ *Ibid* 297 [48].

¹⁹ See *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2007) 164 IR 146.

²⁰ *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465, 471 [21] (Spigelman CJ).

ity had been confused.²¹ The Court dismissed the appeal on the basis that any such errors rested on findings of fact and were thus not ‘jurisdictional errors’ warranting the grant of certiorari.²²

This decision was then appealed to the High Court (No S106 of 2009) and two further and separate applications for special leave were sought in respect of each of the decisions of the Full Bench of the Industrial Court (No S347 of 2008 and No S348 of 2008). As noted, the High Court found it unnecessary to decide the substantive questions raised by the two special leave applications. However, the issues outlined in the written submissions of the appellants/applicants were as follows:

No S106 of 2009 — Appeal from the Court of Appeal Decision:

- (a) Does the construction afforded to s 15 of the *OH&S Act* by the Industrial Court of NSW in the subject proceedings render it incapable of compliance?
- (b) If the answer to (a) above is in the affirmative, does this offend the *Constitution*, as being contrary to the rule of law?
- (c) Did the failure of the Full Bench of the Industrial Court to consider the submission which was underlying the one issue upon which leave to appeal was granted amount to jurisdictional error in that it led to a constructive failure to exercise jurisdiction?
- (d) Where a court of criminal jurisdiction is protected from appellate review, should its jurisdiction be confined strictly to the offences created by the statute?²³

No S347 of 2008 — Appeal from the First Decision of the Full Bench of the Industrial Court

- (a) Is there a right of appeal by leave from the Full Bench of the Industrial Court to this Court?
- (b) If there is such a right of appeal, did the Full Bench of the Industrial Court err in failing to permit the Applicants to agitate on appeal before it those matters which had been identified by the Court of Appeal as being capable of argument before the Full Bench of the Industrial Court?²⁴

No S348 of 2008 — Appeal from the Second Decision of the Full Bench of the Industrial Court

- (a) Is there a right of appeal by leave from the Full Bench of the Industrial Court to this Court?

²¹ Ibid 471 [24].

²² Ibid 474 [38]–[39].

²³ Graeme Joseph Kirk and Kirk Group Holdings Pty Ltd, ‘Appellants’ Submissions’, Submission in *Kirk v Industrial Court of New South Wales*, No S106 of 2009, 14 September 2009, 2 [6] (‘Appellants’ Submissions No S106 of 2009’).

²⁴ Kirk Group Holdings Pty Ltd and Graeme Joseph Kirk, ‘Applicants’ Submissions’, Submission in *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*, No S347 of 2008, 14 September 2009, 2 [9] (‘Applicants’ Submissions No S347 of 2008’).

- (b) If there is such a right of appeal, did the Full Bench of the Industrial Court err in failing to uphold the appeal to it by the Applicants in relation to the assertion that it was Mr Palmer, rather than Mr Kirk, who satisfied the statutory obligations of the Company?²⁵

Special leave was granted in respect of the Court of Appeal decision on 1 May 2009, with the two special leave applications referred to the full bench of the High Court for consideration. Following the issue of *Judiciary Act 1903* (Cth) s 78B notices, the Attorneys-General for the Commonwealth, New South Wales, South Australia and Victoria intervened in the High Court proceedings. Hearings were held over two days in September and October 2009.

IV THE PRINCIPAL ELEMENTS OF THE HIGH COURT'S JUDGMENT

The decision of the Court was handed down on 3 February 2010 and was comprised of two sets of reasons: a joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; and a separate (but largely concurring) judgment of Heydon J. The only issue upon which Heydon J dissented related to the orders for costs; Heydon J would have made a more generous costs order in favour of the appellants. His Honour described the pursuit of Kirk by the WorkCover Authority of New South Wales as a 'sport'²⁶ and the 'cumulative effects on the appellants' as 'oppressive'.²⁷ According to Heydon J, 'the proceedings should have never been instituted.'²⁸ His Honour was concerned to avoid the 'paradoxical result' that Kirk's success would be dwarfed by the costs associated with the proceedings in the courts below.²⁹ The Court was, however, unanimous in holding that certiorari would lie for two jurisdictional errors committed by the Industrial Court. The Court of Appeal decision was set aside and, in its place, orders were made quashing the two decisions of the Industrial Court and the two decisions of the Full Bench.³⁰ With regard to costs, the High Court ordered that the second respondent pay the costs associated with the High Court appeal and the Court of Appeal proceedings, and the original costs orders made by the Industrial Court and the Full Bench were quashed.³¹ In the plurality judgment, however, the view was taken that the Court, in exercising powers akin to the Court of Appeal in its original jurisdiction, had the power to quash the decisions of the Industrial Court and the Full Bench of that Court, but not the power to issue new costs orders in respect of those decisions.³²

²⁵ Kirk Group Holdings Pty Ltd and Graeme Joseph Kirk, 'Applicants' Submissions', Submission in *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*, No S348 of 2008, 14 September 2009, 2 [11] ('Applicants' Submissions No S348 of 2008').

²⁶ *Kirk* (2010) 239 CLR 531, 592 [125].

²⁷ *Ibid.*

²⁸ *Ibid* 591 [125].

²⁹ *Ibid* 591 [124].

³⁰ *Ibid* 584 [109] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 590–1 [123] (Heydon J).

³¹ *Ibid* 584 [111] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³² *Ibid* 584 [110]–[111].

The ch III implications of the decision would have been much wider had the Court been required to decide the special leave applications. However, the decision is nonetheless significant. First, it involved the extension or clarification of the *Kable* principle by identifying the supervisory jurisdiction of the supreme courts as one of the defining characteristics of those courts ultimately protected under ch III.³³ Secondly, it made clear that, at the state level (as is already clear at the federal level), an attempt to remove or limit the supervisory jurisdiction of the supreme courts through a privative clause is beyond the power of the state legislatures.³⁴ Thus, the interpretation and application of privative clauses at the state level will now involve very much the same process that is undertaken at the federal level.³⁵ The High Court has, through the development of the *Kable* principle, as re-articulated in *Forge v Australian Securities and Investments Commission* ('*Forge*'),³⁶ identified an entrenched minimum requirement of judicial review that applies to decisions at the state level, despite there being no state equivalent of s 75(v) of the *Constitution*.³⁷ The plurality judgment offered a detailed analysis of the continuing utility in maintaining the distinction between jurisdictional and non-jurisdictional error in Australia.³⁸ It held that the *Constitution* requires that the distinction be maintained in order to mark out the bounds of legislative power with respect to the supervisory jurisdiction of the supreme courts. As the plurality noted:

Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.³⁹

The decision in *Kirk* has not unsettled the High Court decision in *Craig v South Australia* ('*Craig*'),⁴⁰ but the Court gave a strong indication that the categories of jurisdictional error outlined in that decision should be treated as examples only and not 'taken as marking the boundaries of the relevant field.'⁴¹

Thus, the changes in the position of the law effected by the decision in *Kirk* relate to the scope of state legislative power to impair or remove the supervisory jurisdiction of the supreme courts, the way in which state privative clauses will be interpreted and applied (with the potential for such clauses to be declared invalid if they breach the requirements of ch III), and the general approach to the

³³ Ibid 566 [55].

³⁴ Ibid 566–7 [55].

³⁵ See *Plaintiff S157* (2003) 211 CLR 476.

³⁶ (2006) 228 CLR 45.

³⁷ Section 75(v) provides that '[i]n all matters ... (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.'

³⁸ *Kirk* (2010) 239 CLR 531, 569–73 [60]–[70].

³⁹ Ibid 581 [100].

⁴⁰ (1995) 184 CLR 163. For a more detailed discussion of *Kirk* and its implications for the judgments in *Craig*, see Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of *Hickman*?' (2010) 21 *Public Law Review* 92, 95–7.

⁴¹ (2010) 239 CLR 531, 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

interpretation and operation of the *OH&S Act* in New South Wales. In this last respect, the approach of prosecutors and judges applying the *OH&S Act* must necessarily change.

The following sections are directed to examining the major elements of the decision in *Kirk*: the two jurisdictional errors, the constitutional points derived from the requirements of ch III, jurisdictional error and privative clauses. These sections focus on the major steps as set out in the plurality judgment's reasoning:

- (a) Both errors of law appear in the reasons of Walton J.
- (b) Both errors therefore appear 'on the face of the record' as that expression must be understood in the light of s 69(3) and (4) of the *Supreme Court Act 1970* (NSW).
- (c) Both errors are jurisdictional errors.
- (d) Chapter III of the Constitution requires that there be a body fitting the description 'the Supreme Court of a State'.
- (e) 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.
- (f) A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition and mandamus, and, as explained further in these reasons, also certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error.
- (g) If a court has limited powers and authority to decide issues of an identified kind, a privative provision does not negate those limits on that court's authority.
- (h) A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature. It is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.
- (i) Construed against this constitutional background, s 179 of the [*Industrial Relations Act 1996* (NSW)] does not (and could not validly) exclude the jurisdiction of the Supreme Court of New South Wales to grant relief in the nature of prohibition, certiorari or mandamus directed to the Industrial Court for the purposes of enforcing the limits on that Court's statutory authority. In particular, the privative provisions of s 179 do not, on their proper construction, exclude certiorari for jurisdictional error.
- (j) In determining whether the errors of law that were made by Walton J permitted the grant of relief in the nature of certiorari, statutory identification of the Industrial Court as a 'superior court of record' is irrelevant.⁴²

⁴² Ibid 566–7 [55] (citations omitted).

V THE JURISDICTIONAL ERRORS

A *The First Jurisdictional Error: Misconstruction of Section 15*

The appellants argued that the Industrial Court had applied an interpretation of the Act which meant that it was impossible to comply with the legislation; that ss 15 and 16 created an ‘absolute duty’. Indeed, the High Court acknowledged that the earlier decisions of the Industrial Court had espoused a reading of the legislation that supported the propositions ‘that a prosecutor is not required to demonstrate that particular measures should have been taken’⁴³ and ‘that the duty imposed upon an employer, to ensure the health, safety and welfare of employees at work, is absolute’.⁴⁴ In this respect, the appellants had argued that the legislation was impossible of compliance and was inconsistent with the rule of law (and, therefore, the *Constitution*). In adopting an alternate construction of the sections, the High Court was able to avoid the rule of law issue, although Heydon J did mention it briefly in obiter.⁴⁵

In reference to the reasons of Walton J, the High Court found that the approach taken by the Industrial Court involved a misconstruction of the Act:

The approach taken by the Industrial Court fails to distinguish between the content of the employer’s duty, which is generally stated, and the fact of a contravention in a particular case. It is that fact, the act or omission of the employer, which constitutes the offence. Of course it is necessary for an employer to identify risks present in the workplace and to address them, in order to fulfil the obligations imposed by ss 15 and 16. It is also necessary for the prosecutor to identify the measures which should have been taken. If a risk was or is present, the question is — what action on the part of the employer was or is required to address it? The answer to that question is the matter properly the subject of the charge.⁴⁶

Applying this approach to the construction of the legislation, the Court made the following findings:

his Honour’s reasons disclose a wrong understanding of what constituted an offence against ss 15 and 16 and how the defence under s 53(a) was to be applied in proceedings for such an offence. His Honour did not appreciate that no act or omission on the part of the Kirk company had been charged. To the contrary, his Honour accepted the proposition that the prosecutor is not required to dem-

⁴³ Ibid 560 [32].

⁴⁴ Ibid.

⁴⁵ Ibid 587 [120]:

The suggestion that the owners of farms are obliged to conduct daily supervision of employees and contractors — even the owners of relatively small farms like Mr Kirk’s — is, with respect, an astonishing one. A great many farms in Australia are owned by natural persons who do not reside on or near them, and a great many other farms are owned by corporations the chief executive officers of which do not reside on or near them. The suggestion reflects a view of the legislation which, if it were correct, would justify many of the criticisms to which counsel for the appellants subjected it as being offensive to a fundamental aspect of the rule of law on the ground that it imposed obligations which were impossible to comply with and burdens which were impossible to bear.

⁴⁶ Ibid 561 [34].

onstrate that particular measures should have been taken to prevent the risk identified.

A consequence of the matter proceeding to conviction on the charges as stated, absent the identification of measures the Kirk company should have taken, was that it was denied the opportunity to properly put a defence under s 53(a). Instead, the Kirk company was required to show why it was not reasonably practicable to eliminate possible risks associated with the use, or possible use, of the ATV.⁴⁷

Having identified the need for detailed particulars in the statement of offence — based on the proper construction of the Act and consideration of common law principles — the High Court looked closely at the relevant statements and particulars that were provided to Kirk and the Kirk company. Each was held to contain major deficiencies that were ultimately treated by the Court as involving jurisdictional error. As the plurality judgment observed, the particulars in respect of the s 15 offence ‘did little more than follow the words of that sub-section ... only that [particular] which alleged a failure to ensure that the ATV was operated by persons with appropriate training came close to any measure of specificity.’⁴⁸

This interpretation of ss 15, 16 and 53 was bolstered by reference to the common law and, particularly, the requirement that a defendant be entitled to be told ‘not only of the legal nature of the offence with which he or she is charged, but also of the particular act, matter or thing alleged as the foundation of the charge’.⁴⁹ The Court relied upon statements in *John L Pty Ltd v Attorney-General (NSW)* and *Johnson v Miller*.⁵⁰ The former case offered a dual rationale for the rule — ‘the necessity of informing the court of the identity of the offence with which it is required to deal’ and the need to provide ‘the accused with the substance of the charge which he is called upon to meet’.⁵¹ In the latter case, Dixon J held that information must be provided ‘specifying the time, place and manner of the defendant’s acts or omissions’⁵² and McTiernan J referred to the need for ‘fair information and reasonable particularity as to the nature of the offence charged’.⁵³

Significantly, the Court in *Kirk* adopted the reasoning of Dixon J in *Johnson v Miller* in holding that the common law rule had not been removed by s 11 of the *Criminal Procedure Act 1986 (NSW)*.⁵⁴ That section provides that the description of any offence in the words of an Act creating the offence ‘is sufficient in law.’ This aspect of the judgment therefore involved the application of the principle of legality to preserve the requirements of the common law in the

⁴⁷ Ibid 561–2 [37]–[38].

⁴⁸ Ibid 557 [25].

⁴⁹ Ibid 557 [26].

⁵⁰ Ibid 557 [26], citing *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508 and *Johnson v Miller* (1937) 59 CLR 467.

⁵¹ *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508, 519 (Mason CJ, Deane and Dawson JJ).

⁵² *Johnson v Miller* (1937) 59 CLR 467, 486.

⁵³ Ibid 501.

⁵⁴ (2010) 239 CLR 531, 559 [29] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

absence of their clear legislative removal. In doing so, the High Court was able to maintain its more favourable construction of the unusual legislative provisions in the *OH&S Act*. The interpretive tools of the common law (the principle of legality) coupled with the common law principle previously espoused by the High Court in *Johnson v Miller* were thus critical to the process of interpreting the impugned provisions.

Though this approach enabled the Court to sidestep the broader rule of law arguments raised by the appellants in respect of the Act's construction, it would be wrong to treat the Court's reasoning as a convenient sidestepping of the constitutional issues. In the opinion of the author, this aspect of the judgment involved conventional ch III judging; a determination by the judges as to the operation and effect of an impugned law, which was approached through the application of accepted interpretive principles and principles derived from the common law. Sufficient leeway for judicial choice remained under the legislation and the Court was able to give a beneficial reading of the statutory provisions that did not conflict with ch III principles. The application of that construction to the statement of offences in the case, however, disclosed a major deficiency in how the charges were initially prosecuted:

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.⁵⁵

For the High Court, the deficiencies in the statement of offences and the lack of particulars provided were ultimately reduced to the misconstruction by the Industrial Court of s 15 of the *OH&S Act*. On a proper construction of s 15, the Industrial Court lacked the power to make orders convicting and sentencing Kirk and the Kirk company:

It had no power to do that because 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. And the failure to identify the particular act or omission, or set of acts or omissions, alleged to constitute the contravening conduct followed from the misconstruction of s 15. 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.⁵⁶

Therefore, the High Court held that the Industrial Court, in misconstruing the provisions of the Act, had not only made an error about the limits of its functions and powers, but consequently had made orders convicting Kirk and the Kirk company when it lacked the power to do so.⁵⁷

⁵⁵ Ibid 558 [28].

⁵⁶ Ibid 575 [74] (emphasis in original).

⁵⁷ Ibid 575 [75].

B *The Second Jurisdictional Error: Permitting the Prosecution to Call Kirk as a Witness*

It was not until the hearing of the High Court appeal that an issue arose concerning the fact that the trial judge, Walton J, had permitted the prosecution to call Kirk as a witness. The Industrial Court is subject to the rules of evidence of New South Wales,⁵⁸ including a provision stipulating that a defendant is not competent to give evidence for the prosecution.⁵⁹ Whilst certain rules of evidence can be dispensed with (with the consent of the parties),⁶⁰ the rule in s 17(2) is not one of them. This flaw in the proceedings at trial, despite having been agreed to by the parties, was held by the High Court to involve a significant jurisdictional error that warranted the granting of certiorari. However, in reaching this decision, the Court acknowledged that not every breach of the rules of evidence will warrant the grant of relief in the nature of certiorari.⁶¹ On this issue, Heydon J provided more detailed reasons:

It is possible that there may be instances of failure to comply with the rules of evidence which are of insufficient significance to cause the court making them to move outside jurisdiction. It is also possible, as the majority suggest, that even insignificant failures would be jurisdictional errors, but not jurisdictional errors of a type justifying the exercise of an appellate court's discretion in favour of granting relief.

But the error involved here in the prosecution calling a personal defendant as its witness to give a substantial quantity of testimony is within neither of these two categories. On any view it was a jurisdictional error, and there was no discretionary reason for refusing relief.⁶²

Related to this issue was the concern expressed in both judgments, but most forcefully by Heydon J, with the dangers of establishing 'specialist' courts.⁶³ In this respect, his Honour gave a scathing critique of courts that become 'preoccupied with special problems' and which may be susceptible to 'develop[ing] distorted positions':⁶⁴

a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents.

⁵⁸ *Industrial Relations Act 1996* (NSW) s 163(2).

⁵⁹ *Evidence Act 1995* (NSW) s 17(2).

⁶⁰ *Ibid* s 190.

⁶¹ *Kirk* (2010) 239 CLR 531, 565 [53] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶² *Ibid* 585 [114]–[115] (citations omitted).

⁶³ *Ibid* 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 589–90 [122] (Heydon J).

⁶⁴ *Ibid* 590 [122]. The words 'distorted positions' come from Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up.⁶⁵

In the plurality judgment, the error committed by the Industrial Court was adjudged to mean that the Court conducted a trial that was not in accordance with the laws of evidence. Accordingly, the Industrial Court acted ‘in breach of the limits on its power to try charges of a criminal offence’ and ‘misapprehended a limit on its powers’.⁶⁶

VI THE CONSTITUTIONAL ISSUES AND THE REQUIREMENTS OF CHAPTER III

The capacity of the Court to grant certiorari ultimately rested on the extent to which the supervisory jurisdiction of the supreme courts was protected by ch III. This issue had to be addressed in the context of dealing with the privative clause in s 179(1) of the *Industrial Relations Act 1996* (NSW). That section provides that a decision of the Industrial Court, however constituted, ‘is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.’ Subsection (1) is extended under subsection (5) ‘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.’ That constitutional considerations affect the validity, interpretation and scope of federal privative clauses had been recognised in previous High Court decisions, specifically in *R v Hickman; Ex parte Fox*⁶⁷ and *Plaintiff S157*. However, the question of the impact of the *Constitution* on state privative clauses had not been resolved by the High Court prior to *Kirk*.⁶⁸

The High Court in *Kirk* was able to build upon the clear statements made in *Forge* in 2006 and to clarify certain aspects of the *Kable* principle. *Forge* made it clear that one of the implications to flow from the inclusion of the supreme courts in ch III is the requirement that there be a body fitting the description ‘the Supreme Court of a State’.⁶⁹ The constitutional corollary of that requirement is that it lies ‘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.’⁷⁰ In *Kirk*, the Court accepted that at federation each of the supreme courts referred to in s 73 of the *Constitution* had jurisdiction reflecting that of the Court of Queen’s Bench in England and that each, accordingly, had the power to issue the writ of certiorari to any inferior court.⁷¹ Citing *Colonial Bank of Australasia*

⁶⁵ *Kirk* (2010) 239 CLR 531, 590 [122].

⁶⁶ *Ibid* 575 [76] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁷ (1945) 70 CLR 598.

⁶⁸ See *Darling Casino Ltd v Casino Control Authority (NSW)* (1997) 191 CLR 602, 633–4 (Gaudron and Gummow JJ).

⁶⁹ *Ibid* 76 [63] (Gummow, Hayne and Crennan JJ).

⁷⁰ *Ibid*.

⁷¹ (2010) 239 CLR 531, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing *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 1867 (Qld)* 31 Vict 23, ss 21, 34; *Supreme Court Act 1855–6 (SA)* 19 Vict 31, s 7;

v Willan,⁷² the High Court also noted that ‘accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.’⁷³ On that basis, the plurality reasoned as follows:

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 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. And because, ‘with such exceptions and subject to such regulations as the Parliament prescribes’, s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the ‘Federal Supreme Court’ in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.⁷⁴

There are two points that should be made about this reasoning. The Court referred to the jurisdiction of the supreme courts at the time of federation in identifying that the supervisory jurisdiction of the Courts was a ‘defining characteristic’ that could not be altered or removed by Parliament. This is consistent with the approach taken in earlier cases where the Court claimed it was impossible to list the defining characteristics of courts, but that the capacity to conduct an adversarial trial was probably one such characteristic.⁷⁵ Thus, consideration of the powers and jurisdiction of the supreme courts throughout history is an obvious method for identifying a ‘defining characteristic’. The second point to be made relates to the High Court’s superintendence of the supervisory jurisdiction of the supreme courts. In linking that superintendence with the High Court’s responsibility for maintaining a unified common law, the High Court signalled a warning against the removal of the supervision of the supreme courts. This limb of the Court’s reasoning was not premised on the legal position that pertained at federation, but on its decisions handed down nearly 100 years later:

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. 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

Supreme Court Act 1890 (Vic) 54 Vict 1141, s 18; *Supreme Court Ordinance 1861* (WA) 24 Vict 15, s 4; *Supreme Court Act 1880* (WA) 44 Vict 10, s 5.

⁷² (1874) LR 5 PC 417, 442 (Sir James W Colville for Sir James W Colville, Sir Barnes Peacock, Sir Montague E Smith, Sir Robert P Collier and Sir Lawrence Peel).

⁷³ *Kirk* (2010) 239 CLR 531, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁴ *Ibid* 580–1 [98].

⁷⁵ *Forge* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ).

islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of ‘distorted positions’. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.⁷⁶

Interestingly, the High Court linked the defining characteristics of the supreme courts to the High Court’s role in maintaining the unified common law. The Court also clearly stated that the defining characteristics of the supreme courts are to be exercised in accordance with principles set by the High Court. The implicit point here is that history alone will not set the parameters of what ch III requires of the supreme courts, but that the High Court’s responsibility for the maintenance of the Australian common law will also underscore the Court’s approach to ch III and its requirements. One thing that is certain from *Kirk* is that the High Court will not countenance ‘islands of power’ beyond its supervision or restraint.

VII THE PRIVATIVE CLAUSE IN SECTION 179(1) OF THE *INDUSTRIAL RELATIONS ACT 1996* (NSW)

The constitutional points made by the Court obviously applied directly to the question of interpretation of the privative clause in s 179(1) of the *Industrial Relations Act 1996* (NSW). In this context, the Court’s reasoning was consistent with the approach that it takes at the federal level to privative clauses; giving them a narrow construction and, where possible, interpreting them in a way that preserves the section’s constitutional validity. In this vein, s 179(4) was treated as irrelevant to the case before the Court — that section extends the privative clause to purported decisions of the Industrial Court on an issue of the jurisdiction of that Court. Applying the decision in *Batterham v QSR Ltd*,⁷⁷ this provision was read as referring to ‘a decision of the Industrial Court that it does or does not have jurisdiction in a particular matter.’⁷⁸

In interpreting s 179(1), the Court adopted an approach based on the constitutional considerations previously outlined. The Court determined that on its proper construction the section ‘does not preclude the grant of certiorari for jurisdictional error’⁷⁹ and that ‘[t]o grant certiorari on that ground is not to call into question a “decision” of the Industrial Court as that term is used in s 179(1).’⁸⁰ Thus, s 179(1) did not preclude review of decisions affected by jurisdictional error, as such decisions were not to be treated as ‘decisions’ protected by the privative clause. This construction of the section was necessi-

⁷⁶ *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted), citing *Lipohar v The Queen* (1999) 200 CLR 485, 505 [43] (Gaudron, Gummow and Hayne JJ).

⁷⁷ (2006) 225 CLR 237.

⁷⁸ *Kirk* (2010) 239 CLR 531, 582 [103] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁷⁹ *Ibid* 583 [105].

⁸⁰ *Ibid*.

tated by the constitutional requirements of ch III and reflects the same approach to interpretation that takes place where federal privative clauses are involved.

The Court, when considering the construction of the privative clause, also looked at the implications of the Industrial Court being described as a 'superior court of record'. For the High Court, such a description of the Industrial Court had no bearing on the availability of certiorari in the case. In the Court's opinion, the amenability of an inferior court to supervisory review rests upon the fact that the court is one of limited jurisdiction, and not because it is 'inferior'.⁸¹ Indeed, as the High Court stated, the notion of 'superior courts of record' has no ready application in Australia, where every court is one of limited jurisdiction, including the state supreme courts (at least since federation).⁸²

VIII CERTIORARI, JURISDICTIONAL ERROR AND INFERIOR COURTS

One of the lengthier sections of the plurality judgment in *Kirk* concerned the availability of certiorari, both for jurisdictional error and for error of law on the face of the record. Particular attention was given to providing an historical overview of the development of the two bases upon which certiorari may be granted,⁸³ the presence of competing purposes behind the grant of the remedy⁸⁴ and the lack of coherent principles based on logic informing the law in this area.⁸⁵ The plurality judgment highlighted the tension inherent in wanting to ensure that tribunals observe the law but also in desiring that a degree of finality be afforded to the decisions of the tribunal.⁸⁶ The judgment also traced the law's development in response to the narrowing of the 'record' for the purposes of identifying errors of law on the face of the record, from the *Summary Jurisdiction Act 1848* (UK) 11 & 12 Vict, c 43 to the decision of the High Court in *Craig*.⁸⁷ The search for 'jurisdictional' errors began as a means of ensuring that inferior tribunals observed the law. In this context, the judgment is illuminating for the extent to which it includes reference to Louis L Jaffe,⁸⁸ who argued against allowing 'distorted positions' to be developed in inferior tribunals.⁸⁹ According to Jaffe, 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.'⁹⁰ As the High Court noted, Jaffe believed that

⁸¹ Ibid 583 [107].

⁸² Ibid.

⁸³ Ibid 568–573 [60]–[70].

⁸⁴ Ibid 567–8 [57].

⁸⁵ Ibid 567 [56].

⁸⁶ Ibid 567–8 [57].

⁸⁷ Ibid 568–73 [59]–[70].

⁸⁸ Ibid 570 [62]–[64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See Jaffe, above n 64.

⁸⁹ See Jaffe, above n 64, 963.

⁹⁰ Ibid.

denominating some questions as ‘jurisdictional’ was ‘almost entirely functional: it is used to validate review when review is felt to be necessary’.⁹¹

Having acknowledged the functional nature of jurisdictional error, the plurality judgment moved to an examination of *Craig*, where a distinction had been drawn between inferior courts and tribunals for the purposes of identifying jurisdictional errors.⁹² Though the Court did not question the substance of the decision in *Craig*, the decision in *Kirk* offers a number of important qualifications to the reasoning in the earlier decision. First, the distinction made between inferior courts and tribunals in *Craig* was said to rest on unexpressed assumptions about the capacity of a body ‘authoritatively’ to determine questions of law (the assumption being that courts can so decide, whereas tribunals cannot).⁹³ Secondly, the decision assumed that it is an easy task to distinguish between the two types of bodies, when in fact that task can be a rather complex one at the state level, where a strict separation of judicial power is not mandated.⁹⁴ The High Court in *Kirk* made it clear that ‘authoritative’ in the sense used in *Craig* did not mean that the decision of an inferior court was not subject to review by a superior court. An authoritative decision would be one that was ‘not attended by jurisdictional error’.⁹⁵

Two final comments need to be made in the context of the Court’s discussion of jurisdictional error. First, the Court reiterated that the general description of jurisdictional error for an inferior court, as described in *Craig*, still applied:

an inferior court falls into jurisdictional error ‘if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist’.⁹⁶

However, the three examples provided in *Craig* were to be treated as such and not ‘seen as providing a rigid taxonomy of jurisdictional error’.⁹⁷ Those examples included the following:

- (a) the absence of a jurisdictional fact;
- (b) disregard of a matter that the relevant statute requires be taken into account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and
- (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.⁹⁸

⁹¹ *Kirk* (2010) 239 CLR 531, 570 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Jaffe, above n 64, 963.

⁹² *Craig* (1995) 184 CLR 163, 176 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁹³ *Kirk* (2010) 239 CLR 531, 572–3 [68]–[69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁹⁴ *Ibid* 573 [69].

⁹⁵ *Ibid* 573 [70].

⁹⁶ *Ibid* 573–4 [72], quoting *Craig* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) (emphasis added by the plurality).

⁹⁷ *Kirk* (2010) 239 CLR 531, 574 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

The Court made it abundantly clear, therefore, that, whilst the examples from *Craig* might be helpful, any attempt to set out the bounds of jurisdictional error 'is neither necessary, nor possible'.⁹⁹ An explanation for the avoidance of taxonomies and the desire to maintain flexibility in the identification of jurisdictional errors necessarily lies in the constitutional considerations that the High Court is required to attend to. In that context there must be a desire to retain the 'functional' aspect of jurisdictional error that affords a degree of flexibility in the High Court's superintendence of other courts. In this respect, *Kirk* may well prove to be a difficult case to respond to, as the search for 'jurisdictional error' will depend on a number of variables, all ultimately subject to potential review by the High Court.

The final point that deserves mention in reference to the High Court's examination of error warranting the grant of certiorari relates to the Court's discussion of error of law on the face of the record. Whilst this section of the plurality judgment can be regarded as obiter (the Court having already found two jurisdictional errors), it contains subtle indications that the constitutional considerations raised in *Kirk* might eventually warrant a reconsideration of the exclusion of reasons from the 'record', as decided in *Public Service Board of New South Wales v Osmond*.¹⁰⁰ The High Court later rejected (in *Craig*) an extension of the 'record' to include reasons for decision, on the basis that it would transform certiorari into a 'discretionary general appeal for error of law' and increase the financial hazards involved in minor litigation.¹⁰¹ With regard to the first basis for denying the extension, the Court in *Kirk* made the following statement:

But the need for and the desirability of effecting that purpose [of not providing a 'discretionary general appeal for error of law'] 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.

Whether and when the decision of an inferior court or other decision-maker should be treated as 'final' (in the sense of immune from review for error of law) cannot be determined without regard to a wider statutory and constitutional context.

The most immediately relevant statutory context is found in the provisions that establish the inferior court, and regulate appeals from, or review of, its decisions. The decisions of many inferior courts are open to appeal or review for error of law. (The availability of appeal or review would ordinarily be a powerful discretionary reason not to grant certiorari even if it were otherwise available.) If appeal or review for error of law is provided by statute, the availability of certiorari would not greatly alter the extent of the financial hazards to which those involved in litigation in the inferior court are exposed. To the extent to

⁹⁸ Ibid 574 [72].

⁹⁹ Ibid 573 [71].

¹⁰⁰ (1986) 159 CLR 656, 667 (Gibbs CJ).

¹⁰¹ (1995) 184 CLR 163, 181 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

which appeal or review for error of law is available, the first of the premises for the conclusion reached in *Craig* is denied.¹⁰²

In the opinion of the author, these statements do not support the idea that reasons are likely to form part of the record in all cases, but they certainly demonstrate a potential willingness to extend the record to include reasons in certain cases where the ‘wider statutory and constitutional context’ might require that outcome. In particular, if legislatures move away from privative clauses in favour of careful legislative drafting in an attempt to identify or narrow the list of errors which might be classed as ‘jurisdictional’,¹⁰³ the Court may well find other legal bases upon which certiorari might be granted. Whilst the decision in *Kirk* does not go so far, it certainly hints at an expansive approach to the ‘record’ in future cases.

IX THE UNANSWERED QUESTIONS IN *KIRK*

As previously mentioned, the appellants had presented arguments in both the appeal and the special leave applications that rested on contentions about the rule of law. With respect to the appeal from the decision of the Court of Appeal, the argument was made that the interpretation given to ss 15 and 16 of the *OH&S Act* was incapable of compliance and therefore offensive to the rule of law.¹⁰⁴ That same proposition was advanced by the appellants as one basis upon which an appeal lay directly to the High Court from the decision of the Full Bench of the Industrial Court.¹⁰⁵ By virtue of the fact that the interpretation given to ss 15 and 16 was said to offend the rule of law, the applicants argued that it was inconsistent with the *Constitution*. The written submissions relied heavily on arguments that were based on an expansive reading of the High Court’s appellate jurisdiction under s 73(ii) of the *Constitution*. That section provides that

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
- (ii) of any other federal court, or court exercising federal jurisdiction; or of 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 to the Queen in Council;
- (iii) of the Inter-State Commission, but as to questions of law only;

¹⁰² *Kirk* (2010) 239 CLR 531, 577–8 [85]–[87] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

¹⁰³ See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146. Each of these authorities may well have to be differently (and more cautiously) approached following the decision in *Kirk*.

¹⁰⁴ Appellants’ Submissions No S106 of 2009, 8 [35]–[36].

¹⁰⁵ Applicants’ Submissions No S347 of 2008, 7 [34].

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

The appellants presented three alternative arguments supporting their case that a right of direct appeal lay (by leave) from the Full Bench of the Industrial Court to the High Court under s 73(ii). Those arguments were as follows:

- (i) That the matter was one from which an appeal lay at the establishment of the Commonwealth, by leave, to Her Majesty in Council;
- (ii) That the Industrial Court was exercising the jurisdiction of the Supreme Court of New South Wales;
- (iii) That federal jurisdiction had been invoked, on the basis that the interpretation of the *OH&S Act* was contrary to the rule of law and thus breached the *Constitution*.¹⁰⁶

The first argument focused on the assertion that all criminal offences under the laws of New South Wales were matters in which ‘at the establishment of the Commonwealth’ an appeal lay from the Supreme Court to the High Court. This argument was also bolstered by the assertion that an appeal lay from the former Court of Arbitration at the establishment of the Commonwealth, by leave, to Her Majesty in Council. That Court was, according to the appellants, the ‘statutory predecessor’ of the Industrial Court.¹⁰⁷

The second argument above rested on several points, including that the Industrial Court was composed of judges of equivalent status to the Supreme Court, that the Industrial Court had been conferred powers previously exercised by the Supreme Court, and that the Industrial Court had been substituted for the Court of Criminal Appeal for the purposes of the *Criminal Appeal Act 1912* (NSW), pursuant to s 196 of the *Industrial Relations Act 1996* (NSW).¹⁰⁸ This argument drew upon statements in several cases, beginning with *Kable*, that ‘it would not be open to the legislature ... to abolish the Supreme Court and to vest the judicial power of the State in bodies from which there could be no ultimate appeal to [the High] Court.’¹⁰⁹

The final argument made was that, since the first appeal to the Court of Appeal, constitutional arguments had been raised by the applicants which thereby

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* 8 [41].

¹⁰⁸ *Ibid* 9–10 [50]–[51].

¹⁰⁹ *Kable* (1996) 189 CLR 51, 139 (Gummow J). See also *Forge* (2006) 228 CLR 45, 138 [245] (Heydon J).

invoked federal jurisdiction; the effect being that there existed a right of appeal to the High Court (by leave).¹¹⁰ As previously noted, the Attorneys-General for the Commonwealth, New South Wales, South Australia and Victoria intervened in the proceedings. The New South Wales Attorney-General joined the submissions of the second respondent, the WorkCover Authority of New South Wales. The other Attorneys-General each presented arguments supportive of the respondents. Despite the fact that the High Court found it unnecessary to consider the arguments raised in the special leave applications or the rule of law points made in the appeal, it is worth considering the responses of the interveners.

X THE INTERVENERS' SUBMISSIONS

With regard to the argument that the Industrial Court's interpretation of ss 15 and 16 was offensive to the rule of law, New South Wales and the WorkCover Authority of New South Wales submitted that, even if that proposition were accepted, it would not affect the validity of the legislation itself.¹¹¹ On this issue, the submissions of the Attorney-General for South Australia were similar: 'If legislation is invalid then, generally speaking, it is invalid *ab initio*: validity of legislation does not depend upon whether a court in a particular case makes an error in its construction.'¹¹² This statement is certainly correct, but it fails to take into account the fact that, whilst an erroneous interpretation of a statute may not of itself impact on a law's validity, the inability to have that erroneous interpretation corrected either on appeal or by way of judicial review would certainly impact on the law's validity. The judgment in *Kirk* makes this clear.

New South Wales made the argument that the reference to 'any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council' in s 73(ii) was a reference particularly to the Local Court of Appeal in South Australia (referred to by Quick and Garran as the 'anomalous tribunal').¹¹³ Whilst the submissions of the Commonwealth Attorney-General acknowledged the theoretical possibility that the words used in s 73(ii) might extend beyond the South Australian anomaly, they stated that the words 'plainly do not encompass the Industrial Court, which did not exist at the

¹¹⁰ Applicants' Submissions No S347 of 2008, 11 [56]–[57].

¹¹¹ WorkCover Authority of New South Wales and Attorney-General (NSW), 'Submissions of the Second Respondent and the Attorney-General for New South Wales (Intervening)', Submission in *Kirk v Industrial Court of New South Wales and Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*, No S106 of 2009, No S347 of 2008, No S348 of 2008, 18 September 2009, 8 [32] ('NSW Consolidated Submissions').

¹¹² Attorney-General (SA), 'Submissions of the Attorney-General for South Australia', Submission in *Kirk v Industrial Relations Court of New South Wales and Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*, No S106 of 2009, No S347 of 2008, No S348 of 2008, 21 September 2009, 19 [77] (citations omitted) ('SA Consolidated Submissions').

¹¹³ NSW Consolidated Submissions, 14 [61], citing John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1976 ed) 742–3.

establishment of the Commonwealth.¹¹⁴ The applicants had made the argument that the Court of Arbitration established under the *Industrial Arbitration Act 1901* (NSW) was the statutory predecessor to the Industrial Court and that a right of appeal existed from its decisions to the Privy Council. The interveners rejected the ‘statutory predecessor’ argument, with the Commonwealth pointing to the fact that the *Industrial Arbitration Act 1901* (NSW) did not commence until 10 December 1901 (during the first year after federation, but not ‘at the establishment of the Commonwealth’).¹¹⁵

The argument was put that, contrary to the submissions of the applicants, s 73(ii) identified the appellate jurisdiction of the High Court by reference to persons and institutions, rather than by reference to subject matter (such as criminal matters or workplace safety).¹¹⁶ As the Commonwealth Attorney-General submitted:

Leaving aside the position of courts exercising federal jurisdiction, the conferral of jurisdiction by s 73(ii) does not depend upon the nature of the ‘matter’ in question but rather on the character of the court from which an appeal is sought to be brought.¹¹⁷

Furthermore, the argument that the Industrial Court was acting, for all intents and purposes, as the ‘Supreme Court’ of New South Wales was strongly disputed by each of the interveners. The general view expressed in the second respondent’s and interveners’ submissions was that the reference to the ‘Supreme Court of any State’ in s 73(ii) was a reference to the courts ‘which at the time of the establishment of the Commonwealth were known by that name.’¹¹⁸ However, as the submission of the Attorney-General for Victoria acknowledged, there does exist obiter support for the idea that the words ‘Supreme Court of any State’ might be more widely construed:

In *Parkin & Cowper v James*, the Court, after affirming that the term ‘Supreme Court’ meant the court of each State so designated at federation, added as an obiter comment: ‘It may be that the term would also include courts established under another name in substitution for them, but with similar functions.’¹¹⁹

¹¹⁴ Attorney-General (Cth), ‘Submissions of the Commonwealth Attorney-General (Intervening)’, Submission in *Kirk v Industrial Relations Commission of New South Wales and Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*, No S106 of 2009, No S347 of 2008, No S348 of 2008, 21 September 2009, 2 [9] (‘Cth Consolidated Submissions’).

¹¹⁵ *Ibid.*

¹¹⁶ NSW Consolidated Submissions, 16 [65].

¹¹⁷ Cth Consolidated Submissions, 1 [6].

¹¹⁸ *Parkin v James* (1905) 2 CLR 315, 330 (Griffith CJ, Barton and O’Connor JJ), cited in Cth Consolidated Submissions, 2 [7], NSW Consolidated Submissions, 17 [67], SA Consolidated Submissions, 5 [18] and Attorney-General (Vic), ‘Submissions on Behalf of the Attorney-General for the State of Victoria (Intervening)’, Submission in *Kirk v Industrial Relations Commission of New South Wales and Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*, No S106 of 2009, No S347 of 2008, No S348 of 2008, 21 September 2009, 8 [42] (‘Vic Consolidated Submissions’).

¹¹⁹ Vic Consolidated Submissions, 9 [46], quoting *Parkin v James* (1905) 2 CLR 315, 330 (Griffith CJ, Barton and O’Connor JJ).

In respect of the argument based on federal jurisdiction, New South Wales argued that, despite the acceptance by all parties that the Industrial Court is invested with federal jurisdiction,¹²⁰ the court must be ‘exercising federal jurisdiction in the proceedings at issue’ for a right of appeal to exist.¹²¹ This approach sits somewhat uncomfortably with recent commentary,¹²² a fact which may have prompted the appeal to policy considerations within their submissions:

If an appeal directly to the High Court lay under s 73(ii) from any court which was empowered to interpret the *Constitution* (and thus to exercise federal jurisdiction), notwithstanding that the court was not exercising federal jurisdiction in the case in question, then appeals would lie, for example, to the High Court from all local courts of a State. Such a result is unlikely to have been intended by the drafters of s 73(ii).¹²³

The submissions of the South Australian Attorney-General were more persuasive on this issue:

It might be argued that the words ‘any court exercising federal jurisdiction’ should be construed as meaning any court that exercises federal jurisdiction from time to time, rather than a court that is exercising federal jurisdiction in the particular matter under consideration. The expression ‘exercising federal jurisdiction’ is capable of bearing that meaning, although the use of the expression in that way would be grammatically inelegant.

However, such a construction is not consistent with either the more natural grammatical meaning of the words used, nor the evident purpose for which the class of ‘courts exercising federal jurisdiction’ was included in s 73(ii). That purpose was to provide for an avenue of direct appeal to the High Court in cases involving those matters with a ‘federal’ aspect which, by ss 75 and 76, were within the original or potential original jurisdiction of the High Court.¹²⁴

This point is one to which I return below, and it has relevance to the broader rule of law arguments presented by the appellants but left unexamined by the High Court in its reasons. Interestingly, the Commonwealth submissions, in responding to those arguments, engaged with them in a manner which was to an extent reflective of the actual decision of the Court. The Commonwealth submissions contain an express reference to the rule of law premises which underpin the Court’s ultimate decision:

The general supervisory jurisdiction which derived from the jurisdiction of the English Court of King’s Bench and which was conferred on the colonial Supreme Courts as the highest courts of general jurisdiction in their respective areas was a characteristic of those courts as they existed at the establishment of the Commonwealth. The capacity to enforce jurisdictional limits by providing a remedy for jurisdictional error ought therefore be recognised as having been,

¹²⁰ See *Judiciary Act 1903* (Cth) s 39.

¹²¹ NSW Consolidated Submissions, 20 [79].

¹²² See, eg, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 677; Tom Pauling and Sonia Brownhill, ‘The Territories and Constitutional Change’ (2007) 28 *Adelaide Law Review* 55, 65–6.

¹²³ NSW Consolidated Submissions, 21 [80].

¹²⁴ SA Consolidated Submissions, 4 [12]–[13] (citations omitted).

and as remaining, a defining characteristic of State Supreme Courts. Any law which substantially impaired that characteristic would be unconstitutional.¹²⁵

This point is embodied in the Court's judgment. However, the following statements contained in the Commonwealth's written submissions locate the point in the context of the rule of law as provided under the *Constitution*:

[25] It may be accepted that the *Constitution* is predicated on the rule of law. The rule of law is 'part of the fabric on which the written words of the *Constitution* are superimposed'.¹²⁶

[26] If the Industrial Court were immune from the supervisory review jurisdiction of the Supreme Court, that is a matter which would have implications for the rule of law. However, as noted above, the Industrial Court is subject to review for jurisdictional error by the Supreme Court.¹²⁷

The High Court decision is consistent with this approach. However, notwithstanding that the Court felt it unnecessary to decide the substantive issues raised in the special leave submissions and the broader rule of law issues raised by the appellants, it is worth considering the response to those arguments from the Commonwealth. The Commonwealth's submissions concluded as follows:

The rule of law dictates that a citizen be able to know the legal consequences of any action. This requirement of the rule of law was plainly satisfied in the present case, where the relevant duties derived from ss 15 and 16 of the *OHS Act*.

As a principle of statutory construction, depending on the context, the proposition that a law should be construed so far as possible so as to be capable of obedience may have some force. However the rule of law on which the *Constitution* is predicated does not require that every law must be capable of obedience. This much is apparent from the principle that it is within the legislative power of the Commonwealth to pass laws having retrospective effect.¹²⁸

Essentially, the High Court's determination in the case, whilst not directly rejecting this approach, is inconsistent with it. The decision in *Kirk* favours the proposition that a fundamentally flawed and oppressive construction of a statute must be susceptible to correction by the Supreme Court and, ultimately, by the High Court. At the heart of the Court's decision is a concern with maintaining the rule of law and ensuring that courts and tribunals are kept within the limits of their jurisdiction. An oppressive construction that is insusceptible of correction by a supervisory court is entirely inconsistent with both the rule of law and the tenor and substance of the judgment in *Kirk*. To cite *Polyukhovich v Commonwealth*¹²⁹ (as the Commonwealth did) in support of the argument that a law need not be capable of obedience in order to be valid is to ignore the complexities

¹²⁵ Cth Consolidated Submissions, 4 [15], citing *Higgins v Comans* (2005) 153 A Crim R 565, 568 [5] (McPherson JA).

¹²⁶ *Ibid* 6 [25], quoting *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 237 [124] (Spigelman CJ).

¹²⁷ Cth Consolidated Submissions, 6 [26], citing *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 237-8 [124] (Spigelman CJ).

¹²⁸ *Ibid* 7 [27]-[28], citing *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *R v Kidman* (1915) 20 CLR 425.

¹²⁹ (1991) 172 CLR 501.

within and between the separate judgments comprising that decision and the limits of its ratio.¹³⁰ However, as with the other interveners' submissions, the Commonwealth presented arguments that displayed a particular concern with the effect of a direct right of appeal to the High Court under s 73(ii). The Court, however, was more concerned with the supervisory jurisdiction exercised by the supreme courts and, ultimately, by the High Court. In using the mechanism of judicial review for jurisdictional errors, the Court was able to sidestep the complex and controversial questions surrounding its appellate jurisdiction under s 73(ii).

XI CONCLUSION

The plurality judgment in *Kirk* clearly left open the issues raised by the special leave applications, including the extent to which s 73(ii) embraces the decisions of specialist courts conferred with jurisdiction previously exercised by supreme courts. Also left open were the rule of law arguments presented in the appellants' submissions, though the decision itself has clear rule of law foundations and implications. Indeed, when viewed in hindsight, the arguments of the appellants appear (at least in some respects) to have only been strengthened by the Court's decision. However, the decision itself means that the alternative arguments raised in the special leave applications have become less important. The High Court has effectively guaranteed the supervisory jurisdiction of supreme courts in all matters, ensuring that all fundamental or significant errors of law (those classed as jurisdictional errors) will be reviewable in the supreme courts and, ultimately, in the High Court. It lies beyond the scope of any state Parliament, therefore, to create 'islands of jurisprudence', whether directly or indirectly.

The clear implication for state Parliaments arising from the case relates to the scope of state privative clauses. In *Kirk*, the High Court has recognised that ch III impliedly provides the same minimum guarantee of judicial review for state decisions that s 75(v) was held to provide for Commonwealth decisions in *Plaintiff S157*. Parliament, however, still retains the power to identify which duties and limits will be classed as imperative and inviolable; in other words, the power to influence the process by which a court will determine which errors will be classed as 'jurisdictional'. However, the decision in *Kirk* has left open the prospect of a possible right to directly appeal from a decision of a state court to the High Court under s 73(ii); and, in this respect, the arguments made by the appellants may well be revisited in a future case. If that occurs, the decision in *Kirk* is likely to assist those arguing for a direct right of appeal, particularly in the sense that the Court's reasons provide the 'federal aspect' that South Australia had found wanting in its submissions in *Kirk*. In other words, the High Court,

¹³⁰ The High Court held by a 6:1 majority (Brennan J dissenting) that the *War Crimes Amendment Act 1988* (Cth) was a law with respect to external affairs. For Brennan J, the retrospective operation of the Act was critical and created a disconformity with international law: at 577–84. Both Deane J and Gaudron J held the Act to be incompatible with ch III: at 631 (Deane J), 707–8 (Gaudron J); a view which Toohey J appeared to largely support in principle, though his Honour held that the Act did not involve retroactivity in the relevant sense: at 692. The Act was ultimately held to be constitutionally valid by a narrow 4:3 majority.

through s 73(ii), retains a ch III basis for reviewing the decision of a state court in the event that a state Parliament seeks to frustrate the practical operation and effect of the Supreme Court's supervisory jurisdiction. Outside the use of privative clauses, one of the most effective ways of reducing the scope of judicial review is to confine and narrow the potential grounds of review, and in this respect the decision in *Kirk* is silent. Thus, the High Court may have entrenched judicial review at the state level in *Kirk*, but (like the decision in *Plaintiff S157*) not a minimum content in terms of grounds of review or errors that will be treated as jurisdictional.

The appellants' arguments rested on the premise that the protection of ch III, its integrated court system and the unified system of common law could only be partly protected through the supervisory jurisdiction of the supreme courts. This was evident in the reply to the submissions of the interveners:

The existence of a remnant power in the New South Wales Court of Appeal to supervise only in relation to jurisdictional error, referred to by the Interveners, is no answer. Jurisdictional review can never be adequate to ensure that precedent and fundamental principles of criminal law are observed. This argument fails to take account of the fact that State Parliaments have the power to control the scope and availability of judicial review due to the absence of a State equivalent of s 75(v) of the *Constitution*. The lack of entrenched mechanisms for judicial review at State level, the capacity of State legislatures to determine which legal errors will amount to jurisdictional errors under State law and the potential for State privative clauses to protect purported decisions (*Darling Casino Ltd v NSW Casino Control Authority*) should caution against reliance on the availability of Supreme Court superintendence through judicial review. Such review mechanisms have a limited capacity to protect Chapter III, its integrated court system and the unified system of common law in Australia. This is particularly the case where judicial review mechanisms provide the only avenue for challenging decisions of specialist State courts exercising criminal jurisdiction.¹³¹

The decision in *Kirk* has removed a number of the obstacles that informed the cautionary submission of the appellants. The absence of an entrenched mechanism for judicial review, equivalent to s 75(v), lay at the heart of this concern. However, following the High Court's decision in *Kirk*, the only concern voiced by the appellants which remains is the one relating to the capacity of state Parliaments to define, through careful legislative drafting, which errors might be treated as jurisdictional for the purposes of judicial review of decisions made under an Act. The situation reflects that which pertains at the federal level. In both administrative and constitutional law terms, the decision in *Kirk* is, therefore, a major judgment that has fundamentally changed the constitutional landscape in which state privative clauses must be framed and applied. However, the judgment is also significant for its treatment, in obiter, of several important questions left to be determined for another day.

¹³¹ Graeme Joseph Kirk and Kirk Group Holdings Pty Ltd, 'Submissions in Reply of the Appellants/Applicants', Submission in *Kirk v Industrial Court of New South Wales and Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*, No S106 of 2009, No S347 of 2008, No S348 of 2008, 24 September 2009, 10 [39] (citations omitted).