Chapter Ten

Kirk: Newton's apple fell

Justice J. Gilmour

Introduction

I have been asked to speak to you today about the High Court's recent judgment in *Kirk v Industrial Court (NSW)* (hereafter: *Kirk*).[1]

The rather obscure title to this paper is an allusion to what Chief Justice Spigelman wrote in a paper he delivered on *Kirk* during 2010.[2] His Honour had on a previous occasion described the "gravitational pull" which the Constitution exerts in the field of administrative law at the State level. Referring to *Kirk*, his Honour said:

> The gravitational force has done its work. Newton's apple is on the ground . . . I wish to pick it up, polish it a little and check it for worms.

I will not attempt to do any of those things. Rather I propose to do no more than share the apple with you and perhaps find at its centre some seeds of promise for the future in this important area of the law.

Kirk is a significant decision recognising, as it does, the constitutional entrenchment of supervisory powers of State supreme courts over inferior courts and tribunals. Against the background of a greatly expanded fleet of such courts and tribunals, *Kirk* firmly delineates a check upon State legislatures from attempting to put the decisions of those bodies beyond the review of their respective supreme courts.

It is a powerful authority in the constitutionally sourced legal constraints to unlimited executive power. Absent such constraint, in the words of Lord Denning, ". . . the rule of law would be at an end".[3] More recently, Chief Justice French, in his paper entitled "Executive Power"[4], called to mind Andrew Inglis Clark, one of the drafters of the Constitution, who was a great believer in legal limits on official power enforced by the judiciary. In an article published in the *Harvard Law Review* in November 1903, Clark wrote:

> The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power.[5]

Indeed, the High Court has been concerned of late with a number of cases involving issues as to executive power which have not gone unnoticed in the press. *The Australian*, in an article on 25 June 2010, referred to these cases as the "French Court reclaiming judicial power".[6]

In *Pape*[7], French CJ referred approvingly to what Sir Owen Dixon had said in the *Communist Party case:*

> History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by

> those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.[8]

Kirk is deceptively simple in its analysis but clearly sits in a complex area. This paper attempts no more than a general overview. I have deliberately put introductory explanations in the broad. Time does not permit detailed analysis.

I will explain, in overview, the concept of judicial review for those of you who are not lawyers, or who have not had occasion to practice or study in the field. Judicial review is an ancient common law process. Certainly it predates federation in Australia – it was part of the law of England and spread from there to other common law jurisdictions, including the United States and Australia.

When a superior court conducts a review of, for example, an administrative decision made under statute, the process is in some respects akin to an appeal against the decision; the key words here being, "in some respects": because, in other respects, the process is not at all akin to an appeal, but is instead far more limited than an appeal typically is.

It is in these similarities and differences that lie the issues that should interest this Society. Because the similarities and differences mark out a boundary – not always or, perhaps, even typically, a clear boundary, but a boundary nonetheless – between, on the one hand, executive decisions with which the judiciary will interfere, on grounds of perceived error; and, on the other hand, executive decisions with which the judiciary will not interfere in spite of perceived error.

The principles that govern, or should govern, the drawing of this boundary reflect a conception of the proper roles assigned by our system of government to the three arms of government: that is to say, to the executive, the judiciary and to the legislature. The concept sounds reasonably simple at this level of abstraction, but in Australia things are a little more complicated.

Australia is a federation of States. This means that we do not have a unitary government, with one executive arm, one judicial arm and one legislative arm. Between the States and the Commonwealth, we have, like some mythical creatures, many arms, in fact 21 of them: seven executive arms, seven judicial arms and seven legislative arms, one of each kind comprising the Commonwealth government and one of each kind comprising the government of each of the six States. (I say nothing of the territories.)

So, in Australia, analysing the proper roles of the three traditional arms of government is a process that involves levels and overlays. At the Commonwealth level, one needs to ask: what functions and powers does the Federal Constitution vest in the federal executive, in the federal judiciary and in the federal legislature? And what are the limits of their respective functions and powers? At the level of each of the States, one needs to ask the same question, in the context of each State constitution: that is to say, what functions and powers does the State constitution vest in the State executive, in the State judiciary and in the State legislature? And, then, one has to address the overlay issue: to what extent have the State's constitutional arrangements been modified by the Federal Constitution; because the Federal compact has its implications for what the States can and cannot do, irrespective of their constitutional arrangements.

It is in relation to this overlay issue that the judgment in *Kirk* does its defining work. At its core, the question for the Court in *Kirk* was whether the Federal Constitution requires that there be, in each of the States, judicial control of executive decision-making. An important question, to be sure, for reasons I will return to; and the answer to the question, given in *Kirk*, is, yes.

In arriving at this answer, and especially in identifying the irreductible level of judicial control that the Federal Constitution demands, the Court drew heavily on the legacy of the past; but it also left open for the future some important questions. There are two of those questions which I would particularly like to touch upon in this paper. The first is whether it is now beyond the power of the States to restrict in any significant way the scope of judicial review: to restrict in significant ways the kinds of error that will justify supreme court interference with a decision on review.

The second question relates to judicial review of fact-finding errors. As to that, let me just make this observation to bring this introduction to a close. Defining the extent to which fact-finding errors can be the subject of judicial review is surely one of the most important practical tasks facing Australian courts today.

The Rise of Tribunals

The importance of *Kirk* in the jurisprudence of Australia is measurable, in one sense, by the burgeoning growth of administrative tribunals across the country. I now describe the Victorian context but its example is broadly replicated across the country.[9]

The significant expansion of administrative tribunals in Victoria prior to 1998 was pointed to by Chief Justice Warren in a 2004 paper.[10] Her Honour described the encroachment of tribunal power within the Victorian legal landscape from 1984 as "the tiger in the jungle". The Victorian Administrative Appeals Tribunal, the "infant tiger", was born in that year, as her Honour put it, "under the dual veil of expediency and efficiency", reaching maturity, in the form of the Victorian Civil and Administrative Tribunal. Appropriately the "tiger" is referred to as V-CAT.

V-CAT assumed the jurisdiction of the Victorian Administrative Appeals Tribunal[11] and later a range of new jurisdictions.[12] Most of these jurisdictions have been exclusive to V-CAT and not concurrent with court jurisdictions. The Supreme Court of Victoria is, thereby, often deprived of jurisdiction in the absence of an error of law. The bar to review in the Supreme Court is high.[13]

Morris J, the then President of V-CAT, in "The Emergence of Administrative Tribunals in Victoria", observed that there was a change in the relationship "between the State and the individual".[14] President Morris was taken by Warren CJ, correctly I think, to be referring to the role of V-CAT. According to the V-CAT 2009 Annual Report there were approximately 86,000 cases with 225,000 parties involved in matters before it that year. This, it explains, in turn, affected the interests of about one million Victorians. It now has three divisions: Human Rights; Civil; and Administrative. There were, during that year, six judicial members, 41 full-time members, 180 sessional members and 196 staff. Although a direct comparison might be misleading, it is still worth noting that the Supreme Court of Victoria comprises 36 judges including members of the Court of Appeal with a Registry staff of 45.

Judicial Review

Judicial review is not an appeal. Appeal is a statutory process, one put in place by the legislature; and thus capable of removal by the legislature. It is a process by which decisions of government are referred to a higher government authority for reconsideration. Appeals can take place wholly within the judicial arm of government: that is, appeals from one court to a higher court; or within the executive arm of government: that is, appeals from one administrator to a higher administrator, or administrative body; or from the executive arm to the judiciary: for example, appeals from an administrative body, such as a tribunal, to a court.

Appeals heard by courts typically have as their purpose the correction of errors: errors of law and errors of fact. Much depends on the particular context, especially the statutory context, but broadly speaking this remains true. And error in this sense is demonstrated whenever the appeal court concludes that the position taken below was wrong – wrong because it involved a misapprehension of what the law is; or wrong because it involved findings of fact that were not justified by the evidentiary material. The important point of principle here is that the appeal court, broadly speaking, engages in a reconsideration of the merits of the original decision, and will substitute its own decision when it is satisfied that the original decision was wrong.

Judicial review at common law is, by contrast, a process by which superior courts exclusively exercise control over the decisions of inferior courts and executive decision-makers, not by reconsidering

their decisions on the merits, so as to correct their errors at large, or even to prevent substantial injustice; but only so far as is necessary to ensure that decision-makers respect the legal limits of their functions and powers. Accordingly, judicial review is for the correction of errors only if correction is necessary to ensure that decision-makers respect the legal limits of their functions and powers. What this entails, I will come to.

Traditionally, the review process was engaged by application for one or more of the common law, or prerogative writs: *certiorari* (to call in a decision for quashing); *prohibition* (to prevent a person or body from proceeding to or under a decision); and *mandamus* (to compel a person or body to do that which it is legally obliged to do).

The power to review judicially is a facet of the judicial power of government. It has long existed as a facet of the judicial power of each of the States and of the Commonwealth. At the Commonwealth level, it has been since Federation a facet of judicial power set apart by this consideration: its existence is expressly mandated by section 75(v) of the Constitution which vests the High Court with original jurisdiction in all matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth. These writs have been described by the High Court as "constitutional writs".[15] The grant of *certiorari* against an officer of the Commonwealth, though not expressly provided for in section 75(v) of the Constitution, is regarded as available as an incidental or ancillary authority to the effective exercise of the jurisdiction to issue writs of prohibition and mandamus.[16]

Section 75(v) thereby serves a basic element of the rule of law.[17] Indeed, adopting what had been said by Sir Owen Dixon in the *Communist Party case*[18], Chief Justice Gleeson of the High Court said that the Australian Constitution is framed upon the assumption of the rule of law. His Honour also recalled what had been stated by Brennan J, as his Honour then was, in *Church of Scientology Inc v Woodward*:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[19]

"Jurisdictional error"

The Court in *Bodruddaza* referred to "jurisdictional error" which "might arise from a want of legislative or executive power as well as from decisions made in excess of jurisdiction itself validly conferred".[20] Accordingly, the control mechanism emanating from section 75(v) for restraining officers of the Commonwealth from exceeding Federal power is the identification of jurisdictional error. A decision affected by jurisdictional error is, as a matter of law, no decision at all.

It is instructive to consider briefly the history of jurisdictional error within the Australian context.

As the Solicitor-General for the Commonwealth pointed out in 2009, there was notably absent from any significant administrative law decision of the High Court or the Federal Court during the 1980s any reference at all to a notion of "want" or "excess" of jurisdiction or the use of the language of "jurisdictional error".[21]

This, it seems, was the result of the passage of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (ADJR Act) which introduced by section 5(1)(f) the ground of "error of law" which did not depend for its availability on the need to show that the error appeared "on the face of the record".

The concept of jurisdictional error was well known to the law going back at least to the late nineteenth century in Australia which was co-extensive with the like power of the Court of Queen's Bench in England.[22] In England, the distinction between jurisdictional and non-jurisdictional error was effectively abandoned in *Anisminic Ltd v Foreign Compensation Commission*[23] as construed in later cases such as *O'Reilly v Mackman*.[24]

During the 1980s in Australia the distinction was not operative in the face of the ADJR Act. Later, however, the distinction was not to be discarded in this country for reasons embedded in the constitutional limitations arising from the doctrine of separation of judicial and executive powers which are not present in the United Kingdom: *Craig v South Australia.*[25]

Ultimately the different position as between this country and England concerning this distinction was described by the joint judgment in *Kirk*[26] as follows:

> In England, the difficulties presented by classification of some errors as jurisdictional and others as not were ultimately understood as requiring the conclusion that *any* error of law by a decision-maker (whether an inferior court or a tribunal) rendered the decision ultra vires.[27] But that is a step which this Court has not taken.[28] [Emphasis in original]

The usage in the 1990s of jurisdictional error as a concept, though not in terms, can be traced to the following well-known statement by Brennan J in *Attorney-General (NSW) v Quin*[29], later approved in the joint judgment of four members of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang:*

> The duty and jurisdiction of the court to review administrative action *do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power*. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[30] [Emphasis added]

The year before (1995) five members of the High Court in a joint judgment in *Craig v South Australia*[31] had directly employed the term "jurisdictional error" to describe an administrative tribunal falling into error which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion resulting in it exceeding its authority or powers.

Errors that can be redressed on review are not limited to errors about the existence of jurisdiction to make a decision, or exercise some power. Of course they include those kinds of errors; but they also include certain kinds of errors that are made in the course of exercising a jurisdiction that has undoubtedly been engaged.

Errors of this kind are reviewable as jurisdictional errors because they go to the existence of jurisdiction. But the courts have recognised other kinds of errors as "jurisdictional", errors typically committed even where jurisdiction properly exists, including:

a. failure to make a genuine attempt to evaluate evidentiary material;

b. failure to consider relevant material or factors;

c. importantly, failure to accord procedural fairness, that is, to afford a fair hearing, and an unbiased determination; and

d. in the area of discretions, exercising a discretionary power so unreasonably that no reasonable repository of the power could exercise it in that way – this is the so-called "*Wednesbury* unreasonableness".

All these kinds of errors are regarded as jurisdictional because they are perceived as fundamentally undermining the decision-making process in a way that is incompatible with the true scope of the decision-maker's functions and powers.

Therein lies the touchstone of what constitutes jurisdictional error. And it is important. The High Court put it this way in *Kirk*[32], citing what an earlier High Court had said, in 1995, in *Craig*:

> . . .The Court [in Craig] stated, as a general description of what is jurisdictional error by an inferior court, that 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". [33]

The Court, in *Kirk*,[34] gave three examples, referred to in *Craig*,[35] of an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of that court's functions or powers:

(a) the absence of a jurisdictional fact;[36]

(b) disregard of a matter that the relevant statute requires be taken to 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.

However, the Court was quick to emphasise that the reasoning in *Craig* is not to be seen as providing a rigid taxonomy of jurisdictional error and that the three examples given above as to the ambit of jurisdictional error by an inferior court are just that – examples.[37] They are not to be taken as marking the boundaries of the relevant field. This reinforced what their Honours said before that it was neither necessary nor possible to attempt to mark the metes and bounds of jurisdictional error.[38]

Both the errors in *Kirk* fall into the third category: the misconstruction of section 15 of the *Occupational Health & Safety Act* 2000 (NSW) (OH&S Act) and then permitting Mr Kirk, in contravention of section 17 of the *Evidence Act* 1995 (NSW), to give evidence for the prosecution at his own prosecution. This was an error of law, because Mr Kirk was not and could not be made competent to give evidence for the prosecution under the applicable State legislation. The Industrial Court misapprehended the limits of its functions and powers. It conducted the trial of Mr Kirk and the Kirk company in breach of the limits on its power to try charges of a criminal offence.

Overview

Stepping back, one can see the logic in this branch of the law. Decision-makers can go beyond their true functions and powers by exercising or, rather, purporting to exercise, a function or power that they do not have, or that has not yet arisen – for example, because some essential precondition, such as a jurisdictional fact, has not occurred. But they can also be taken beyond the true functions and powers by things that they erroneously did, or failed to do, in attempting to discharge functions or powers that have been enlivened in them. Here, the question is whether the thing that they have erroneously done violates some essential attribute of the functions or powers; or whether the thing that they have failed to do constitutes an essential attribute of those functions or powers.

It is inherent in this logic that not all errors will have the essential character that makes them liable to be corrected on review. Those that do not are not jurisdictional errors, and they are not capable of review. That remains so, at least in theory, even if they are errors which cause substantial injustice: that is to say, even if they are the kind of errors that an appeal court, in an appeal, would reverse in its reconsideration on the merits. On review, as opposed to appeal, that kind of treatment is reserved only for jurisdictional errors; because only jurisdictional errors are seen as affecting the legality of a decision, as opposed to, or as well as, its correctness.

It is the focus on legality that distinguishes judicial review from a typical appeal. An appeal is typically concerned with whether a decision is correct; or whether it is affected by errors that lead

to injustice. Judicial review is concerned with legality: namely, whether a decision, be it correct or otherwise, was made within the essential scope of the decision-maker's true functions and powers. As Chief Justice French of the High Court put it in his recent paper on Executive Power,[39] the application of jurisdictional error in relation to administrative decisions today is concerned with the limits of executive power exercised under statute or directly under the Constitution.

By keeping the executive within the limits of the law – or at least that part of the law which defines the executive's essential functions and powers in a given context – and by not otherwise adjudicating on the correctness of executive decisions, the courts have sought to balance their role, as the judicial arm of government, with the role of the executive under legislation.

In striking this balance, it falls to the courts to identify, from time to time, what the essential functions and powers of decision-makers are, under law. It is a pivotal task, one that I want to return to later, in connection with judicial review of fact-finding errors. But first let me outline the impact of *Kirk* in the context of the law as I have described it.

Kirk

Mr Kirk was a director of the "Kirk" family company. A farm manager employed by the company was killed while working on a farm owned by the company. The daily operations of the farm had been his responsibility.

The company was charged under sections 15 and 16 of the *OH & S Act*. Section 15(1) provided that every employer should ensure the health, safety and welfare at work of all the employer's employees. Section 16(1) provided that every employer should ensure that persons not in the employer's employment were not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they were at the employer's place of work. Mr Kirk was charged with the same offences, pursuant to section 50 of the Act, which prima facie deemed each director of the company to have contravened the provisions contravened by the company. The charges were required to be heard by the Industrial Court of New South Wales. On 9 August 2004, Walton J convicted Mr Kirk and the company of the offences charged.

As one avenue of review Mr Kirk and the company unsuccessfully applied to the NSW Court of Appeal for orders in the nature of *certiorari* and prohibition. They then applied to the Full Bench of the Industrial Court against the trial judge's decisions. A limited leave was granted but the appeal was dismissed.

Next they applied to the Court of Appeal, again without success, for orders in the nature of *certiorari* quashing the decisions of the trial judge and the Full Bench.

The Court of Appeal held that neither decision disclosed jurisdictional error. Special leave to appeal from this decision was granted by the High Court. The application for leave to appeal from the decision of the Full Bench was referred to an enlarged Bench of the High Court.

The High Court unanimously allowed the appeal from the judgment of the Court of Appeal. Six members of the Court delivered a joint judgment. Heydon J, in a separate judgment, dissented only as to the form of the orders. The orders of the Court of Appeal were set aside and substitute orders were made quashing the relevant orders of the Industrial Court as well as the Full Bench.

The Industrial Court is subject to the supervisory jurisdiction of the Supreme Court of New South Wales. Orders in the nature of prohibition, *certiorari* and *mandamus* may be directed to the Industrial Court.[40]

However, section 179(1) of the *Industrial Relations Act* 1996 (NSW) read with section 179(5) provides, in effect, that a decision of the Industrial Court is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal, (whether by order in the nature of prohibition, *certiorari* or *mandamus*, by injunction, declaration or otherwise).

This strongly worded privative clause stood in the path to the grant of relief by writ of *certiorari* quashing the orders of the Industrial Court and the Full Bench.

That the clause failed to have that effect was at bedrock for constitutional reasons, which I will now explain.

The High Court found jurisdictional error at the instance of the Industrial Court. First, because it had no power to convict and sentence Mr Kirk and the Kirk company because at no point in the proceedings had any particular act or omission or set of these been identified as constituting the offences for which they were convicted and sentenced which followed its misconstruction of sections 15 and 16 of the *OH&S Act*. By misconstruing section 15, 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.[41] Second, the breach of the rules of evidence by permitting Mr Kirk, as a defendant, to give evidence as a witness for the prosecution when, in contravention of section 17 of the *Evidence Act* 1995 (NSW), he was not competent to do so. This provision may not be waived.

It followed, as the joint judgment said, that the error made by the Industrial Court was not only an error about the limits of its functions or powers but was also an error in that it made orders beyond its powers to make.[42]

As was pointed out in *Plaintiff S157/2002 v The Commonwealth*[43] and referred to in *Kirk*[44] in considering Commonwealth legislation, account must be taken of two fundamental constitutional considerations. The first, which is relevant here, is that the jurisdiction of the High Court to grant relief under section 75(v) of the Constitution cannot be removed by or under a law made by the Commonwealth Parliament. Specifically, the jurisdiction to grant section 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed.

So far as concerns the judicial power of the States, with one exception[45], the position under the various State constitutions is different. Under these, no State court, other than in Victoria, has a constitutionally mandated jurisdiction; and there is no constitutional requirement that the judicial power of the State be exercised by a court only, however defined. Subject to the Victorian exception, there seems to be no obvious reason why the parliament of a State could not abolish some or all of the jurisdiction of the State courts, and, for example, vest the jurisdiction that they formerly exercised in an administrative tribunal. As a matter of State law, there seems to be no obvious reason why the State parliaments could not abolish the State supreme courts' judicial review jurisdiction altogether.

But the Commonwealth Constitution exerts what, as I mentioned, Chief Justice Spigelman of New South Wales has characterised as a gravitational pull on State law in this regard.[46] The fact is that the network of State courts including State supreme courts are a platform upon which the Commonwealth Constitution partially rests, and through which federal judicial power is distributed and exercised. The Constitution presupposes the existence of State supreme courts.

The reasoning in *Kirk* gave expression to that gravitational pull in this way. Chapter III of the Constitution by section 73 provides that "The High Court shall have jurisdiction . . . to hear and determine appeals from all judgments, decrees, orders, and sentences . . . (ii) . . . of the Supreme Court of any State". As Gummow J said in *Kable*:

> The meaning of the term "Supreme Court" in s 73 is to be determined in the process of construction of the Constitution and is not to be governed merely by legislation of the relevant State. It is, in this sense, a constitutional expression. The phrase identifies the highest court for the time being in the judicial hierarchy of the State . . .[47]

This was adopted in the joint judgment of Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission*[48] where it was said that "Chapter III [of the Constitution] requires that there be a body fitting the description 'the Supreme Court of a State' ", and "that it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description". Earlier, in *Fardon v Attorney-General (Qld)*[49] Gummow J observed that the "institutional integrity of the State courts … bespeaks their

constitutionally mandated position in the Australian legal system". His Honour was there referring to the Commonwealth Constitution.

Thus, whilst not having an expressed constitutionally mandated jurisdiction, the State supreme courts do have under the Constitution a position as necessary institutions within the federal compact.

The 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. At Federation, each of the supreme courts referred to in section 73 of the Constitution had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England.[50] Thus, each court had "a general power to issue the writ [of *certiorari*] to any inferior Court" in the State.[51]

That supervisory jurisdiction has continued since Federation and constitutes the means for defining and enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role, exercised through the grant of prohibition, *certiorari*, *mandamus* and *habeas corpus*, was and remains a defining characteristic of the supreme courts of the States.[52]

Importantly, by virtue of the appellate jurisdiction of the High Court, the exercise of the supervisory jurisdiction of the State supreme courts is ultimately subject to the superintendence of the High Court as the "Federal Supreme Court" in which section 71 of the Constitution vests the judicial power of the Commonwealth.[53] There being but one common law of Australia, the exercise of supervisory jurisdiction exercised by the State supreme courts proceeds according to principles established by the High Court. As the joint judgment noted:

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of "distorted positions".[55] And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.[54]

Ultimately, section 179 of the *Industrial Relations Act* 1996 (NSW) was not declared invalid in *Kirk*. Rather, it was read down, as was the case in *Plaintiff S157*. The expression, "a decision of the Commission", in section 179 was construed to mean, "a decision of the Industrial Court that was made within the limits of the powers given to the Industrial Court to decide questions".[56] Put another way, section 179 was construed so as not to include a decision of the Industrial Court[57] made outside the limits of its power. In other words, its "decision" infected by jurisdictional error was not "a decision of the Industrial Court".

It seems clear enough that, in a case where a privative clause to the same effect cannot be read down, it will likely be declared invalid as being unconstitutional. It seems unlikely that section 179(4) which extends the reach of the privative clauses to "purported decisions" would escape the same result as section 179(1). Section 179(4) was not engaged in *Kirk* but it was discussed in the joint judgment at [103]-[105] where the conclusion in *Batterham v QSR Ltd*,[58] that the addition of the word "purported" did not extend the scope of section 179 beyond the word "decision", was approved. The conclusion that a decision was properly understood to be only a "purported decision" would be arrived at for the very reason that it was tainted by jurisdictional error. Viewed in that way, a "purported decision" is synonymous with an "invalid decision", that is, one which, by force of the reasoning in *Kirk*, is constitutionally invalid.

Accordingly, at least five important propositions emerge from the judgment in *Kirk*.

1. Chapter III of the Commonwealth Constitution requires that in each State there be a body fitting the description of "the Supreme Court of (a) State".[59]

2. A defining characteristic of such a body is its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power.[60]

3. 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. This is because such a provision would remove from the relevant Supreme Court one of its defining characteristics.[61]

4. Not every privative provision will be invalid. Rather, the constitutional significance of the supervisory jurisdiction of the State supreme courts underpins the need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power.[62]

5. The categories of jurisdictional error are not closed.[63] It is therefore for the supreme courts and, ultimately, the High Court, to determine, on a case-by-case basis, the limits of the supreme courts' irreductible powers to prevent and correct errors by inferior courts and tribunals.

Jurisdictional Error – The search for certainty

The reasoning of the Court in *Kirk* is at one level uncomplicated. The distinction between jurisdictional error and non-jurisdictional error, in the Australian constitutional context, marks the relevant limit on State legislative power. Importantly, *Kirk* reiterated what had earlier been said in cases such as *Craig*, that, unlike the position in the United Kingdom where any error of law by a decision-maker, whether an inferior court or a tribunal, rendered the decision *ultra vires,* the distinction between these two kinds of error remains central to this part of the Australian legal landscape.

However, hidden beneath lies a conceptual difficulty long recognised by academic writers and judges: the not-infrequent difficulty in discerning between the two. It is well recognised that the lines, not necessarily straight lines, which divide jurisdictional error from non-jurisdictional error are blurred.

Professor Aronson put it this way:

> For some time now, academic literature has been looking for overarching general principles which might help explain the grounds of judicial review. We refer here not to the debate as to how tightly or loosely the review grounds might be linked to theories of statutory interpretation or to parliamentary sovereignty … Rather, we refer to the debates flowing from the sheer number and fluidity of judicial review's grounds.[64]

And again:[65]

> Judicial review's expansion into qualitative review has been hesitant, inconsistent, patchy, and theoretically troubled. Academic commentators have suggested for some time now that there must be underlying principles.[66]

However, the real problem it seems to me is in applying the principles when the case does not fall into one of the established species of jurisdictional error. This necessarily involves case-by-case judgment, but perhaps no more than does, for example, application of the principles that govern the law of negligence.

The joint judgment in *Kirk*[67] restated what had earlier been said in *Craig*, that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern" and gave examples of such difficulties.[68] Their Honours referred approvingly, I think, to what

Professor Sawer has said in relation to *certiorari* about the difficulties in articulating a singular unifying principle. This concerned "the unresolved competition between the two purposes for the grant of *certiorari*", namely, on the one hand, keeping the inferior tribunal within its jurisdiction and, on the other hand, to give the inferior decision some degree of finality or, as is often said, some jurisdiction to go wrong. Their Honours adverted to the difficulty in the application of the principles:[69]

> Those two purposes pull in opposite directions. There being this tension between them, it is unsurprising that the course of judicial decision-making in this area has not yielded principles that are always easily applied. As Sawer wrote, 'it is plain enough that the question is at bottom one of policy, not of logic'.[70]

The intriguing question then is, just how far policy will go, and in which direction. The joint judgment in *Kirk*[71] also referred with apparent approval to what Professor Jaffe said that "denominating some questions as jurisdictional … is almost entirely functional: it is used to validate review when review is felt to be necessary. … If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified".[72]

As Finn postulated:

> As a result of *Kirk,* it seems that the boundary of reviewability will be marked out, wholly and solely, by the notion of 'jurisdictional error'. This remains a difficult notion.
>
> First, the court has evidently endorsed the long-held suspicion that labelling an error as 'jurisdictional' is simply a functional post hoc classification. It reflects the court's view that the identified error or errors, the 'distorted positions' as identified in *Kirk*, are sufficiently serious to warrant intervention.
>
> This means that the predictive power of that label is limited. It will be difficult, or perhaps more difficult, to formulate in advance clear analytic categories of jurisdictional error. At best, intuitive assessments will need to be made of the extent to which a decision-making body is straying from its statutorily assigned functions or beyond its associated powers.[73]

These observations highlight the difficulties confronting clients and practitioners in this field, let alone judges. Finn suggests options for a pragmatic search to find the required guidance:

> Such a search might focus on the commonalities between the occurrences of 'jurisdictional error' in the decided cases and the indicia to be drawn from those cases of the level of seriousness which is seen by a superior court as requiring its intervention by means of supervisory review. Aronson's own listing of 'categories' of jurisdictional error may be one starting point for this more pragmatic search. Another may be McDonald's suggestion that one touchstone for judicial intervention may be interference with long-established and deep-rooted common law rights, such as property rights, and perhaps procedural fairness requirements, or with rights which can be shown to have some constitutional basis. [74]

Hayne J said in *Ex parte Aala:*

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error.[75]

Nonetheless, the difficulty remains.

Ramifications for State Courts and Tribunals

The reach of *Kirk* will extend beyond section 179 of the *Industrial Relations Act* (NSW) which is a very strongly-worded privative clause. As Chief Justice Spigelman said of section 179, it is difficult to know what more the Parliament could have done to signal an intention to insulate the Industrial Commission from review for jurisdictional error.[76] Privative clauses in State enactments, however worded, will not be effective to denude the State supreme courts of their jurisdiction to review for jurisdictional error although review for error of law on the face of the record may still be excluded. This limited exclusory power is unlikely to be of great import.

The important ramifications, potentially, emanate from questions left open in *Kirk.* They are important questions in modern Australia with the major expansion of tribunals and their jurisdiction.

I have already mentioned the trend towards legislative transfer of subject-matter jurisdiction from State courts to tribunals, with appeal rights to the court system existing only for so long as, and to the extent that, State legislation allows.

The first question

I now turn to the first of the two questions mentioned in the introduction as left open for the future: whether it is now beyond the power of the States to restrict in any significant way the scope of judicial review. Can they restrict in significant ways the kinds of error that would otherwise justify supreme court interference with a decision on review. Put another way, are there recognised and yet to be recognised categories of jurisdictional error constitutionally entrenched to give necessary content to the constitutional entrenchment of the right of review itself.

Kirk establishes that State parliaments cannot strip the supreme courts of the power to review for jurisdictional error. But does that mean that they cannot curtail by legislation any aspect of that jurisdiction? For example, procedural fairness is typically required of primary decision-makers. Failure to accord procedural fairness, where required, is a well-established species of jurisdictional error. Is it now beyond the competence of State parliaments to provide that decisions made under an enactment will be valid for all purposes even if made without according procedural fairness?

The issue has parallels at the federal level. The writs mentioned in section 75(v) of the Constitution – *mandamus* and prohibition – are now described as constitutional writs, which they are. They used to be called prerogative writs, after the traditional title given to their common law counterparts. The change in terminology does not just reflect semantics. It reflects the recognition that when the High Court issues those writs, under the Constitution, it is engaged in a constitutional process, not just a common law process. Common law processes can be adapted by legislation. Constitutional processes cannot.

When a State supreme court issues a prerogative writ based on jurisdictional error, is it, in light of *Kirk*, engaged in a constitutional process? Does the answer depend on what kind of jurisdictional error is being reviewed? *Kirk* establishes that the power to review jurisdictional error is a defining attribute of the State supreme courts, as comprehended by the Constitution. However, the joint judgment, significantly, did not close the door on privative clauses. Their Honours admitted to the possibility of legislation which might affect the availability of judicial review in the State courts[77]. No hint of what that might be was given.

At issue in *Kirk* was a privative clause purporting to repeal the entirety of the NSW Supreme Court's review jurisdiction in respect of one of the inferior courts of that State. Is it to be assumed that every facet of a supreme court's review jurisdiction must enure if that court is to continue to answer to its constitutional description? Can the States legislate away grounds for review presently available? Such questions were not posed, or answered, in *Kirk*. They are vital questions. The power to review requires that grounds of review are available; otherwise it is a power without substance.

It is perhaps most intriguing in the context of review based on procedural fairness, because procedural fairness is a requirement traditionally regarded as excludable; but a similar question could

be framed in respect of, for example, bias. Absence of bias is typically required of primary decision-makers, and its presence is a recognised species of jurisdictional error. Would State legislation purporting to selectively repeal the jurisdiction to review decisions affected by bias offend the principle recognised in *Kirk*?

Whether procedural fairness is to be seen as a common law duty or an implication from statute is an open question.[78] The position is the same in respect to *Wednesbury* unreasonableness in respect to a discretionary power statutorily conferred.[79]

Gaudron and Gummow JJ in *Ex parte Aala*[80] implicitly acknowledged that such obligations might upon the proper construction of the relevant statute be limited or excluded. This would, however, require "plain words of necessary intendment".[81] The same position, in light of *Kirk*, will, it seems, attach to State legislation.

This is not the position at the Commonwealth level where the Commonwealth officer is a member of a federal court or is one who executes an executive power, not one conferred by statute, where a question will arise whether that element of the executive power of the Commonwealth found in Chapter II of the Constitution includes a requirement of procedural fairness. If the answer is that it does, then prohibition will lie to enforce observance of the Constitution itself.[82] In those instances procedural fairness is a constitutional obligation.

Justice Hayne, in *Ex parte Aala*,[83] observed that the Constitution is silent about the circumstances in which constitutional writs under section 75(v) may issue and that "(w)hat is constitutionally entrenched is the jurisdiction of this Court when the writs are sought, rather than any particular ground for the issue of writs".

Jeremy Kirk in a 2004 paper suggested that the principle of legality offers the surest foundation for establishing the constitutionally entrenched minimum provision of judicial review.[84] This analysis turns on the statement of the joint judgment in *Plaintiff S157/2002 v Commonwealth*[85] that "s 75 introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review". Jeremy Kirk's paper explored the question, as do I, of what guiding principle or doctrine may determine just what judicial review is entrenched. Kirk writes: "The principle of legality requires, at its core, asking the following questions: 'What does the law authorise?' and 'What does the law require?' " The answers will require consideration of the relevant statute(s).

Whatever the answer as a matter of law informed by policy, it would be very difficult perhaps at a political level for the States to legislate away any of the long accepted grounds of jurisdictional error. As Chief Justice French put it:

> Executive power is essential to the functioning of government. Judicial power is essential to the rule of law. Ultimately the judicial power relies not only upon the confidence of the people but also upon the power of the State to make its exercise effective. Importantly, it is not the only constraint, nor always the most significant constraint upon the abuse of executive power. In a responsible government where ministers are truly answerable to the parliament and where there is a vigorous, sceptical and well-informed media, political realities can impose their own limits upon what even a powerful executive can do.[86]

The second question

The second question is more difficult. Despite this, it is a question worth exploring. What is or may be the extent to which fact-finding errors can be the subject of judicial review? This is, in my opinion, an important practical question facing Australian courts in the development of administrative law.

As the law presently stands, errors in fact-finding are treated differently according to the basis upon which they are said to be jurisdictional errors. If the fact in question is a jurisdictional fact, or is determinative of a jurisdictional fact, a review court will undertake a merits review of that

finding: that is to say, it will substitute its own finding of fact for that of the primary decision-maker if it is satisfied that the decision-maker was wrong. The position is the same, for example, if the jurisdictional error complained of is bias. On the factual question – or, more precisely, on the factual aspects of the question – whether the primary decision-maker was affected by bias, the review court will make its own findings.

The High Court has rejected the notion that jurisdictional error is confined to error of law.[87] Yet uncertainty pervades this aspect of the law when it comes to errors of fact; or, more precisely, errors of fact-finding. The issue is whether the notion of jurisdictional error embraces minimum standards of fact-finding; or, put another way, whether competent fact-finding is legally essential in some, or in most, or in all statutory contexts. From the point of principle, the issue is one of defining, typically under statute, the function and power that has been vested in the decision-maker. Just as the courts developed the notion that procedural fairness is essential to performance of function and exercise of power, so, too, the question is whether competent fact-finding is essential in administrative decisions.

Review in England is now available for fundamental error of fact.[88]

Traditionally, in this country, the courts have set their face against any kind of "merits review" and that factual matters (other than jurisdictional facts) were always in that category. Professor Aronson has said the net result until recently was an uncertain equilibrium between the common law's general refusal to contemplate factual review, counterbalanced by more or less covert ways around that refusal by resort to other grounds of review.[89]

The High Court, although not unanimously, has consistently declined review for substantive unfairness.[90] Moreover, *Wednesbury* unreasonableness is not established merely because a tribunal gives inadequate weight to certain matters and undue weight to others.[91]

The High Court, in *Ex parte Applicant S20/*2002,[92] recognised, it is argued by some and doubted by others, a separate ground of review of "serious illogicality or irrationality" separate from, but no less demanding than, that of *Wednesbury* unreasonableness which is now limited to supervising discretionary outcomes from administrative decision-making.

The sense one has is that a significant proportion of executive decisions that are wrong are wrong because of reasons to do with fact-finding; and that many of these find their way to the review courts on the back of some attempt to fit the case into a better-established head of jurisdictional error.

Historically, deference has been paid by reviewing courts to findings of a "specialist tribunal" by reason of its presumed qualifications and expertise in the area of jurisdiction conferred upon it.

In *Kirk,* in effect, this was brought into question. Justice Heydon was forthright, observing that setting up a specialist court presents the difficulty that such court "tends to lose touch with the traditions, standards and mores of the wider profession and judiciary".[93]

The joint judgment in *Kirk*[94] referred to what Jaffe had said more than 50 years ago:

> Jaffe[95] expressed the danger, against which the principles (of jurisdictional error) guarded, as being that "a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned.

The joint judgment then generously observed that it was not useful to examine whether Jaffe's explanation as to why distorted positions arose was correct but rather to see that distorted positions do not arise. It is that quest, at the level of fact finding, which presents a real challenge. Specialist tribunals may often have the expertise in making evaluative or discretionary decisions once relevant primary facts have been found. The same, certainly when compared to the experience of the judiciary, cannot necessarily be said as to their fact-finding ability. There are recognised but limited exceptions where the Court will perform a factual merits review. Nonetheless, it might be asked why a superior court should in the main pay complete deference to findings of fact by a tribunal. Administrative law

countenances the authority of inferior courts and tribunals to go wrong, that is, to decide matters within jurisdiction incorrectly.[96] This concept is a difficult pill to swallow for a party on the wrong end of a decision arrived at "incorrectly", particularly when it involves incorrect findings of fact. Are there any seeds of promise in *Kirk* that this might one day change? Time, no doubt, will tell.

Endnotes

* I gratefully acknowledge the assistance of Mr John Manetta, Barrister, Melbourne, in the preparation of this paper.

1. *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.
2. "The Centrality of Jurisdictional Error", Keynote address delivered by Chief Justice J. J. Spigelman to the AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010.
3. *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586.
4. A paper delivered by Chief Justice R. S. French, *The Executive Power*, Sydney University, Inaugural George Winterton Lecture, 18 February 2010.
5. A. Inglis Clark, "The Supremacy of the Judiciary under the Constitution of the United States and under the Constitution of the Commonwealth of Australia" (1903) 17 *Harvard Law Review* 1 at 18-19.
6. *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Lane v Morrison* (2009) 239 CLR 230; *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319.
7. (2009) 238 CLR 1 at [10].
8. *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 187.
9. Administrative Appeals Tribunal (Cth) established 1976

   ACT Civil & Administrative Tribunal established 2009

   Administrative Decisions Tribunal (NSW) established 1998

   Victorian Civil & Administrative Tribunal established 1998

   Queensland Civil & Administrative Tribunal established 2008

   State Administrative Tribunal (WA) established 2005.

   The Tasmanian Administrative Review Advisory Council recommended the establishment of a Tasmanian Civil & Administrative Tribunal in 2003 but has not been established as yet.

   The Magistrates Court of Tasmania has an administrative appeals division

   There is no administrative tribunal in the Northern Territory

   In South Australia there is no administrative tribunal. They have various small subject based tribunals and the District Court hears administrative appeals.
10. M. Warren, "The Growth in Tribunal Power", paper delivered to the Council of Administrative Tribunals, 7 June 2004.
11. Victorian Administrative Appeals Tribunal; Anti-Discrimination Tribunal; Credit Tribunal; Domestic Building Tribunal; Estate Agents Disciplinary and Licensing Appeals Tribunal;

Guardianship and Administration Board; Residential Tenancies Tribunal; and the Small Claims Tribunal. It also took on a range of licensing appeals functions as well as inquiry and disciplinary functions.

12. Retails tenancies, and significantly, fair trading and domestic building disputes: *Retail Leases Act* 2003 (Vic) ss 89 and 98; *Fair Trading Act* 1999 (Vic) ss 11, 112 and 164; *Domestic Building Contracts Act (Vic)* 1995 ss 57 and 134.

13. *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331.

14. Paper delivered at the Annual General Meeting of the Victorian Chapter of the Australian Institute of Administrative Law Inc on 13 November 2003 at Parliament House, Melbourne.

15. *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

16. *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [14] per Gaudron and Gummow JJ, Gleeson CJ concurring; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [165] per Kirby J.

17. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 per Gleeson CJ at [5].

18. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

19. (1982) 154 CLR 25 at 70.

20. (2007) 228 CLR 651.

21. S Gageler, "Impact of migration law on the development of Australian administrative law" (2010) 17 *Australian Journal of Administrative Law* 92 at 95-96.

22. *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.

23. [1969] 2 AC 147.

24. [1983] 2 AC 237 at 278; *R v Greater Manchester Coroner; Ex parte Tal* [1985] QB 67 at 81-83.

25. (1995) 184 CLR 163 at 179. (However, as Keane CJ noted recently:

    … but in that case, the High Court's refusal to abandon the distinction was explicitly pronounced only in relation to the position of an inferior court: administrative agencies and tribunals were expressly put to one side for the purposes of the court's decision: *Craig v South Australia* (1995) 184 CLR 163 at 178. Further, the High Court referred with apparent approval to the statement in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171 by Lord Reid in relation to administrative tribunals: "[T]here are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

    P. A. Keane, "Legality and merits in administrative law: an historical perspective", (2009) 1 *Northern Territory Law Journal* 117 at 118.

26. *Kirk* (2010) 239 CLR 531 at [65].

27. *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 696, 702; Lord Diplock, "Administrative Law: Judicial Review Reviewed", (1974) 33 *Cambridge Law Journal* 233 at 242-243.

28. *Houssein v Under Secretary Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 92-95; *Hockey v Yelland* (1984) 157 CLR 124 at 130; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372, 377; *Public Service Association (SA) v Federated Clerks' Union(SA Branch)* (1991) 173 CLR 132 at 141, 149, 165; *Craig v South Australia* (1995) 184 CLR 163 at 178-179; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [29]-[32], 226 [78]; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 439-440 [173], 462-463 [253]-[254]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 507 [79]-[81]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 675 [70].

29. (1990) 170 CLR 1 at 35-36.

30. (1996) 185 CLR 259 at 272.

31. (1995) 184 CLR 163 at 179.

32. *Kirk* (2010) 239 CLR 531 at [72]

33. (1995) 184 CLR 163.

34. *Kirk* (2010) 239 CLR 531 at [72]-[73].

35. (1995) 184 CLR 163.

36. A jurisdictional fact has been variously characterized as "a condition of jurisdiction": *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429-430; "a preliminary question on the answer to which … jurisdiction depends": *The Queen v Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125; "the criterion, satisfaction of which enlivens the power of the decision-maker: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [43]; an "event or requirement" constituting "an essential condition of the existence of jurisdiction": *Craig v South Australia* (1995) 184 CLR 163 at 177. What facts are jurisdictional is fundamentally a matter of statutory interpretation.

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

38. *Kirk* (2010) 239 CLR 531 at [71].

39. RS French, above n 4.

40. *Kirk* (2010) 239 CLR 531 at [102].

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

42. *Kirk* (2010) 239 CLR 531 at [75].

43. (2003) 211 CLR 476 at 512 [98].

44. *Kirk* (2010) 239 CLR 531 at [95].

45. Part III s 85(1) of the *Constitution Act 1975 (*Vic) confers unlimited jurisdiction upon the Supreme Court of Victoria as the superior Court of that State. It is open to amend that section upon a vote of both Houses of the Victorian parliament.

46. JJ Spigelman, above n 2.

47. *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 141-142.

48. (2006) 228 CLR 45 at 76 [63].

49. (2004) 223 CLR 575 at 617.

50. *Kirk* (2010) 239 CLR 531 per majority at [97]; *Australian Courts Act 1828 (Imp)* (9 Geo 4 c 83), s 3, which conferred jurisdiction on the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land; *Supreme Court Act 1890 (Vic)*, s 18; *Supreme Court Act 1867 (Qld)*, ss 21, 34; *Act No 31 of 1855-56 (SA)*, s 7; *Supreme Court Act 1880 (WA)*, s 5, picking up *Supreme Court Ordinance 1861 (WA)*, s 4.

51. *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 440. Despite the submissions of Victoria and South Australia, intervening, that colonial legislatures had enacted statutory privative provisions in order to deny the remedy of certiorari, the joint judgment in *Kirk* pointed out that the Privy Council in *Colonial Bank of Australasia v Willan* said of such provisions, that there are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari.

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

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

54. *Kirk* [2010] 239 CLR 531 at [99].

55. Professor Louis Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact", *Harvard Law Review*, vol 70 (1957) 953 at 963.

56. *Kirk* (2010) 239 CLR 531 at [105].

57. The Industrial Commission became the Industrial Court during the pendency of the proceedings in *Kirk*.

58. (2006) 225 CLR 237.

59. *Kirk* (2010) 239 CLR 531 at [96].

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

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

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

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

64. Aronson, Dyer & Groves, *Judicial Review of Administrative Action*, 4th ed., 2009 at [5.65].

65. *Ibid.*, at [5.70].

66. Kirby J expressed the same view in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [122].

67. *Kirk* (2010) 239 CLR 531 at [72].

68. *R v Dunphy; Ex parte Maynes* (1978) 139 CLR 482, *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371 and *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132.

69. *Kirk* (2010) 239 CLR 531 at [57].

70. G. Sawer, "Error of Law on the Face of an Administrative Record", *University of Western Australia Annual Law Review,* vol 3 (1956) 24, at 34-35.

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

72. L. Jaffe, above n 55, at 963 (footnote omitted).

73. C. Finn: "Constitutionalising supervisory review at State level: The end of Hickman?" (2010) 21 PLR 92 at 103.

74. C. Finn, above n 73, at 104.

75. (2000) 204 CLR 82 at [163].

76. J. J. Spigelman, above n 2.

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

78. *Abebe v The Commonwealth* (1999) 197 CLR 510 at 553 [112] per Gaudron J; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100 per Gaudron and Gummow JJ.

79. *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *Ex parte Aala* (2000) 204 CLR 82 at [40] per Gaudron and Gummow JJ.

80. (2000) 204 CLR 82 at [41].

81. *Annetts v McCann* (1990) 170 CLR 596 at 598; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [126] per McHugh J.

82. (2000) 204 CLR 82 at [42] per Gaudron and Gummow JJ.

83. (2000) 204 CLR 82 at [166].

84. Jeremy Kirk, "The entrenched minimum provision of judicial review" (2004) 12 *Australian Journal of Administrative Law* 64.

85. (2003) 211 CLR 476 at [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; as well as *Re Minister for Immigration and Multicultural Affairs; Exparte Applicant S20/2002* (2003) 198 ALR 59 at [27].

86. R. S. French, above n 4, at 17.

87. (2003) 198 ALR 59.

88. *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at 321 and 355; *Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 at 451.

89. Aronson, Dyer & Groves, *op. cit.*, at [4.405].

90. *Attorney-General (NSW) v* Quin (1990) 170 CLR 1 at 36 per Brennan J; *In Re Minister for Immigration and Multicultural* Affairs; Ex parte Lam (2003) 214 CLR 1 at 9-10 and 34.

91. *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

92. (2003) 198 ALR 59.

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

94. *Kirk* (*2*010) 239 CLR 531 at [64].

95. Jaffe, *op. cit.*, at [64].

96. (2000) 204 CLR 82 at [163] per Hayne J.