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Professor Harry Whitmore

It is a very great honour and privilege to be invited to give the Lecture named in honour of that outstanding Australian administrative lawyer, Professor Harry Whitmore. Professor Whitmore's contributions to administrative law as a scholar, teacher and law reformer are well-known. The sweeping reform of federal administrative law resulting from the work of the Kerr Committee, on which Harry played such a crucial role, is a permanent testament to his scholarship, dedication and sense of justice.

As Harry himself said in a personal recollection published in 2001,[1] the reform was achieved by the efforts of a comparatively small number of individuals . He was certainly one of the driving forces in that extraordinary group, which included a future Chief Justice of Australia.

I had the pleasure of working closely with Harry during our time together at the (then) very young University of New South Wales Law School. Harry was the second Dean of the Law School (1973-1975). He presided over the successful transition from the initial excitement and occasional chaos of the early days of the Law School, to an institution which has maintained its excellence in teaching but also developed a formidable reputation for innovative research and for a faculty of the highest quality. I have always thought that Harry has received too little recognition for his achievements as Dean during that critical period.

Although Harry was much older and more senior than I, we had a good deal in common. We were both graduates of Yale Law School and derived inspiration from our studies there and from academics with whom each of us subsequently worked. Harry had a conception of the University, which I shared, as a centre of learning and inquiry in which excellence was to be encouraged. We also shared a commitment to carefully considered law reform. I was fortunate to be in a

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1 H Whitmore, "*Administrative Law Reform: A Personal Recollection*" (2001) 7 AJAL 144.

position to learn a great deal from Harry and to benefit frequently from his thoughtful advice and practical wisdom.

The Transformation of State Judicial Review

The immediate impetus for the title of this lecture was the decision of the High Court in *Kirk v Industrial Relations Commission (NSW)*.[2] In that case, the High Court held[3] that a privative clause in State legislation cannot deprive the Supreme Court of the State of its supervisory jurisdiction over inferior courts, tribunals or administrative decision-makers, where the decision under challenge is affected by jurisdictional error. The effect of the decision in *Kirk* is to equate the supervisory jurisdiction of the Supreme Court of each State with the "*entrenched minimum provision of judicial review*" vested in the High Court by s 75(v) of the *Constitution*.[4] Section 75(v) has been interpreted to mean that the Commonwealth Parliament cannot remove the jurisdiction of the High Court to grant relief by way of the so-called constitutional writs in respect of "*jurisdictional error*" by an officer of the Commonwealth.[5] Just as the Commonwealth Parliament cannot deny the High Court's minimum supervisory jurisdiction, so State Parliaments cannot now deny an equivalent jurisdiction to the Supreme Courts of the States.

Kirk rests on constitutional foundations, specifically on implications drawn from Chapter III of the *Constitution*. In essence, the Court reasoned as follows:[6]

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2 (2010) 239 CLR 531 (hereinafter "*Kirk*").

3 The High Court's observations on the constitutional limitations of a State privative clause were technically *obiter dicta*, since the Court construed the particular privative clause (s 179 of the *Industrial Relations Act* 1996 (NSW)) as not extending to jurisdictional error. However, the principles articulated by the High Court are clearly authoritative.

4 *Constitution*, s 75(v), provides that in all matters in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth, the High Court shall have original jurisdiction. The quoted words in the text are from the joint judgment of five members of the High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ("*Plaintiff S157/2002*"), at 513 [103].

5 *Plaintiff S157/2002* (2003) 211 CLR 476, at 512 [98].

6 *Kirk* (2010) 239 CLR 531, at 579-581 [93]-[100].

- the operation of so-called privative clauses in State legislation designed to achieve finality of decision-making by an inferior court or tribunal is subject to constitutional considerations;
- Chapter III of the *Constitution*, in particular s 73,[7] requires that there be a body fitting the description of "*the Supreme Court of a State*", from which appeals lie to the High Court;
- it is beyond the legislative power of a State to alter the constitutional character of its Supreme Court so that it ceases to meet the constitutional description;[8]
- the supervisory jurisdiction of the Supreme Courts was at federation and remains the mechanism for determining 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 was and is a "*defining characteristic*" of Supreme Courts; and
- the limit on State legislative power to restrict the supervisory jurisdiction of the Supreme Courts reflects the distinction between "*jurisdictional errors*" and "*non-jurisdictional errors*", it being open to a State Parliament to deny jurisdiction to grant relief in respect of the latter, but not the former.

Until very recently the High Court accepted that it was open to a State Parliament, provided it made its intention sufficiently clear, to enact a privative clause that precluded judicial review. Thus in *Darling Casino Ltd v NSW Casino Control Authority,*[9] Gaudron and Gummow JJ observed that the operation of a State privative clause was "*purely a matter of its proper meaning ascertained in its legislative context*" and that, provided its intention was clear, a valid State enactment could "*preclude review for errors of any kind*".[10] This was subject to

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7 *Constitution*, s 73(ii) provides that the High Court shall have jurisdiction, subject to such exceptions as Parliament prescribes, to hear and determine appeals, inter alia, from the Supreme Court of any State. Section 73 also provides that no exception prescribed by Parliament shall prevent the High Court from hearing and determining an appeal from the Supreme Court of a State in any matter in which, at the establishment of the Commonwealth, an appeal lay from such Supreme Court to the Privy Council.

8 Citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, at 76 [63].

9 (1997) 191 CLR 602.

10 (1997) 191 CLR 602, at 633-634.

the so-called *Hickman* principle[11] that required the court to reconcile a wide privative clause with express or implied limitations on the decision-maker's authority. But the reconciliation was to be achieved by techniques of statutory construction.[12]

Kirk has transformed the nature of the enquiry in cases involving privative clauses in State legislation. A process of statutory construction, albeit one that favoured preservation of judicial review, has now acquired constitutional dimensions. The key concept is jurisdictional error, which marks out the limits of the constitutionally inviolable scope of judicial review of decisions under State law.

This development has brought about a fundamental realignment of the power of Supreme Courts (and, not incidentally, the High Court as the ultimate appellate court on matters arising under State law) to review administrative decisions and the decisions of inferior courts. In particular, the realignment has enhanced the authority of Supreme Courts to enforce judicially created norms designed to maintain the rule of law. The significance of the decision is demonstrated by the plethora of recent cases in State Supreme Courts in which *Kirk* has been invoked, with varying success, as the basis for a challenge to a decision of an inferior court or tribunal.[13]

Kirk directly undercuts privative clauses that have been carefully drafted and enacted by State Parliaments to deny categories of (disfavoured) persons access to judicial review of decisions affecting them, including decisions affecting their very liberty. An example is Queensland legislation which denies judicial review to prisoners in respect of security classification, work orders and transfer decisions. The intent of the privative clauses is perfectly clear. Not only do they apply to "*decisions made or purportedly made*", but "*decision*" is defined to include a

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11 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

12 See also *Fish v Solution 6 Holdings Limited* (2006) 225 CLR 180, at 233 [175], per Heydon J (dissenting).

13 See, for example, *Chase Oyster Bar v Hamo Industries* (2010) 272 ALR 750; *Seiffert v The Prisoners Review Board* [2011] WASCA 148; *Campbell v M & I Samaras Pty Ltd* [2011] SASCFC 58; *GPI (General) Pty Ltd v Industrial Court of New South Wales* [2011] NSWCA 157; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 22. See also *South Australia v Totani* (2010) 242 CLR 1, at 62 [128] per Gummow J; 78-79 [193]-[195], per Hayne J.

"*decision affected by jurisdictional error*".[14] To the extent that this legislation attempts to prevent the Supreme Court of Queensland correcting jurisdictional errors by the prison authorities, *Kirk* renders the legislation invalid.

Even in the absence of a privative clause, State legislation has been construed so as to preclude the jurisdiction of a court to grant relief in the nature of certiorari or prohibition for what might otherwise be jurisdictional error. *Brodyn Pty Ltd v Davenport*,[15] for example, was widely understood to hold that the language of the *Building and Construction Industry Security of Payments Act* 1999 (NSW) excluded the Supreme Court's supervisory jurisdiction, even in relation to jurisdictional error.[16] It has now been held that the legislation cannot be construed, consistently with *Kirk*, so as to exclude judicial review for jurisdictional error.[17]

It should be acknowledged that *Kirk* is concerned only with one element of State administrative law, namely judicial review of administrative decisions or of the decisions of inferior courts. While lawyers tend to see judicial review as co-extensive with administrative law, it is in truth only one component.[18] Other key components, such as merits review of administrative decisions,[19] freedom of information legislation and a range of mechanisms designed to enhance the accountability of government decision-makers (Ombudsmen and the like) are not directly affected by *Kirk*. For that reason, it may be more accurate to speak of the "*constitutionalisation of judicial review of State decision-making*", rather than the constitutionalisation of administrative law. However, none of this diminishes the significance of the expansion of the constitutional role and functions of the

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14 *Corrective Services Act* 2006 (Qld), ss 17, 66, 68, 71. These sections are referred to by M Aronson, "Commentary on 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' by Leighton McDonald" (2010) 21 PLR 35.

15 (2004) 61 NSWLR 421.

16 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, at [90], per Basten JA; at [147], per McDougall J; cf at [32], per Spigelman CJ.

17 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190; *Northbuild Construction Pty Ltd v Central Interior Lining Pty Ltd* [2011] QCA 22.

18 M Aronson, B Dwyer and M Groves, *Judicial Review of Administrative Action* (4th ed 2009), at 1.

19 For example, under the *Administrative Decisions Tribunal Act* 1997 (NSW), s 63(1),(2) the Tribunal is to "*decide what the correct and preferable decision is*" and may exercise all of the functions of the initial decision-maker.

Supreme Courts of the States in enforcing limitations on the powers of inferior courts, tribunals and administrative decision-makers.

Fragile Foundations

The decision in *Kirk* has attracted "*unmitigated admiration*"[20] from distinguished commentators and indeed there would seem to be much to admire. The decision achieves constitutional symmetry between judicial review of decisions of an "*officer of the Commonwealth*" under s 75(v) of the *Constitution* and judicial review of decisions by what may be described as State officers (although this is not a constitutional phrase). By entrenching "*jurisdictional error*" as the single criterion of constitutionally entrenched judicial review, the High Court has gone a long way towards achieving a uniform national system of judicial review of Federal and State decisions. The decision has increased the authority of the courts to interpret and enforce limits on the scope of executive powers, thereby enhancing the rule of law. The decision has also filled a significant gap in the integrated character of the Australian judiciary under Chapter III of the *Constitution*.

Nevertheless, the apparent advantages of the decision in *Kirk* should not obscure the fragility of the constitutional foundations on which it is erected. Nor should those advantages obscure the extent to which the authority of the judicial arm of government has been increased at the expense of Parliament and the Executive. The constitutionalisation of the concept of jurisdictional error marks yet another transfer of power from the executive and Parliament to the judiciary.[21]

The reasoning in *Kirk* builds on the now established interpretation of s 75(v) of the *Constitution*. The plurality judgment pointed out[22] that in considering Commonwealth legislation, account had to be taken of two "*fundamental constitutional considerations*" applied in *Plaintiff S157/2002*:[23]

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20 JJ Spigelman, "*The Centrality of Jurisdictional Error*" (2010) 21 PLR 77, at 77.

21 R Sackville, "*Bills of Rights: Chapter III of the Constitution and State Charters*" (2011) 18 AJAL 67.

22 (2010) 239 CLR 531, at 579 [95].

23 (2003) 211CLR 476, at 512 [98].

> "*First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.*"

These two fundamental considerations implement what has been described as the "*accountability purpose*" of s 75(v) of the *Constitution*: that is, its role in preserving the rule of law by enabling the High Court to determine and enforce the limits on the powers of federal administrative decision-makers and of inferior federal courts. Yet, as a recent article demonstrates, the "*accountability purpose*" attributed to s 75(v) played a relatively minor part in the Convention debates.[24] Edmund Barton saw the provision as necessary to ensure that the High Court could protect the subject against any violation of the *Constitution* or of any law made under the *Constitution*.[25] However, other contributors to the debates saw the provision that became s 75(v) as serving different and more limited purposes. These were to ensure the grant of prerogative relief was within the original (as distinct from the appellate jurisdiction of the High Court) and to protect the Commonwealth government and its officers from the exercise of State judicial power.[26]

The jurisprudence of the High Court has identified the accountability purpose as the principal justification for reading s 75(v) as entrenching a minimum constitutional standard of judicial review.[27] By contrast, contributors to the Convention debates saw the grant of jurisdiction to the High Court to issue mandamus and prohibition against Commonwealth officers as a matter distinct from the grant of a right to secure relief from a court. The drafting history of s 75(v) lends only modest support for the High Court's reading of an ambiguous

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24 J Stellios, "*Exploring the Purposes of Section 75(v) of the Constitution*" (2011) 34 UNSWLJ 70.

25 J Stellios, note 24 above, at 71, at 80-81.

26 J Stellios, note 24 above, at 78, at 81-82.

27 *Plaintiff S157/2002* (2003) 211 CLR 467, at 513-514, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

text to elevate the power of the High Court over that of the executive and the Commonwealth Parliament.

Once the High Court entrenched a minimum standard of judicial review as an incident of the original jurisdiction of the High Court, it may seem a relatively small step to conclude that the *Constitution* also entrenches a minimum standard of judicial review in State Supreme Courts. But to reach this conclusion the High Court was required to adopt a very different process of reasoning. In particular, it was necessary to draw sweeping inferences from the cryptic reference to the "*Supreme Courts of any State*" in s 73(ii) of the *Constitution*. As Justice Basten, writing extra-judicially, has remarked:

> "*the mere use of the expression 'Supreme Court' does not indicate why the failure to permit review of a specific judicial officer [the Industrial Court] prevented the Supreme Court of New South Wales satisfying the constitutional descriptor of 'Supreme Court' of the State.*"[28]

The High Court in *Kirk* attempted to bridge this textual gap by contending that a statutory privative clause could not prevent the Supreme Court of an Australian Colony, prior to federation, correcting manifest defects of jurisdiction.[29] Accordingly, the entrenched supervisory jurisdiction of the Supreme Courts is one of their "*defining characteristics*". But the case cited by the High Court as authority for this proposition does not establish that, regardless of the width of a privative clause, the Supreme Court of a Colony could grant relief for what is now described as "*jurisdictional error*".[30] It is therefore difficult to see why a "*defining characteristic*" of a Supreme Court, in addition to qualities such as independence, impartiality and procedural fairness, should include the power to override privative clauses insofar as they seek to protect decisions from the usual consequences of jurisdictional error. If the textual justification for the decision in *Kirk* is doubtful, it must be said that the historical basis is even more doubtful.

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28 J Basten, "*The Supervisory Jurisdiction of the Supreme Courts*" (2011) 85 ALJ 273, at 279.

29 (2010) 239 CLR 531, at 580 [97].

30 The case cited is *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417. See R Sackville, note 21 above, at 78; J Basten, note 28 above, at 284.

Jurisdictional Error – The Constitutional Norm

However fragile its foundations, the principles articulated in *Kirk* are now authoritative. As a result of the decision, the key element in the constitutionally entrenched systems of State and Federal judicial review is "*jurisdictional error*". As the historical analysis in *Kirk* demonstrates, the concept of jurisdictional error was formulated and developed in a non-constitutional setting.[31] Over time, its content has expanded greatly as more categories of jurisdictional error have been identified and the content of existing categories has expanded.[32] Perhaps the most obvious example is the obligation to accord procedural fairness, a breach of which will ordinarily constitute jurisdictional error.[33] Although the extent of the obligation depends on the circumstances of the individual case, in practice the requirements of procedural fairness imposed on administrative decision-makers have become distinctly more onerous over time.

The elevation of "*jurisdictional error*" to a constitutional norm makes its content a matter of great significance in demarcating the respective limits of judicial, executive and legislative power. A striking feature of the reasoning in *Kirk* is the determination of the High Court to preserve to itself flexibility in fixing the boundaries of "*jurisdictional error*". The consequence is that the potential scope of constitutionally entrenched judicial review is very wide indeed. The limits will be determined by the meaning the High Court attributes to the expression.

The plurality judgment in *Kirk*[34] refers to the categories of jurisdictional error identified in *Craig v South Australia*,[35] a non-constitutional case arising under State law. The broad language used in *Craig* to describe the categories of jurisdictional error allows for a generous interpretation of the constitutional concept. Thus an inferior court (or tribunal) falls into jurisdictional error:

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31 (2010) 239 CLR 631, at 569-571 [60]-[65].

32 For a frequently cited list of eight categories, see M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009), at 14-15. The High Court has said that the list is not exhaustive: *Kirk* (2010) 239 CLR 531, at 573 [71].

33 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

34 (2010) 239 CLR 531, at 573-574 [72].

35 (1995) 184 CLR 163. The High Court held in *Craig* that a District Court Judge had not fallen into jurisdictional error in staying criminal proceedings where the accused had been denied legal aid.

> "*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.*"[36]

An inferior court will also commit jurisdictional error if it does "*something which it lacks authority to do*". An example of such conduct is where the decision-maker misconstrues the governing statute and thereby misconceives the nature of the function it is performing. As the Court in *Craig* acknowledged:

> "*the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern*".[37]

The plurality judgment in *Kirk* is at pains to establish that the categories of jurisdictional error are not closed. It is "*neither necessary nor possible to attempt to mark the metes and bounds of jurisdictional error.*"[38] The judgment in *Craig* is not to be seen as "*providing a rigid taxonomy of jurisdictional error*" and the examples given in that judgment are not to be taken as marking the boundaries of the relevant field.[39] Indeed, the plurality in *Kirk* endorses the view of Professor Jaffe in a 1957 article, that denominating some questions as jurisdictional is "*almost entirely functional*" and "*simply expresses the gravity of the error*".[40]

Professor Jaffe made these observations in the context of discussing the development in English law, over several hundred years, of the doctrine of jurisdictional fact. He explained that the functional justification of the doctrine, even in its early days, was that a tribunal of limited jurisdiction should not be a judge of its own powers, particularly as a tribunal preoccupied with special problems or staffed by less able individuals "*is likely to develop distorted positions*".[41] Thus if the supervisory court could construe the legislation as conferring decision-making power only if the fact existed (as distinct from the

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36 (1995) 184 CLR 163, at 177, *per curiam*.
37 (1995) 184 CLR 163, at 178.
38 (2010) 239 CLR 531, at 573 [71].
39 (2010) 239 CLR 531, at 574 [73].
40 Louis L Jaffe, "*Judicial Review: Constitutional and Jurisdictional Fact*" (1957) 70 Harv LR 953, at 963, cited in *Kirk* (2010) 239 CLR 531, at 570-571 [64].
41 The plurality in *Kirk* also cited this passage: (2010) 239 CLR 531, at 570 [64].

decision-maker forming an opinion that the fact existed), the court could decide for itself whether the relevant fact actually existed.

The reference in *Kirk* to the danger of specialised courts and tribunals developing distorted positions may have been intended as a comment on the approach taken by the Industrial Court of New South Wales to prosecutions for breaches of safety laws, a theme taken up enthusiastically by Heydon J in his concurring judgment.[42] Nonetheless, when the two concepts – that characterising an error as jurisdictional is almost entirely functional and that the categories of jurisdictional error are not closed – are combined, they suggest a constitutional norm of variable and uncertain application.

This impression is reinforced by the High Court's conclusion that the Industrial Court had committed jurisdictional error by permitting the prosecution to call the defendant as a witness, notwithstanding that legislation provided that the defendant in criminal proceedings was not competent to give evidence for the prosecution.[43] The plurality reasoned that, since the Industrial Court was bound to apply the rules of evidence, it had misapprehended its powers and had conducted a criminal trial in breach of the limits on its powers. There can be no dispute that permitting the prosecution to call the defendant as a witness was a serious procedural error. Even so, the borderline between erroneous evidentiary rulings that are within jurisdiction and that those constitute jurisdictional errors is likely to remain elusive without further clarification.

The insistence in *Kirk* on leaving open-ended the boundaries of jurisdictional error contrasts with the distaste expressed by Dixon J in 1938 to the tendency of courts:

> "*to draw within the scope of the remedy provided by [prerogative] writ complaints that the inferior court has proceeded with some gross disregard of the forms of law or the principles of justice.*"[44]

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42 (2010) 239 CLR 531, at 589-590 [122].

43 (2010) 239 CLR 531, at 565 [51], 575 [76], referring to s 17(2) of the *Evidence Act* 1995 (NSW).

44 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, at 389.

His Honour pointed out that:

> "*this tendency has been checked again and again, and the clear distinction must be maintained between want of jurisdiction and the manner of its exercise.*"[45]

In the light of the observations in *Kirk*, it might have been thought that Dixon J's warning, given in a case involving a prosecution in a Court of Petty Sessions under State law, had long been overtaken by events. Yet the warning was expressly cited by the majority of the High Court when declining to find jurisdictional error, in *Federal Commissioner of Taxation v Futuris Corporation Ltd*, [46] a case decided only two years before *Kirk*.

In the same case,[47] Kirby J repeated concerns he had expressed earlier as an "*unsatisfactory*" and "*elusive*" distinction between "*error within jurisdiction*", "*jurisdictional error*" and "*non-jurisdictional error*".[48] He also repeated his reservations about:

> "*the importation into the constitutional writs provided by s 75(v) of all the artificial technicalities and distinctions that have gathered around the prerogative writs of the same name in England.*"[49]

In his view, the classification of jurisdictional and non-jurisdictional error:

> "*is conclusory. It is very difficult to define and to apply. In recent years it has been substantially discarded by English legal doctrine. Jurisdictional error is nearly impossible to explain to lay people even though the Constitution (including the central provisions in s 75(v)) belongs to them. Most non-lawyers would regard it as a lawyer's fancy.*"[50]

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45 (1938) 59 CLR 369, at 389.

46 (2008) 237 CLR 146, at 152 [5], per Gummow, Hayne, Heydon and Crennan JJ. The proceedings were originally brought in the Federal Court under s 39B(1) of the *Judiciary Act* 1903 (Cth). Section 39B(1) confers jurisdiction on the Federal Court in the same terms as s 75(v) of the Constitution confers jurisdiction on the High Court.

47 (2008) 237 CLR 146, at 184 [129].

48 *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372, at 439-440 [173].

49 (2002) 209 CLR 372, at 440 [175].

50 (2008) 237 CLR 146, at 184 [129]. See also *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, at [28]-[30], per Spigelman CJ.

The difficulties identified by Kirby J are compounded given that the concept of jurisdictional error, in a non-constitutional context, has been understood as the outcome of a process of statutory interpretation.[51] The elevation of jurisdictional error to a constitutional norm makes it difficult to maintain this understanding. After all, the very point of a constitutional norm is to deny Parliament power to achieve the outcome it desires. It is no doubt true that in many cases the text of the legislation may make it quite clear that a failure to comply with a statutory requirement will constitute a jurisdictional error, for example where the legislative constraint is in mandatory form.[52] Even so, the interpretative techniques traditionally employed to identify jurisdictional error will not necessarily determine the outcome in a constitutional context.[53]

Legislative Alternatives

The potential width of the constitutional concept of jurisdictional error following *Kirk* is likely to shift the focus from privative clauses in State legislation to other legislative techniques intended to protect decisions of State inferior courts and tribunals from judicial review. A variety of techniques are potentially available to State Parliaments. Some will bring out the tension between the rule of law rationale underlying the constitutional entrenchment of judicial review and the origins of jurisdictional error as the product of a process of statutory interpretation.

Exclusion of Procedural Fairness

One apparently permissible legislative technique to protect inferior courts and tribunals from judicial review is to exclude the rules of procedural fairness. It is well established that where legislation confers power on a decision-maker to

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

52 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, at [40]-[41], per Spigelman CJ.

53 In *Craig v South Australia*, the High Court indicated that in considering what constitutes a "*jurisdictional error*", it is necessary to distinguish between inferior courts and "*other tribunals exercising governmental powers which are also amenable to the writ [of 'certiorari']*": (1995) 184 CLR 163, at 176, per curiam. The joint judgment in *Kirk*, a case involving judicial review of a decision of the Industrial Court of New South Wales, did not advert to the distinction drawn in *Craig v South Australia*.

destroy or prejudice a person's rights or interests, the decision-maker must comply with the rules of procedural fairness.[54] However, the High Court in *Saeed v Minister for Immigration and Citizenship*[55] has confirmed that the implication of the principles of procedural fairness in a statute is arrived at by a process of statutory construction. It is presumed to be "*highly improbable*" that Parliament intends to overthrow such fundamental principles without expressing its intention with "*irresistible clearness*".[56] The formulation in *Saeed* recognises that if a State Parliament states its intention to exclude the rules of procedural fairness with "*irresistible clearness*", a decision-maker's failure to accord procedural fairness will not constitute jurisdictional error.

In *Saeed*, the High Court considered a provision which stated that the procedural requirements set out in a sub-division of the *Migration Act* 1958 (Cth) were to be taken as an exhaustive statement of the natural justice hearing rule "*in relation to the matters it deals with*".[57] The High Court construed the latter expression as confining the section to on-shore processing of visa applications and as not extending to off-shore processing. Accordingly an off-shore applicant for a Skilled Independent Visa was entitled to procedural fairness in the consideration of her application. The apparent anomaly that off-shore applicants were in a better position than on-shore applicants did not determine the High Court's construction of the legislation.

That irresistible clearness by Parliament is possible is illustrated by a Western Australian case. In *Seiffert v The Prisoners Review Board*,[58] the applicant sought an order quashing a decision of the Board to revoke his parole. Section 115 of the *Sentence Administration Act* 2003 (WA) provided that the rules of procedural fairness did not apply to acts or omissions of the Board under specified Parts of the legislation. Martin CJ held that:

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54 *Annetts v McCann* (1990) 170 CLR 596, at 598, per Mason CJ, Deane and McHugh JJ; *Saeed v Minister for Immigration and Citizenship* ("*Saeed*") (2010) 241 CLR 252, at 258-259 [11]-[12], per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

55 (2010) 241 CLR 252.

56 (2010) 241 CLR 252, at 259 [15].

57 *Migration Act* 1958 (Cth), s 51A.

58 [2011] WASCA 148.

- but for s 115, the Board would have been obliged to comply with the principles of procedural fairness when considering whether or not to revoke the applicant's parole;
- the applicant was plainly denied procedural fairness by the Board in that he was not given proper notice of the case he had to meet, nor an opportunity to meet that case;
- the denial of procedural fairness was not remedied by the limited review process available to him;
- nonetheless, on the authority of *Saeed*, the "*unmistakeable and unambiguous language of s 115 excluded any obligation to accord procedural fairness that would otherwise arise.*"[59]

Martin CJ rejected the applicant's submission that s 115, construed in this way, was unconstitutional by reason of *Kirk*. His Honour considered that *Kirk* had not altered the distinction between:

> "*provisions which purport to oust or restrict the supervisory jurisdiction of the courts on the one hand, and provisions which define the duties of decision-makers on the other.*"[60]

Section 115 did not in terms preclude judicial review and did not in substance operate to exclude judicial review of the Board's decision by the Supreme Court. Thus s 115 did not violate the principles stated in *Kirk* and the applicant was not entitled to relief in respect of the Board's denial of procedural fairness.

If *Seiffert* is correct, a State Parliament has the power to eliminate judicial review of an administrative decision on the ground of a denial of procedural fairness. Parliament must use unequivocal language and it runs the ever present risk that a court may interpret the legislation creatively so that the apparent intention is not

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59 [2011] WASCA 148, at [69]-[76].

60 [2011] WASCA 148, at [111]. *Seiffert* was followed in *Kirby v Prisoners Review Board* [2011] WASCA 149.

achieved. But if Parliament demonstrates "*irresistible clearness*", the requirements of procedural fairness can be eliminated.[61]

"*No-Invalidity*" Clause

A "*no-invalidity clause*" states that a breach of a statutory provision does not render the relevant decision invalid.[62] There is no doubt that a no-invalidity clause can prevent a breach of a particular statutory requirement constituting a jurisdictional error. As Professor McDonald has pointed out,[63] *Ex parte Palme*[64] is an example. In that case, the Minister failed to comply with a statutory obligation to set out the essential grounds on which he had concluded that the prosecutor had not passed the character test and that the prosecutor's visa should be cancelled.[65] Nonetheless the High Court held that the Minister's failure did not constitute jurisdictional error in the making of the cancellation decision.

One reason for the Court's holding was that the legislation expressly provided that a failure to notify the prosecutor of the reasons for the cancellation decision did not affect the validity of the cancellation.[66] The joint judgment noted that the cancellation decision could still be reviewed for jurisdictional error "*otherwise arising*". The implication seems to be that provided the legislation leaves room for judicial review on the ground of jurisdictional error, some breaches of the legislation can be designated, in effect, as non-jurisdictional.

A question arises as to how far a State Parliament can go in relying on a no-invalidity clause to insulate a decision-maker from a challenge on the basis of jurisdictional error. In *Plaintiff S157/2002*, the High Court expressed doubts as to

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61 *The Migration Legislation Amendment (Offshore Processing and Other Measures) Bill* 2011 (Cth) is replete with provisions stipulating that the rules of natural justice do not apply to the exercise of particular powers conferred by the Bill. The Bill is intended to overturn the decision of the High Court in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, which was seen as scuttling the Government's so-called Malaysian solution for asylum seekers arriving by boat.

62 L McDonald, note 51 above, at 19.

63 *Ibid.*

64 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212.

65 (2003) 216 CLR 212, at 224 [40], per Gleeson CJ, Gummow and Heydon JJ.

66 (2003) 216 CLR 212, at 225 [45], relying on s 501G(4) of the *Migration Act* 1958 (Cth).

whether the Commonwealth Parliament could confer an open-ended discretion on the Minister to decide which aliens can and cannot come to Australia, subject only to non-binding statutory guidelines. It was said that a provision of this kind might not be a law with respect to the relevant head of Commonwealth power, in this case the power to make laws with respect to aliens.[67]

In *Bodruddaza v Minister for Immigration and Multicultural Affairs*,[68] the High Court was concerned with a provision imposing a time limit for the filing of an application in the High Court in relation to a migration decision. The Court rejected an argument that the effect of the applicant's failure to comply with the time limit was to "*validate*" the migration decision for all purposes, even if the decision was infected by fraud. The joint judgment observed that it would be a "*bold exercise of legislative choice*" for Parliament to enact that a decision-maker is authorised to exercise powers fraudulently. In the "*unlikely eventuality*" of such legislation, questions of validity "*might well arise of the nature outlined in Plaintiff S157/2002*".[69]

Both *Plaintiff S157/2002* and *Bodruddaza* were concerned with decisions under the *Migration Act*, a Commonwealth enactment. The reasoning which cast doubt on the validity of an attempt to enact a comprehensive no-validity clause is not necessarily applicable to similar State legislation. The legislative powers of a State Parliament, although subject to limitations under the *Constitution*, are not defined by reference to specific subject matter. Yet it would be surprising if the High Court did not hold invalid a no-invalidity clause in a State enactment which, for example, purported to characterise any breach whatsoever by a decision-maker as non-jurisdictional. The precise reasoning process by which this result will be reached, like so many of the consequences of *Kirk*, remains uncertain.[70]

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67 (2003) 211 CLR 476, at 512-513 [102]; Constitution, s 51(xix) (Parliament has power to make laws with respect to "*Naturalization and Aliens*".

68 (2007) 228 CLR 651.

69 (2007) 228 CLR 651, at 663-664 [28], per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ.

70 Professor McDonald cites *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 as an example of a wide no-invalidity clause (s 175 of the *Income Tax Assessment Act* 1936 (Cth)) being given effect: L McDonald, note 51 above, at 20-22. However, the decision in *Futuris* owes much to the fact that merits review was not

Time Bars

Legislation may attempt to limit the availability of judicial review by imposing stringent time limits for the institution of a challenge to a decision. In the context of State planning legislation, for example, the imposition of a time limit for questioning the validity of a development consent may be essential in the interests of certainty. Thus in *Woolworths Ltd v Pallas Newco Pty Ltd*,[71] the New South Wales Court of Appeal expressed the view that a provision preventing the validity of a development consent being questioned in legal proceedings, if they commenced more than three months after the grant of the consent, extended to protection from jurisdictional error.[72]

Woolworths v Pallas Newco contrasts with the later decision of the High Court in *Bodruddaza*.[73] There a unanimous High Court held invalid a provision[74] which denied the Court power under s 75(v) of the *Constitution* to grant a remedy in respect of a migration decision unless that application for relief was brought within strict time limits. In effect, the time limit was 28 days from actual notification of the migration decision, but that period could be extended by another 56 days on application to the High Court.

The proposition accepted by the Court was that:

> "*a law with respect to the commencement of proceedings under s 75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure.*"[75]

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only available to the taxpayer in the Administrative Appeals Tribunal, but an application for such review had already been lodged: see JJ Spigelman, note 20 above, at 90-91.

71 (2004) 61 NSWLR 707.

72 (2004) 61 NSWLR 707, at 723 [80], per Spigelman CJ. The provision was s 101 of the *Environmental Planning and Assessment Act* 1979 (NSW). See also JJ Spigelman, note 20 above, at 89-90.

73 (2007) 228 CLR 651.

74 *Migration Act* 1958 (Cth), s 486A.

75 (2007) 228 CLR 651, 671 [53].

The provision did not satisfy this test as it did not allow for supervening events which might prevent an applicant, without any fault on his or her part, from complying with the stipulated time limit. The time limit "*subvert[ed] the constitutional purpose of the remedy provided by s 75(v)*".[76]

The test for the validity of a time bar stated in *Bodruddaza* is capable of being adapted to State legislation imposing a time limit for applications challenging administrative decisions. However, the practical considerations that influenced the decision in *Bodruddaza* will not necessarily be present in relation to time bars under State law and, in any event, they may well be offset by other factors such as the need for certainty in relation to planning decisions. Once again, there is ample scope for disagreement as to the effect of *Kirk*.

Practical Obstacles

An inviolable jurisdiction to grant relief in respect of jurisdictional error is no guarantee that an applicant will not encounter formidable forensic difficulties in making good a challenge based on such an error. In *South Australia v Totani*,[77] the High Court held, on the authority of *Kirk*, that a privative clause would not protect a declaration by the South Australian Attorney-General that an organisation represented a risk to public health and safety, against challenge on the ground of jurisdictional error.[78] However, it was also held that the fact that legislation created serious practical obstacles to the success of such a challenge did not make the declaration unexaminable for jurisdictional error.

Hayne J accepted that the party challenging the declaration would not be entitled to inspect "*criminal intelligence*" upon which the Attorney-General relied to make the declaration.[79] Moreover, the Attorney-General might well be able to claim public interest immunity in respect of other material taken into account and did not have to give reasons for his decision. It would therefore be "*very difficult*" for

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76 (2007) 228 CLR 651, 672 at [58].
77 (2010) 242 CLR 1.
78 (2010) 242 CLR 1, at 27 [26], per French CJ; 62 [128], per Gummow J; 78 [193], per Hayne J; 153 [415], per Crennan and Bell JJ.
79 (2010) 242 CLR 1, at 79 [195].

the challenger to establish that the decision was affected by an error of law or was based on irrelevant considerations.[80] Nonetheless, this did not make the decision unexaminable for jurisdictional error, especially as it could still be challenged on the ground of want of procedural fairness.[81]

It follows from *South Australia v Totani* that the right to seek judicial review from a State Supreme Court, at least in certain circumstances, may turn out to be more apparent than real. The fact that State legislation creates significant forensic obstacles to a successful challenge for jurisdictional error does not, of itself, cause the legislation to fall foul of *Kirk*. However, there may be a point at which judicial review becomes illusory and the principles stated in *Kirk* apply to render the legislation creating the obstacles, or part of it, invalid. This, too, is an unresolved question.

Conclusion

The decision in *Kirk* has at one stroke constitutionally entrenched judicial review by State Supreme Courts for jurisdictional error. It is now not open to State Parliaments to enact privative clauses that deny the Supreme Court of a State the power to grant relief in respect of administrative decisions affected by jurisdictional error. The same principle applies to privative clauses purporting to protect decisions of inferior courts.

Kirk is plainly a decision of great constitutional significance. Decisions by State officials are now subject to the supervisory jurisdiction of the courts to the same extent as decisions made by officers of the Commonwealth. The broad interpretation accorded by the High Court to s 75(v) of the *Constitution* has been more than matched by a creative understanding of implications derived from Chapter III of the *Constitution*. The power of the State judiciary to scrutinise executive action has been enhanced and, in the process, the authority of courts over the executive and Parliament increased.

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80 (2010) 242 CLR 1, at 79 [195].

81 (2010) 252 CLR 1, at 79 [195]; at 27 [27], per French CJ, at 105 [269], per Heydon J (dissenting as to the result); *Commissioner of Police v Sleiman* (2011) 249 FLR 242, at 289-290 [219]-[226], per Sackville AJA (with whom Allsop P and Handley AJA agreed).

The critical component in the constitutionalisation of judicial review is the concept of jurisdictional error. *Kirk* makes it clear that the boundaries of jurisdictional error are not only uncertain, but potentially very wide indeed. This is not surprising, since the concept of jurisdictional error was formulated in a non-constitutional setting and has been transformed into a constitutional criterion. The boundaries (and therefore the limits of entrenched judicial review) will be determined over time by the High Court .

In the meantime, it is very likely that Parliaments will resort to techniques other than privative clauses to curb the scope of judicial review. The available techniques include elimination of procedural fairness as a decision-making requirement, no-invalidity clauses, time bars and the creation of forensic obstacles for those seeking to challenge administrative decisions. *Kirk* altered the structure of judicial review by State Supreme Courts, but its immediate effect may be to shift the field of conflict between courts and State Parliaments. The balance between the judiciary, the executive and Parliament is a long way from being settled.