

SUPREME AND FEDERAL COURT JUDGES' CONFERENCE

MELBOURNE, 21-25 JANUARY 2012

“JURISDICTIONAL ERROR AFTER *KIRK*: HAS IT A FUTURE?”

The Hon John Basten
Judge of the NSW Court of Appeal¹

Introduction

For some 30 years critical questions about the scope of judicial review in Australia have focused on federal administrative decision-making.² While the original stimulus for revisiting traditional principles was partly the commencement of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in October 1980, the principles have been articulated particularly by reference to the writs referred to in s 75(v) of the Constitution. But judicial review has never been limited to control of the executive: it is also concerned with maintaining the regularity of the exercise of judicial power. It is this form of judicial review, and equally in relation to state and federal jurisdiction, to which attention is now turning. The switch in context is important: one cannot simply assume that criteria for correction of error in administrative decision-making will apply, or apply in the same way, to judicial decision-making.

In *Kirk v Industrial Court (NSW)*,³ the High Court turned its attention to the constitutional guarantee of state supervisory jurisdiction. The findings, relevantly for present purposes, had two limbs: first, the constitutional status of the State Supreme Courts was identified, within what has been described as the hierarchical integrated

¹ I am grateful to Jessica Vogel for her diligent research assistance and to Professor Mark Aronson and Justice Alan Robertson for comments on a draft.

² The reasoning in *Salemi v MacKellar [No 2]* [1977] HCA 26; 137 CLR 396, and *The Queen v MacKellar; Ex parte Ratu* [1977] HCA 35; 137 CLR 461, may be compared with that in *Kioa v West* [1985] HCA 81; 159 CLR 550.

³ [2010] HCA 1; 239 CLR 531.

system for the administration of justice in Australia. The Court held that the essential characteristics of a State Supreme Court, protected from legislative interference, include the supervisory jurisdiction of the Court.⁴ Secondly, it held that the criterion of essential irreducible supervisory jurisdiction is the ability to grant relief for “jurisdictional error”.⁵ Thus, as it appears, it equated the immunity from legislative intrusion on the jurisdiction of a State Supreme Court with that of the High Court under section 75(v) of the Constitution. If that is correct, the post-*Kirk* developments are likely to be as important for federal jurisdiction as for state jurisdiction.

In the two years since *Kirk* was handed down by the High Court, more than 180 cases (mostly in Supreme Courts) have referred to it. The case has also spawned a plethora of articles and commentary, exploring and analysing its principles. That is partly because the development was unexpected, although, as has been noted elsewhere, it was neither unforeshadowed nor without precedent.⁶ More importantly, the decision left unexplored a number of issues, both of high principle and of detail. It is now clear that a criterion of jurisdictional error must either be extremely flexible or it will fail in its purpose. When applied to a superior court, what does it mean? Does it mean something different when applied to an inferior court or an administrative decision? What are the points of distinction?

Like Professor Aronson,⁷ I have been inclined to shrug off (then) Justice Kirby's discomfort with jurisdictional error as an identifiable criterion or set of criteria. I now think it is being called on to do too much work.

It is not necessary to join the debate on the role of top-down reasoning in common law jurisprudence to aver that for superior courts to undertake their constitutionally protected function of supervision, they need to have a clear understanding of their role in the administration of justice.⁸ When and to what extent courts interfere in

⁴ At [98]-[99].

⁵ At [100].

⁶ J Basten, “The supervisory jurisdiction of the Supreme Courts” (2011) 85 ALJ 273 at 276-277.

⁷ M Aronson, “Jurisdictional error without tears”, in M Groves and HP Lee, *Australian Administrative Law* (Camb UP, 2007) Ch 21.

⁸ As Stephen Gageler suggested over a decade ago (in an analysis which bears rereading in the light of later cases), in this area the suggested polar extremes are best seen as an heuristic device, reflecting differences of emphasis: “The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?” (2000) 28 Fed L Rev 303; see also M Taggart, “Australian

administrative and judicial decision-making will reflect beliefs as to their proper role. To review decisions for jurisdictional error, an articulable theory is required as to the role of superior courts⁹ in our system of governance. The distinction between review of the merits of administrative action and curing illegality requires reconsideration in respect of review of a superior court.¹⁰

In the federal sphere, the constitutionally guaranteed role of the High Court is defined by reference to the forms of relief traditionally available to the English Queen's Bench to supervise the activities of other courts and tribunals. Thus the boundaries of the Court's jurisdiction are identified by the grounds upon which such relief is available. But the grounds have tended to expand over time, thus changing the constitutional balance between the judicial branch and both the legislative and executive branches of government.

It is often valuable to compare our path with those taken in other common law countries. Although we have not followed the UK and New Zealand in abandoning the distinction between jurisdictional and non-jurisdictional errors, recent experience shows that some mechanism must be used to fix the limits of judicial review. Further, the basis of control of executive power does not necessarily provide a justification for control of judicial power. The rule of law is not fundamentally threatened by limiting the number of appeals from a court; nor does it require that every exercise of judicial power be subject to review by a higher court. Appeals to the High Court, for example, are controlled by leave requirements, subject to identified, albeit broad, criteria. Those criteria do not speak of "jurisdictional error", but operate in ways which may be broadly described as functional and pragmatic. There is much to be said for adopting similar criteria in respect of judicial review where no appeal is available, a course which has been taken in the UK.

Exceptionalism' in Judicial Review" (2008) 36 Fed L Rev 1, and generally, K Mason "What is wrong with Top-down Legal Reasoning?" (2004) 78 ALJ 574.

⁹ For a functional discussion of what is meant by a "superior court", see Latham CJ in *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208 at 240-242 and, in relation to the Federal Court, Deane J in *The Queen v Gray; Ex parte Marsh* (1981) 157 CLR 351 at 384-385; cf *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; 78 CLR 389 at 399.

¹⁰ Cf, *Attorney General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 35-36 (Brennan J).

The UK experience

Recent decisions in the UK demonstrate two strands of thinking. One (now rejected), sought a return to pre-*Anisminic* jurisdictional error, as the basis for constraining applications for judicial review; the second was the adoption of what may best be described as a functional and pragmatic approach.

Sinclair Investments,¹¹ decided in 2005, commenced in a leasehold valuation tribunal as a dispute as to the levying of a residential service charge. The Lands Tribunal refused permission to appeal, leading to an application for judicial review by the High Court. That Court dismissed the application, a determination upheld by the Court of Appeal. Neuberger LJ gave consideration to earlier decisions dealing with constraints on judicial review in such circumstances and concluded that:¹²

“...the question at issue must be resolved by reference to (a) the generic nature of the issues involved (in this case, residential service charge disputes), (b) the effect of the statutory procedures concerned, particularly those relating to appeals ..., (c) the nature and constitution of the tribunals involved in those procedures, and (d), in so far as it can be ascertained, the legislative intention These factors must be assessed (a) against fundamental policy considerations, namely the desirability of finality, with the minimising of delay and cost, and the desirability of achieving the legally correct answer, and (b) against the practicalities, such as the burdens on the Administrative Court and, in this case, the pressures on the Lands Tribunal.”

These factors require some further explanation. First, they reflected earlier decisions which invited attention to two particular questions, namely whether there was in place “an adequate system for reviewing the merits of decisions” at the first level,¹³ and, if there were such a system, the necessity to find “exceptional circumstances” to warrant judicial review of a refusal of leave to appeal. That system for review must provide “fair and proportionate protection against the risk that [the first instance tribunal] acted without jurisdiction or fell into error”.¹⁴

¹¹ *The Queen on the application of Sinclair Investments (Kensington) Ltd v The Lands Tribunal* [2005] EWCA Civ 1305 (Neuberger LJ, Auld and Laws LJJ agreeing).

¹² At [41].

¹³ At [35], referring to *The Queen (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 at [54].

¹⁴ *Sinclair Investments* at [40].

Secondly, applications for leave to appeal could properly be dismissed with reasons which were characterized as “exiguous”.¹⁵ These might amount to no more than refusing leave “for the reasons given by” the first instance tribunal, if leave had been sought from it.¹⁶

Thirdly, in considering proportionality, Neuberger LJ compared the amount at issue in the case, (being one which did not have wider implications beyond settling the dispute between the parties) and the likely expense of a further hearing. Concluding that the amounts would be of the same order, he upheld that as a factor favouring refusal of the application for judicial review.¹⁷

In 2007 the UK enacted legislation amalgamating within one structure a variety of statutory tribunals.¹⁸ The *Tribunal Act* set up a two-tier system, initial decision-making or review taking place in a “first-tier tribunal”, with appeals to an “Upper Tribunal”. With the apparent purpose of avoiding judicial review, the Upper Tribunal was designated “a superior court of record”. That, it has been held, did not confer immunity from judicial review on the Upper Tribunal.¹⁹

In *Wiles v Social Security Commissioner*²⁰ the Court of Appeal considered an application for leave to review a Social Security Commissioner’s decision. Dyson LJ considered that “if exceptional circumstances were the correct test, I would be inclined to include in the category of exceptional circumstances those cases which raise a point of law of general importance”.²¹ He noted that:²²

“(i) issues that arise in social security cases may affect the lives not only of the individual claimant, but of many others who are in the same position, some of whom are among the most vulnerable members of our society; and

¹⁵ *Sinclair Investments* at [54].

¹⁶ At [55], referring to *Northrange Shipping Ltd v Seatrans Shipping Corporation* [2002] 1 WLR 2397 at [27] (Tuckey LJ).

¹⁷ *Sinclair Investments* at [69].

¹⁸ *Tribunals, Courts and Enforcement Act 2007* (UK).

¹⁹ *Regina (Cart) v Upper Tribunal* [2011] UKSC 28; [2011] 3 WLR 107, approving a similar conclusion in the Court of Appeal - [2010] EWCA Civ 859 - and the Divisional Court - [2009] EWHC 3052 (Admin); [2011] QB 120.

²⁰ [2010] EWCA Civ 258 (Sedley, Dyson and Longmore LJJ).

²¹ *Wiles* at [45].

²² At [47].

(ii) the issues may be of fundamental importance to them, sometimes making the difference between a reasonable life and a life of destitution.”

He then suggested that the proper approach was to apply a statutory provision in respect of leave to appeal, namely that “(a) the appeal would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it”.²³

In *Regina (Cart) v Upper Tribunal*²⁴ the Court of Appeal reconsidered the position after the restructuring of the tribunals. It took the view that a more restrictive attitude should now be taken to applications for judicial review,²⁵ Sedley LJ suggesting that a relabelled version of pre-*Anisminic* jurisdictional error, referred to as “outright excess of jurisdiction”,²⁶ could be adopted as a criterion of constraint.

Cart went on appeal to the Supreme Court,²⁷ the principal judgment being given by Baroness Hale of Richmond JSC. She identified three possible approaches which the Court could take:²⁸

“First, we could accept the view of the courts below ... that the new system is such that the scope of judicial review should be restricted to pre-*Anisminic* excess of jurisdiction and the denial of fundamental justice (and possibly other exceptional circumstances such as those identified in *Sinclair Gardens*...). Second, we could accept the argument, variously described in the courts below as elegant and attractive, that nothing has changed. Judicial review of refusals of leave to appeal from one tribunal tier to another has always been available and with salutary results for the systems of law in question. Third, we could adopt a course which is somewhere between those two options, and was foreshadowed by Dyson LJ [in *Wiles*], namely that judicial review in these cases should be limited to the grounds upon which permission to make a second-tier appeal to the Court of Appeal would be granted.”

There is a tendency in this passage to elide grounds of review, such as excess of jurisdiction and denial of fundamental justice, with gateway criteria, such as exceptional circumstances or other factors warranting a grant of leave to proceed.

²³ *Wiles*, at [48], referring to the *Access to Justice Act 1999* (UK), s 55(1).

²⁴ [2011] QB at 163 (Sedley, Richards LJJ, Sir Scott Baker).

²⁵ At [42].

²⁶ At [4].

²⁷ Above at fn 19.

²⁸ At [38].

However, that distinction proved inconsequential because, with the approval of all members of the Court, including now Lord Dyson JSC, the third approach, being that adopted by Dyson LJ in *Wiles*, was accepted, partly on the basis that the new *Tribunal Act* adopted the same test for proposed appeals from the Upper Tribunal to the Court of Appeal as applied to second appeals in the courts.²⁹

From an Australian point of view, the reasons for rejecting a return to pre-*Anisminic* jurisdictional error are of limited assistance. On the one hand, it was noted in *Cart* that, absent a privative clause, jurisdictional error would operate through quashing orders to correct errors of law on the face of the record. Further, without a privative clause, it was by no means clear what kinds of legal error the tribunals were entitled to make, without correction, and what they were not. Further, it was explained that to return to such a test would be to re-introduce “some of the technicalities of the past”.³⁰ More significantly, Baroness Hale addressed the reliance in the Court of Appeal on the concept of “proportionality”. She stated:³¹

“There must be a limit to the resources which the legal system can devote to the task of trying to get the decision right in any individual case. There must be a limit to the number of times a party can ask a judge to look at a question. ...

This approach accepts that a certain level of error is acceptable in a legal system which has so many demands upon its limited resources. Some might question whether it does provide sufficient protection against mistakes of law. In the ordinary courts, unlike the new tribunal system, there may be an appeal on a point of fact as well as law. It makes sense to limit such appeals to those with a real prospect of success. But judicial review is not such an appeal. The district judge and the circuit judge may both have gone wrong in law. They may work closely and regularly together so that the latter is unlikely to detect the possibility of error in the former. But at least in the county courts such errors are in due course likely to be detected elsewhere and put right for the future. The county courts are applying the ordinary law of the land which is applicable in courts throughout the country, often in the High Court as well as in the county courts. The risk of their developing ‘local law’ is reduced although by no means eliminated.”

²⁹ *Cart* at [129] Lord Dyson JSC.

³⁰ Baroness Hale at [40].

³¹ At [41].

Cart raises two points of interest for Australian courts. First, perhaps because of the view taken by the highly influential Franks Committee in 1957, UK governments have generally eschewed privative clauses.³² The Leggatt Committee's report of 2001, which formed the basis of the 2008 Act,³³ limited appeals to the Upper Tribunal (with no further appeal to a court) and characterized it as "a superior court of record". It was intended that that characterization would render it immune from judicial review. However, applying the principle that judicial review could only be removed or constrained by express and clear words, that device proved ineffective.³⁴

The second point is that the exercise undertaken in *Cart* was only possible because applications for judicial review are, in the UK, universally subject to a leave requirement. The Supreme Court held that leave should be granted to review decisions only on grounds reflecting the language which we would associate with applications for special leave to appeal under s 35A of the *Judiciary Act 1903* (Cth).

As *Sinclair Investments* demonstrated, the UK courts had for some years been moving towards a functional and pragmatic approach to judicial review, which has found acceptance in *Cart*. The functional limb operates at two levels: at a high level of generality, it recognizes that the rule of law requires judicial control of tribunals, to ensure they operate only within the parameters set by legislation. At a more detailed level, it requires reference to the purpose and function of the tribunal under review, according more intense scrutiny to cases which, for example, may involve the return of an asylum seeker to a country where he or she faces possible persecution. The intensity of scrutiny will also depend on such factors as the degree of independence and expertise of the tribunal.

The test of pragmatism is primarily concerned to ensure a degree of proportionality between, on the one hand, the costs of administrative justice, including the demands on the resources of the system from a particular litigant or class of litigant and, on the other, the benefits sought.

³² Report of the Committee on Administrative Tribunals and Inquiries (HMSO, July 1957) (Cmnd 218) at [117].

³³ Report – *Tribunals for Users – One System, One Service* (TSO, March 2001).

³⁴ *R (Cart) v Upper Tribunal* [2011] QB 120 (Div Court, Laws LJ and Owen J), approved in the Supreme Court at [30]-[33] (Baroness Hale JSC).

This brief description sounds a long way from a description of constitutional principle under Australian law: the approach adopted in the UK has been possible because judicial review is subject to a general leave requirement. That is not presently the case in much of Australia, but it is clear that some such form of control is desirable. It is also significant that, given the opportunity to revisit jurisdictional error, in whatever precise linguistic form, the UK Supreme Court has preferred a functional approach, with a lavish dash of pragmatism.

The Australian experience post-*Kirk*

(a) Generally

There have been a number of articles written about the significance of the High Court decision in *Kirk*, which it is not proposed to recapitulate here.³⁵ The case has also been considered and applied by intermediate courts of appeal in New South Wales, the Northern Territory, Queensland, Victoria and Western Australia.³⁶ The

³⁵ See JJ Spigelman “The Centrality of Jurisdictional Error” (2010) 21 PLR 77; JP Knackstredt, “Judicial Review after *Kirk v Industrial Court (NSW)*” (2011) 18 AJ Admin L 203; A Vial, “The minimum entrenched supervisory review jurisdiction of State Supreme Courts: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531” (2011) 32 Adel L Rev 145; R Sackville, “Bill of Rights: Chapter III of the Constitution and State Charters” (2011) 18 AJ Admin L 67; W Lacey, “Casenote: *Kirk v Industrial Court of New South Wales* – Breathing Life into *Kable*” (2010) 34 MULR 641; K Richardson “*NK Collins Industries Pty Ltd v Twigg* – How might *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 apply in Queensland?” (2010) 30 Qld Lawyer 177; J Gilmour “*Kirk*: Newton’s apple fell” (2011) 34 Aust Bar Rev 155.

³⁶ *Thiess Pty Ltd v Industrial Court (NSW)* [2010] NSWCA 252; 78 NSWLR 94, at [30]–[41], [49], [75]–[76] and [84]; *Chase Oyster Bar v Hamo Industries Pty Ltd* [2010] NSWCA 290; 272 ALR 750, at [3]–[5], [27]–[31], [58], [89], [106], [108], [112], [124], [125], [163]ff, [203] and [287]; *Downey v Acting District Judge Boulton (No 5)* [2010] NSWCA 240; 272 ALR 705, at [29]–[33], [48]–[52], [106] and [134]; *Hoffenberg v District Court (NSW)* [2010] NSWCA 142, at [4]–[5], [8]–[11], [21] and [28]; *Simpson Design Associates Pty Ltd v Industrial Court (NSW)* [2011] NSWCA 316; *Brennan v New South Wales Land and Housing Corporation* [2011] NSWCA 298, at [104]; *King v Health Care Complaints Commission* [2011] NSWCA 353; *Gefitlic v Merhi* [2011] NSWCA 241, at [11]–[12]; *Meriton Apartments Pty Ltd v Industrial Court (NSW)* [2011] NSWCA 243, at [78]ff; *Morgan v Commissioner of Police* [2011] NSWCA 134; *GPI (General) Pty Ltd v Industrial Court (NSW)* [2011] NSWCA 157, at [37]–[38] and [41]–[55]; *Ishac v R* [2011] NSWCCA 107, at [33]; *Commissioner of Police v Sleiman* [2011] NSWCA 21; 281 ALR 253, at [202] and [212]ff; *John Holland Pty Ltd v Industrial Court (NSW)* [2010] NSWCA 338; 202 IR 82, at [38], [47], [114]; *Director General, New South Wales Dept of Health v Industrial Court (NSW)* [2010] NSWCA 47; 77 NSWLR 159, at [14]–[15] and [22]–[24]; *R v JW* [2010] NSWCCA 49; 77 NSWLR 7, at [29]; *R v FRH Victoria Pty Ltd* [2010] VSCA 18, at [39] and [49]–[50]; *Kosteska v Magistrate Webber* [2010] QCA 301; *Easwaralingam v Director of Public Prosecutions* [2010] VSCA 353; *K & J Burns Electrical Pty Ltd Group v GRD Group (NT) Pty Ltd* [2011] NTCA 1, at [28], [36], [196], [145] and [135]; *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 22, at [6]–[7], [20], [28], [31]–[35], [50] and [72]–[78]; *Seiffert v Prisoners Review Board* [2011] WASCA 148, at [74] and [86]ff; *R v CAZ* [2011] QCA 231, at [35]–[40]; *Director of Housing v Sudi* [2011] VSCA

State cases have arisen in a variety of contexts, including criminal cases, decisions of adjudicators under legislation providing for progress claims by building sub-contractors, and decisions of tribunals which, at State level, would be treated as exercising judicial functions, often presided over by a judge. It is convenient for present purposes to focus on two issues. The first concerns the constitutional limitation on the legislative powers of the States identified in *Kirk*; the second concerns the supervisory jurisdiction in relation to the exercise of judicial power, with particular reference to superior courts. Not surprisingly, the limit on State legislative power has arisen primarily in State cases, but it is useful to view that discussion from the perspective of the similar limitation on federal legislative power deriving, at least in part, from the guarantee of the High Court's supervisory jurisdiction in s 75(v).

(b) Limits on legislative power

Governmental powers of any kind can be conferred to operate in defined areas and subject to conditions, express or implied, of great variety. French J, while on the Federal Court, suggested a classification of powers conferred by the *Migration Act* 1958 (Cth).³⁷ At least in relation to statutory powers, there will always be a question as to the consequences of an exercise of a power in contravention of a condition of conferral. In some cases, Parliament has indicated an intention in that regard. For example, s 175 of the *Income Tax Assessment Act* 1936 (Cth) provides that "[t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with". Section 177(1) provides that the production of a notice of assessment or a copy thereof "shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act* 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct".

266, at [17], [22], [27]–[30]; *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* [2011] WASCA 217, at [10]ff. This is a selective listing: a Casebase search in late 2011 indicated there were 45 intermediate court of appeal cases referring to *Kirk*, together with a further 7 decisions of the High Court. The High Court is reserved in an appeal from *Public Service Association of SA Inc v Industrial Relations Commission (SA)* [2011] SASCFC 14 inviting a reconsideration of *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*; [1991] HCA 33; 173 CLR 132.

³⁷ See *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 228; 123 FCR 298 at [453].

In 1995, in *Deputy Federal Commission of Taxation v Richard Walter Pty Ltd*³⁸, the taxpayer submitted that the Commissioner could not, in good faith, issue assessments in respect of the same income against two persons. The submission was rejected, but the Court also upheld the validity of the protective provisions. These provisions were not, in the traditional sense, privative clauses. A privative provision purports to remove the authority of a court to review a decision for alleged invalidity.³⁹ As Mason CJ stated in *O'Toole v Charles David Pty Ltd*,⁴⁰ ever since the judgment of Dixon J in *R v Hickman*⁴¹ it has been accepted that such a provision is "subject to significant limitations". In the passage referred to, Dixon J stated:

"Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."

In *Plaintiff S157*,⁴² the High Court held that the privative provision in the *Migration Act*⁴³ did not exclude review of a decision which was invalid because attended by jurisdictional error. Further, no provision would be valid which purported to "confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction".⁴⁴

The experience with cases under the *Migration Act* left some wondering as to the status of the reasoning in *Richard Walter* if a similar tax case should arise after *Plaintiff S157*. Would the Court still view the protective provisions as, in the

³⁸ [1995] HCA 23; 183 CLR 168.

³⁹ The ways in which this can be attempted are variable, but can be usefully categorized: see Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009) at [17.10].

⁴⁰ [1991] HCA 14; 171 CLR 232 at 249.

⁴¹ *R v Hickman; Ex parte Fox and Clinton* [1945] HCA 53; 70 CLR 598 at 615.

⁴² *Plaintiff S157 v Commonwealth* [2003] HCA 2; 211 CLR 476.

⁴³ Section 474.

⁴⁴ At [75].

language of Brennan J,⁴⁵ expanding the scope for the valid exercise of powers, even though not exercised in conformity with the terms of their conferral? In *Richard Walter* the Commissioner, being uncertain as to where liability lay, had included one sum in the assessments of two companies. In 2008, in *Futuris*,⁴⁶ the taxpayer sought judicial review of an assessment which appeared to double-count the liability of the taxpayer in respect of a single amount. Relying on the principle that a validating provision could not operate to protect an assessment from deliberate maladministration,⁴⁷ the taxpayer sought to characterize the inclusion of one amount in two places as deliberate abuse of power, equivalent to misfeasance in public office. The challenge was unsuccessful before Finn J at trial and in the High Court.⁴⁸

Two points of principle and one point of speculation arise from *Futuris*. (The point of speculation will be dealt with in the next section.) First, with respect to the assessments made by the Commissioner, the Court affirmed "the clear distinction... between want of jurisdiction and the manner of its exercise"⁴⁹ as relevant to the scope of s 39B of the *Judiciary Act*, being derived from section 75(v) of the Constitution. However, the clarity of the distinction, as it appeared to Dixon J in 1938, has faded over the years, particularly with the weakening in *Kirk* of the guidance previously obtained from the categories of error identified in *Craig*.

Secondly, the Court held a provision declaring an assessment not invalid for want of compliance with the Act to be effective, placing substantial emphasis on the existence of a statutory regime for challenging an assessment on any ground, as of right, before an independent tribunal (the Administrative Appeals Tribunal) and in the

⁴⁵ At 194, referring to his judgment in *O'Toole*, 171 CLR at 275; see also *Darling Casino Ltd v NSW Casino Control Authority* [1997] HCA 11; 191 CLR 602 at 630-631 (Gaudron and Gummow JJ, Brennan CJ, Dawson and Toohey JJ agreeing); cf *Plaintiff S157* at [64].

⁴⁶ *Commissioner of Taxation v Futuris Corporation Ltd* [2008] HCA 32; 237 CLR 146.

⁴⁷ At [55]. See also *Denlay v Federal Commissioner of Taxation* [2011] FCAFC 63; 193 FCR 412 at [75]-[78] (Keane CJ, Dowsett and Reeves JJ), dismissing an appeal from *Denlay v Federal Commissioner of Taxation* [2010] FCA 1434; 276 ALR 675 at [74]-[80] (Logan J) and M Aronson, "Misfeasance in Public Office: A Very peculiar Tort" (2011) 35 Melb UL Rev 1.

⁴⁸ At [43] and [45]. It is interesting that the NZ Supreme Court recently followed a similar approach, in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, the majority referring to *Futuris*, although they have long since abandoned the distinction between jurisdictional and other errors of law: *Peters v Davison* [1999] 2 NZLR 168 at 181 (Richardson P, Henry and Keith JJ), 201-202 (Thomas J), 206-209 (Tipping J).

⁴⁹ At [5], referring to Dixon J in *Parisiennes Basket Shoes Pty Ltd v Whyte* [1938] HCA 7; 59 CLR 369 at 389; and *Craig v South Australia* [1995] HCA 58; 184 CLR 163 at 176-180;.

Federal Court on appeal from the Tribunal, for error of law. "Assessment" was thus read to cover any assessment which did not involve deliberate maladministration. In effect, the Court accepted the effect of a validating provision, despite non-conformity with the statutory conditions for exercise of a power, in circumstances where other remedies were available, echoing the approach of Neuberger LJ in *Sinclair Investments*. Further, the language of deliberate maladministration bears a resemblance to the first requirement of Dixon J in *Hickman*, requiring a bona fide exercise of power. However, the rule for reconciling inconsistent statutory provisions explained in *Hickman* was expressly disclaimed as being inapplicable in relation to s 177 of the Tax Act,⁵⁰ and generally.⁵¹ In any event, the conclusion raises a question as to the principle of statutory construction which allows a broad effect to s 175, and the necessary scope of the alternative remedies which warrant such a result.

Adapting the language of *Kirk*, it seems that a validating provision will be given effect to the extent that the result is not to create an 'island of immunity' from judicial control.⁵² That metaphor should not, however, be treated as a criterion of invalidity. There are various ways in which the executive avoids judicial scrutiny. Some decisions are said to be non-justiciable; in other circumstances, information subject to immunity from disclosure in the public interest, such as adverse security assessments, may effectively preclude review.⁵³

Privative provisions exist, in various forms, in State legislation: indeed it was a privative provision in relation to decisions of the NSW Industrial Court which led to the statement of constitutional limitation on State legislative power in *Kirk*.⁵⁴ The protection of the supervisory jurisdiction of State Supreme Courts derives from their inclusion in s 73 of the Constitution, as part of the appellate jurisdiction of the High Court: to diminish the essential characteristics of a Supreme Court (to review for

⁵⁰ At [66]-[67].

⁵¹ At [70].

⁵² *Kirk*, at [99].

⁵³ See *Sagar v O'Sullivan* [2011] FCA 182; 193 FCR 311 (Tracey J). See, more generally, the analysis of the limits of the executive power of the Commonwealth in A Twomey "Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers", (2010) 34 MULR 313.

⁵⁴ *Industrial Relations Act 1996* (NSW) s 179.

jurisdictional error) is to diminish the jealously protected constitutional role of the High Court.

At State level, privative clauses are now routinely read as not precluding review for jurisdictional error (as required by *Kirk*). Rather, there has been a tendency to explore the limits on the power of a State Parliament to broaden powers by removing constraints, and particularly elements of procedural fairness.

Thus, in a criminal case, *CAZ*, the Queensland Court of Appeal considered whether a State statute removing a general law obligation on the prosecution to provide particulars in respect of certain kinds of sexual offence was beyond power because it infringed the principles established in *Kable* and *Kirk*.⁵⁵ Fraser JA (Chesterman and White JJA agreeing) rejected the argument. In its terms the argument owed little to *Kirk* and more to *Kable*; it illustrated ways in which a state legislature can remove what might otherwise be grounds for asserting jurisdictional error, by varying the procedural obligations in the exercise of judicial power. However, reliance on *Kable* demonstrates that what was being relied on to establish invalidity was the removal of an allegedly essential characteristic of the exercise of judicial power.

Similarly, the legislature may, with clear words remove at least some elements of procedural fairness and, in particular, general requirements to give notice of the possibility of adverse exercise of a power and the opportunity for the party potentially affected to respond. Legislation to that effect was upheld by the Western Australian Court of Appeal in *Seiffert v Prisoners Review Board*,⁵⁶ albeit a case involving non-judicial decision-making.

In other cases, the existence of the supervisory jurisdiction has been called in aid in construing rights of appeal, though with mixed results. In relation to progress payments under construction contracts, disputed claims are submitted to adjudicators specially appointed from a panel. In Western Australia, adjudication determinations can be reviewed by the State Administrative Tribunal.⁵⁷ In

⁵⁵ *R v CAZ* [2011] QCA 231.

⁵⁶ [2011] WASCA 148 at [69]-[75] and [106]-[114] (Martin CJ).

⁵⁷ *Construction Contracts Act 2004* (WA), s 46(1).

*Perrinepod Pty Ltd v Georgiou Building Pty Ltd*⁵⁸ the Court of Appeal considered whether the right of appeal extended to a failure by an adjudicator to dismiss summarily an application of which notice had not been given within the specified period. The conclusion, that it did not, appears to have gained some support from the availability of judicial review for jurisdictional error.⁵⁹

(c) Review of judicial power

The point of speculation arising from *Futuris* is this: the Full Court of the Federal Court was held to have erred in identifying jurisdictional error on the part of the Commissioner. The matter went to the High Court on appeal from the Full Court, but it could have gone by way of judicial review under s 75(v).⁶⁰ On review under s 75(v), would the Full Court have committed jurisdictional error by wrongly identifying jurisdictional error on the part of the Commissioner, albeit on appeal from a single judge exercising s 39B jurisdiction? Consideration of this possibility leads to another recent decision in the High Court's supervisory jurisdiction in respect of the Federal Court. That jurisdiction, as has long been accepted, extends to the issue of constitutional writs against the judges of the Federal Court.⁶¹ Its operation is relevant where there are exceptions to the appellate jurisdiction of the High Court from the Federal Court.

From 1 January 2010 there has been no right of appeal from interlocutory decisions of the Federal Court, including applications for leave to appeal within the Court.⁶² *Edwards v Santos Ltd*⁶³ involved an application for review under s 75(v) of a refusal of leave to appeal to the Full Court from an order of a single judge. A group of

⁵⁸ [2011] WASCA 217 (Martin CJ, McLure P and Murphy JA).

⁵⁹ At [113]-[121] (Murphy JA, Martin CJ agreeing).

⁶⁰ In practice the Court would not entertain such proceedings where an appeal was potentially available on a grant of special leave.

⁶¹ In respect of judicial officers generally, see *The King v Commonwealth Conciliation and Arbitration Court; Ex parte Whybrow & Co* [1910] HCA 33; 11 CLR 1 at 22 (Griffith CJ); *The King v Commonwealth Conciliation and Arbitration Court; Ex parte The Brisbane Tramways Co Ltd* [1914] HCA 15; 18 CLR 54 at 62 (Griffith CJ); with respect to the Federal Court, *The Queen v Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)* [1979] HCA 6; 143 CLR 190.

⁶² *Federal Court of Australia Act 1976* (Cth), s 33(4B). A similar limitation underlay the proceedings in *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* [1995] HCA 31; 184 CLR 620.

⁶³ [2011] HCA 8; 242 CLR 421.

registered native title claimants, having sought to negotiate an indigenous land use agreement with Santos and its joint venture partner, was confronted with a claim that Santos was entitled to production licences under the *Petroleum Act 1923* (Qld) as a result of authorities to prospect which were said to be “pre-existing rights-based acts” under the *Native Title Act*,⁶⁴ not attracting invalidity under the future act regime. The claimants alleged that variations of the authorities, extending their periods of operation, were void. It was said that the primary judge failed to consider whether the claimants had reasonable prospects of establishing that claim,⁶⁵ but had struck out the proceedings, a result from which a Full Court refused leave to appeal. The primary judge, Logan J, held that the question was prematurely raised because (a) there had been no application for a petroleum lease, and (b) there had been no determination as to whether the claimants held native title, absent which they had no standing and any petroleum lease could not be invalid under the *Native Title Act*, because it would not affect an extant native title.

The Full Court,⁶⁶ found the case indistinguishable from an earlier Full Court authority, *Lardil Peoples v Queensland*,⁶⁷ which supported the last step in the reasoning described above, namely that, absent proven native title, an act could not be invalid as a “future act” under the *Native Title Act*.⁶⁸ The claimants had sought to distinguish *Lardil* on the basis that they were relying on their status as registered native title claimants to negotiate an indigenous land use agreement with Santos. It was in that context that they applied to the Federal Court to resolve a dispute as to the status of the prospecting authorities which was central to the negotiating stance of each party. The point of distinction was accepted; Heydon J concluded (all other members of the Court agreeing):⁶⁹

“The opinion of the primary judge, not disturbed by the Full Court, was erroneous in concluding that there was no matter, that the plaintiffs had no standing, that the plaintiffs' application was merely for an advisory opinion, and that the Federal Court had no jurisdiction.

⁶⁴ *Native Title Act 1993* (Cth), s 241B.

⁶⁵ Per Heydon J at [34].

⁶⁶ *Edwards v Santos Ltd* [2010] FCAFC 64; 185 FCR 280 (Stone, Greenwood and Jagot JJ).

⁶⁷ [2001] FCA 414; 108 FCR 453 (French, Merkel and Dowsett JJ).

⁶⁸ At [61], [70] and [114].

⁶⁹ At [46].

Mistakenly to deny jurisdiction is a jurisdictional error attracting a writ of certiorari.”

The Court divided over whether it had power to award costs of the proceedings in the Federal Court. A majority (Hayne J dissenting) found authority in s 32 of the *Judiciary Act* to grant remedies which would “completely and finally” determine all matters in controversy, permitting such a step.⁷⁰ This last point may be significant for Supreme Courts exercising supervisory jurisdiction, or hearing appeals on questions of law,⁷¹ but the present significance of the case is the conclusion that a superior court which errs in determining its own jurisdiction (in this case restrictively) thereby commits jurisdictional error and is subject to correction, absent an appeal, by way of judicial review. That conclusion was not seen to require explanation. Did it matter that the question was constitutional in form; that it was an issue that would have attracted a grant of special leave in appellate jurisdiction; or would any error in determining the scope of the powers of the trial court have sufficed? The succinct conclusion set out above does not provide answers to these questions.

A similar issue arose in *Kirk* itself. The High Court stated at [108]:

“An order in the nature of certiorari could, and in this case should, have been directed to the Industrial Court in respect of its decisions at first instance. That remedy should have been granted for jurisdictional error of the Industrial Court. Because both the order of Walton J finding the offences proved and the order of Walton J passing sentence should have been quashed, the orders subsequently made by the Full Bench of the Industrial Court should also be quashed.”

The NSW Court of Appeal has discussed whether this was intended to be a finding of jurisdictional error on the part of the Full Bench. In *Thiess Pty Ltd v Industrial Court (NSW)*⁷² Spigelman CJ concluded that because the trial judgment was quashed, with retrospective effect, there was no judgment to support an appeal and

⁷⁰ At [5] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); [67] (Heydon J), Hayne J in dissent concluding that no such power arose in the supervisory jurisdiction of the Court as to make orders which should have been made in the Federal Court, would be to usurp the power of that Court and compromise the distinction between judicial review and an appeal: at [6]-[20].

⁷¹ *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300; 71 NSWLR 230 at [97] (Spigelman CJ); and *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [32] (French CJ).

⁷² [2010] NSWCA 252; 78 NSWLR 94 at [75]-[77].

therefore the Full Bench had no jurisdiction to dismiss the appeal.⁷³ However, that appears to invoke a concept of retrospective nullity which, at least in relation to a judgment of a superior court, requires justification.⁷⁴

If superior courts differ from inferior courts and tribunals in the autonomy conceded to them to determine their own powers, the difference appears to be diminishing.⁷⁵ In principle, the justification for subjecting the Federal Court to judicial review is to be found in it not being a court of unlimited jurisdiction; but where such a Court errs, not by exceeding its jurisdiction, but by foregoing a jurisdiction it in fact enjoyed, some different principle must be invoked. In particular, the idea of jurisdictional error as resulting in a nullity provides little assistance.

It may be noted, however, that “nullity” has been used in a somewhat different sense in relation to criminal trials, as equivalent to an error so fundamental that it cannot be waived by the affected party.⁷⁶ That principle may better explain the willingness of the High Court to set aside the judgments of the Industrial Court, described in the statute as “a superior court of record”,⁷⁷ in *Kirk*.

These issues may be further explicated in a matter in which the High Court is presently reserved, which involves a reconsideration of the reasoning in *Public Service Association (SA) v Federated Clerks’ Union of Australia*.⁷⁸ The 1991 case involved an attempt by the PSA to change its eligibility requirements so as to permit it to obtain members in employment then covered by other unions. The rule change took effect if registered by the registrar under the relevant legislation.⁷⁹ The registrar was implicitly required to register the rule change unless satisfied that one of a list of

⁷³ Beazley JA agreed at [79]; I reserved my position at [81]-[84]. Because the discussion was obiter, it did not address the distinction between an invalid trial before a superior court judge, as in *Kirk*, and one conducted by a magistrate, as in *Thiess*.

⁷⁴ See Aronson, Dyer and Groves at [7.20].

⁷⁵ The conventional approach was articulated with concinnity by Mason J in *The Queen v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375.

⁷⁶ See *R v Swansson* [2007] NSWCCA 67; 69 NSWLR 406 at [21]-[23] (Spigelman CJ). While the inability to waive may not assist in identifying a ‘fundamental error’ of this kind, it helps to explain the nature of such an error.

⁷⁷ *Industrial Relations Act*, s 152(1); for the purposes of the *State Constitution Act*, it has equivalent status to the Supreme Court and the Land and Environment Court: s 152(2)

⁷⁸ (1991) HCA 33; 173 CLR 132. (It is possible the outcome will turn on a question of statutory construction and the broader question will not be reached.)

⁷⁹ *Industrial Conciliation and Arbitration Act 1972 (SA)*, s 121.

disqualifying circumstances existed. He was not so satisfied and accordingly the change was registered. An appeal was available to the Industrial Commission, which should itself have considered whether it was satisfied of a condition warranting refusal of registration. In considering an application for leave to appeal, the Commission failed to appreciate that the appeal was by way of rehearing and was not limited to a review of a discretionary decision of the registrar governed by *House v The King* principles. Leave to appeal was refused. A privative clause in the Act precluded review by the State Supreme Court “except on the ground of excess or want of jurisdiction”.⁸⁰ On one view, the Commission had not exercised a jurisdiction it did not have, nor had it exceeded its jurisdiction in some other way; it had merely failed to exercise the jurisdiction conferred upon it.⁸¹ The alternative view was that by mistaking the scope of its jurisdiction the Commission was led to make an order (refusing leave to appeal) which it had no power to make. This was the view of the majority.⁸² As later explained by Doyle CJ,⁸³ the Commission had acted in excess of its jurisdiction “because it made an order refusing leave to appeal when it had no jurisdiction to do so, not having considered the issue posed by the application for leave to appeal”.

The argument in the 2011 case, following *Kirk*, was that the State privative clause could not exclude the jurisdiction of the Supreme Court to consider any form of jurisdictional error, whether it involved an excess of jurisdiction or a failure to exercise jurisdiction. However, if, as was held in the 1991 case, any error in formulating the question to be answered is jurisdictional, with the result that an order based upon a wrong formulation of the question will involve an excess of jurisdiction,⁸⁴ the point of distinction appears to disappear.

⁸⁰ Section 95.

⁸¹ At 153 (Deane J) and 164-166 (McHugh J).

⁸² At 144-145 (Brennan J), 161 (Dawson and Gaudron JJ).

⁸³ *Public Service Association of SA Inc v Industrial Relations Commission of SA* [2011] SASFC 14 at [12] (Doyle CJ, Duggan and Vanstone JJ agreeing).

⁸⁴ For a recent example of such jurisdictional error, see *Plaintiff M13-2011 v Minister for Immigration and Citizenship* [2011] HCA 23; 85 ALJR 740, at [22] (Hayne J).

Scope of “jurisdictional error”

Jurisdictional error is clearly a misnomer. It is a conclusory label - no necessary harm in that - but it has been rendered formless by over-application. Nevertheless, as Mark Aronson has demonstrated, it has a long history of usage, a central core meaning and, in his view, we can tolerate its imprecision.⁸⁵

An illustration of the continued functional significance of the distinction between jurisdictional and other error appears from a recent Victorian case. *Easwaralingam v Director of Public Prosecutions (Vic)*⁸⁶ involved judicial review of an interlocutory decision of a magistrate hearing a criminal prosecution (from which no appeal lay), refusing the prosecutor’s application for an adjournment because of the unavailability of a key witness. The magistrate’s decision was set aside by a single judge in the Supreme Court (Pagone J), but an appeal from that decision was allowed by the Court of Appeal (Tate JA, Buchanan JA agreeing). Victoria, like New South Wales, has a statutory provision extending the concept of “the record” for the purpose of identifying error, permitting the grant of relief in the nature of certiorari.⁸⁷ In each statute the record is defined to include the reasons for decision. As Tate JA explained:⁸⁸

“An application for certiorari is not the same as a general appeal for error of law, most importantly, because it falls to be determined on the basis of different material. An application for certiorari does not invite a scouring of all the evidence before the inferior court to determine whether the proper inferences were drawn from it or whether an item of evidence was overlooked”.

The decision of the magistrate was not protected by a privative clause, so that jurisdictional error was not required to justify intervention, but a relevant error of law had to appear on the face of the record, which incorporated the reasons for the decision, but not the evidence. Although jurisdictional error was apparently not relied upon, had it been, the scope of the ground may have been reduced, but the scope of the inquiry would have expanded.

⁸⁵ Above fn 7.

⁸⁶ [2010] VSCA 353; 208 A Crim R 122.

⁸⁷ *Administrative Law Act 1978* (Vic), s 10; cf *Supreme Court Act 1970* (NSW), s 69(4).

⁸⁸ At [25].

To make a finding without any evidential support is in one sense an arbitrary or capricious exercise of power; it thus engages jurisdictional error. However, the malleability of the “no evidence” ground has become apparent in recent years. In past decades the Hon Michael Kirby used to rail against the strictures of *Azzopardi v Tasman UEB Industries Ltd*,⁸⁹ which held that illogical reasoning could not be challenged on an appeal limited to questions of law. But *Azzopardi*, like *The Queen v The District Court; ex parte White*,⁹⁰ has been partly sidestepped. The reasoning is that “no evidence” means nothing “relevant” in the sense of providing, by analogy with section 55 of the *Evidence Acts*, a logical basis for an inferred fact. (Ultimate, or determinative, facts are almost always inferred.) Accordingly, to misunderstand evidence as providing relevant support for a particular conclusion when, in the opinion of the reviewing court it does not, is not merely to reason illogically, but maybe to make a finding for which there is “no evidence”.

Whether a particular inference flows from available evidence is often a contestable proposition. Further, there is a question whether the reviewing court is assessing the reasoning process of the decision-maker or making an objective assessment of the evidence and the finding? Often the tribunal of fact will not have addressed explicitly a ‘no evidence’ issue; the finding of a particular fact will, however, contain an implicit finding that there was some (and indeed adequate) evidence to support it.⁹¹

The issue as to how to assess fact-finding may be illustrated by the different approaches in the High Court in *Amaca v Booth*,⁹² a case in which the Dust Diseases Tribunal (NSW) had upheld a claim for damages in respect of a lung cancer which it found had been caused by exposure to asbestos dust. Amaca both appealed and sought judicial review of the Tribunal's decision; the appeal was limited to a decision of the Tribunal on a question of law, but the alternative process was abandoned as immaterial. (Thus the issues identified in *Easwaralingam* did not arise.) The central point was whether the plaintiff's expert was asserting a causal connection between the worker's exposure to asbestos dust and his lung cancer, or

⁸⁹ (1985-86) 4 NSWLR 139.

⁹⁰ [1966] HCA 69;116 CLR 644.

⁹¹ *Kostas*, 241 CLR 390 at [69].

⁹² [2011] HCA 53.

whether all he could (and did) say was that the exposure to a known carcinogen increased the risk of lung cancer which, on the probabilities, was caused by something else.

Reviewing documentary evidence (or even a transcript) is permissible for a court on an appeal by way of rehearing,⁹³ but where it is necessary to identify an error of law, what are the proper limits of such an assessment? No other member of the High Court accepted the level of critical review of the evidence undertaken by Heydon J (in dissent).

In *Kirk*, the High Court stated that the reasoning in *Craig* was “not to be seen as providing a rigid taxonomy of jurisdictional error”.⁹⁴ The joint judgment had earlier referred to the statement that “the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine”.⁹⁵ Behind such a statement, it was said, “lie premises about what is meant by jurisdictional error”. Those “premises” were said to give content to the notion of authority.⁹⁶ However, there was a larger question arising in *Kirk*, not addressed in *Craig*. In *Craig* the discussion of “jurisdictional error” commenced with the drawing of a distinction between “the inferior courts which are amenable to certiorari and ... those other tribunals exercising governmental powers which are also amenable to the writ”.⁹⁷ *Craig* was concerned with a possible error on the part of a judge in the District Court of South Australia, required to apply in a criminal trial the principles with respect to an unrepresented accused discussed in *Dietrich v The Queen*.⁹⁸ *Craig* was not concerned with error committed by a superior court.

Despite the suggestion that *Craig* might not be the last word on the concept of “jurisdictional error”, even in relation to inferior courts, the joint judgment in *Kirk* ascribed the errors in question to the third example identified in *Craig*, namely

⁹³ *Amaca v Ellis* [2010] HCA 5; 240 CLR 111.

⁹⁴ At [73].

⁹⁵ *Craig* at 179; *Kirk* at [68].

⁹⁶ *Kirk* at [69].

⁹⁷ *Craig* at 176.

⁹⁸ [1992] HCA 57; 177 CLR 292.

misapprehending the limits of the court's functions and powers.⁹⁹ With respect to the statutory designation of the Industrial Court as a "superior court of record", the joint judgment merely concluded that it "does not alter the conclusion stated about the availability of certiorari".¹⁰⁰ Such a designation must, however, at least in State jurisdiction, require attention to the scope of the powers conferred by the State on the relevant court or tribunal. There are ways by which a State legislature, without expressly limiting judicial review, can confer broad powers on its courts and officers.

Mechanisms for the control of judicial review

There seems little doubt that the availability of judicial review must take into account a range of factors, including the wide variety of circumstances in which it must operate. Accordingly, the criterion of engagement must be flexible to permit the courts to adopt a functional approach.

There is also a need for pragmatism. It is well understood that litigation demands a high level of resources, in terms of the skills, training and experience of participants in the process and the infrastructure needed to support the courts and enforce orders. This is not something which the courts themselves can ignore: indeed, they are obliged by statute to facilitate the just, quick and cheap resolution of the real issues in dispute.¹⁰¹ Further, courts must be conscious of the fact that litigation may be used (or misused) in the armoury of individuals seeking to achieve an outcome which promotes their perceived interests. Dismissal of proceedings as an abuse of process is a blunt instrument to protect the interests of opposing litigants, other users of the judicial system, the courts themselves and public expenditure. A more sophisticated control mechanism, that can operate earlier in the process, is desirable.

Two questions arise: first, what is the appropriate mechanism to give effect to functional and pragmatic considerations? Secondly, is such an approach consistent with the constitutional obligations of Supreme Courts, as determined by *Kirk*?

⁹⁹ At [74] and [76].

¹⁰⁰ At [106]; cf at [56].

¹⁰¹ See, eg, *Civil Procedure Act 2005* (NSW), s 56.

One mechanism is to impose, where it does not now exist, a general leave requirement with respect to judicial review applications. Such a provision has long been in force in the UK.¹⁰² Traditionally, prerogative relief was obtained in two stages: first it was necessary to obtain an order nisi calling on the respondent to show cause why relevant relief should not be granted, which order might be made absolute in due course. That process was abandoned in the UK in 1973. In Australia, the procedure only continues to operate in the Northern Territory and Western Australia.¹⁰³ In all other jurisdictions the process has been replaced by a general form of application for judicial review, pursuant to which the appropriate relief is granted, without the issue of the old prerogative writs.¹⁰⁴ However, in South Australia there is a general requirement for leave (“permission”) to proceed.¹⁰⁵

The jurisdiction of the High Court is not directly relevant for this purpose, but it is both dependent upon and constrained by s 75(v) of the Constitution. The terminology of prerogative relief has been abandoned, but the “constitutional writs” provided for in s 75(v) permit the traditional procedure to be adopted. There thus remains a requirement for an application for an order to show cause.¹⁰⁶ The Court has on occasion refused an application for an order nisi in circumstances where the procedure invoking the original jurisdiction of the High Court appeared to have been invoked to avoid the special leave requirements of the appellate jurisdiction.¹⁰⁷ This discussion is not concerned with the jurisdiction of the High Court: the point is rather than it maintains a process which permits it to impose an initial filter on not only its appellate jurisdiction, but also its original supervisory jurisdiction.¹⁰⁸

¹⁰² *Senior Courts Act 1981* (UK), s 31(3).

¹⁰³ See Rules of the Supreme Court 1971 (NT), Order 56; Rules of the Supreme Court 1971 (WA) Order 56.

¹⁰⁴ Court Procedure Rules 2006 (ACT), Pt 3.10, r 3553; *Judicial Review Act 1991* (Qld) s 41; *Supreme Court Act 1970* (NSW), s 69; Supreme Court Civil Rules 2006 (SA), Ch 8, Pt 3; *Judicial Review Act 2000* (Tas) s 43; Supreme Court (General Civil Procedure) Rules 2005 (Vic), Order 56.

¹⁰⁵ Supreme Court Civil Rules, r 200(1).

¹⁰⁶ High Court Rules 2004 (Cth), Pt 25, r 25.01.

¹⁰⁷ *Re Carmody; Ex parte Glennan* [2000] HCA 37; 74 ALJR 1148 (Kirby J); *The Queen v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; 78 CLR 389 at 400.

¹⁰⁸ The High Court also has power to remit matters in its original jurisdiction, pursuant to the *Judiciary Act 1903* (Cth), s 44.

The rules of the Federal Court are more specific: Part 31 now deals separately with applications for orders under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the *Judiciary Act*, the *Migration Act 1958* (Cth) and the *Australian Crime Commission Act 2002* (Cth).¹⁰⁹ Although a respondent may object to competency, there is no leave requirement in respect of the Court's judicial review jurisdiction.

A leave requirement has the constitutional benefit of vesting control of the supervisory jurisdiction in the hands of the courts which exercise it. That should satisfy constitutional requirements. There remains a question as to the criteria for a grant or refusal of leave.

The criteria for the grant of leave are not to be confused with (or elided into) the grounds upon which the supervisory jurisdiction can be invoked, but they must operate coherently. They should, for example, take into account the availability and scope of rights of appeal, including those already exercised. For example, the approach adopted by the UK Supreme Court in *Cart* involved a tribunal which was in all but name a court presided over by a senior judge. No lesser degree of restraint is appropriate when determining an application to review a superior court judgment, absent a right of appeal. In such cases the criteria may reflect those applied by the reviewing court in relation to the best analogous appellate jurisdiction. The wide variation in circumstances in which judicial review may be sought, however, will preclude the development of uniform criteria: indeed, such an attempt would thwart the purpose of the exercise.

The future of jurisdictional error

The grounds for review, particularly in respect of courts described, whether by tradition or legislation, as "superior courts of record", are important. The adoption of the concept of "jurisdictional error" as the criterion of limitation of the legislative power of a State with respect to its Supreme Court may be thought unfortunate. It was not a term in use in 1900, nor was the concept of "jurisdiction" understood then as it is now. An important constitutional function of section 75(v) was to permit judicial review of legislation, executive action and exercises of judicial power which

¹⁰⁹ Federal Court Rules 2011 (Cth), Pt 31, Divs 31.1, 31.2, 31.3 and 31.4 respectively.

exceeded constitutional limits. Thus, excess or want of jurisdiction will be reviewable, even if the error is found in the judgment of the Federal Court (or the Family Court), having undoubted authority to determine such questions without usurping judicial power, or leaving an island of unreviewable decision-making. This is review for "constitutional error", a role readily justified.

Deliberate maladministration or abuse of process may provide a separate ground. Examples will be rare, but may include, in relation to a superior court, failure to recuse for actual bias.

Exercising a power not available to a statutory court (such as the Federal Court, the Family Court and a range of State courts) or withdrawn (for example, by the *Judiciary Act*, s 38) from a Supreme Court otherwise described as a "court of general jurisdiction", is also readily justifiable. However, this ground can have uncertain limits. First, there is a question as to whether the legislation has vested in the court power to determine a non-constitutional issue of fact or law on which its jurisdiction depends.¹¹⁰ Secondly, there may be "implied" or "common law" limitations, such as denial of procedural fairness or acting without an evidential basis. In all such cases, the error should be one which involves a fundamental feature of a civil or criminal trial, rather than a statutory condition of a special statutory jurisdiction. Parliament can generally remove common law requirements or provide that non-compliance does not entail invalidity, thereby raising a separate question as to the limits of legislative power.

There will come a point at which the removal of protections for one party (particularly a criminal defendant) will be seen to undermine the fairness of a trial so as to be incompatible with the independent exercise of judicial power. This may identify a constitutional limit on legislative power of the kind identified in *Kable*. The characteristic of judicial impartiality has been described by Gaudron J as one of the "defining features of judicial power".¹¹¹ These are limits which can be breached either, as in *Kable*, through the imposition of a novel statutory regime, or, as with a

¹¹⁰ See, eg, *Ex parte WA National Football League*, 143 CLR at 202 (Barwick CJ), 214 (Gibbs J) and 224-226 (Mason J, Jacobs J agreeing); *Ex parte Marsh* 157 CLR at 376-377 (Mason J), 394-395 (Dawson J).

¹¹¹ *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 at [80].

strong privative clause, by limiting a traditional judicial role. Such breach, whether legislative or judicial, will entail constitutional invalidity. Although not upheld so far, this is the basis of a credible objection to a "conclusive evidence" clause.¹¹²

Some substantive powers may contain implicit procedural constraints. For example, it has been said that for "an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed".¹¹³ The Court in *MacCormick* continued:

"Not only must it be possible to point to the criteria themselves, but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner."

The supervisory jurisdiction in respect of superior courts will either reflect fundamental principles of the common law trial or, where statute has intervened, the constitutional limits of state legislative power. These limits derive from Chapter III of the Constitution and the principles of separation of powers and incompatibility, as identified in *Kable* and its recent progeny. There is no need in this scheme for any novel adaptation of jurisdictional error in relation to a superior court. A coherent justification for judicial review, identifying relevant boundaries, can be expressed in constitutional terms, whence flows the core supervisory jurisdiction of the High Court, the Federal Court and the Supreme Courts.

¹¹² See *Futuris* at [64]-[65] and *Nicholas v The Queen* [1998] HCA 9; 193 CLR 173.

¹¹³ *MacCormick v Federal Commissioner of Taxation* [1984] HCA 20; 158 CLR 622 at 640 (Gibbs CJ, Wilson, Deane and Dawson JJ).