



## The riddle of jurisdictional error

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*The concept of ‘jurisdictional error’ recurs throughout the Australian legal system, and therefore in legal reasoning, in a variety of important and well-known ways. However, legal reasoning involving ‘jurisdictional error’ may in truth only seem to be simple, for the term can conceal the underlying complexity, and indeed can distract from the correct approach. Like a riddle, ‘jurisdictional error’ often conceals the underlying necessary analysis. This article seeks to illustrate those propositions across various areas of administrative law, and suggests that in novel cases, the safer approach is not to use the term ‘jurisdictional error’ at all.*

### Introduction

Roger Traynor’s monograph *The Riddle of Harmless Error* commences by asking, ‘How does a judge determine whether an error is harmless or not?’<sup>1</sup> His focus was on criminal appeals, an area which is only superficially simple,<sup>2</sup> illustrating Learned Hand’s observation that history teaches scepticism about any easy explanations.<sup>3</sup> The *seeming* simplicity of that ubiquitous term ‘jurisdictional error’ in the Australian legal system is no different. Indeed, the use of the term ‘jurisdictional error’ can be deceptive, masking the complexity of the legal analysis required in a particular case.

The term ‘jurisdictional error’ defines the limits of legislative, executive and judicial power at federal and state levels. It describes a limitation upon Commonwealth and state legislative power — for it is not possible for any Legislature to deny jurisdiction to the High Court or the state Supreme Courts to review for ‘jurisdictional error’. It specifies a limitation upon the exercise of executive power, whose validity will always be judicially reviewable if affected by ‘jurisdictional error’. At the judicial level, it delineates the constitutionally entrenched jurisdiction of the High Court and state Supreme Courts, which extends not only to exercises of executive power, but to jurisdictional errors made by other courts. That supervisory jurisdiction is a ‘defining characteristic’ of those courts,<sup>4</sup> supplementing the (largely statutory) appellate structure.

That is a lot of work for one term — a term not found in the Commonwealth

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1 R Traynor, *The Riddle of Harmless Error*, Ohio State University Press, 1970, p 3.

2 See *United States v Lane* 474 US 438 (1986) discussed in *Darkan v R* (2006) 227 CLR 373; 228 ALR 334; [2006] HCA 34; BC200604514 at [148]ff per Kirby J.

3 Testimony to the Senate Committee on Labor and Public Welfare, 28 June 1951, in I Dilliard (Ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand*, Knopf, 1952, pp 225–52, 249.

4 *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1; BC201000230 at [55].

Constitution or the Constitution of any State — to do! I am echoing the point made by John Basten that ‘jurisdictional error’ is being called on to do too much work.<sup>5</sup> It ought to come as no surprise that a deal of complexity<sup>6</sup> underlies its various usages. There is no harm in continuing to use the term, so long as it is borne in mind, no differently from many other familiar legal terms (such as ‘right’ or ‘property’<sup>7</sup> or indeed ‘court’ — see below)<sup>8</sup> that the same word has quite different legal meanings in different contexts. This is not a phenomenon confined to administrative law: the position resembles the limited utility of ‘unconscionability’ as a unifying principle or theme underlying many equitable doctrines, of which it has been said that ‘this may have masked rather than illuminated the underlying principles at stake’.<sup>9</sup> The seeming simplicity derived from using of the same label in a variety of contexts is illusory.

The purpose of this article is to emphasise aspects of that complexity, in order to discourage loose thinking about jurisdictional error. It addresses jurisdictional error in courts and non-courts, the nature of jurisdictional error where there has been a failure to accord procedural fairness, and the contrast between jurisdictional and non-jurisdictional error, all in order to illustrate that ‘jurisdictional error’ is a conclusionary term of limited assistance in legal analysis, which indeed may be best avoided in a novel case.

## Jurisdictional error in courts and bodies other than courts

It had been conventional to observe that what amounts to jurisdictional error for a tribunal was different from what amounts to jurisdictional error for a court. It used to be said that the latter has authority to decide questions of law in a binding way, the former does not. A familiar passage in the joint judgment in *Kirk*, by reference to *Craig*, identified a series of errors which exceeded the authority or powers of a tribunal and therefore amounted to jurisdictional error, and then contrasted the position with inferior courts, whose ‘ordinary

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5 J Basten, ‘Jurisdictional error after Kirk: Has it a future?’ (2012) 23 *PLR* 94 at 95; ‘Judicial Review of Administrative Action: Tiers of Scrutiny or Tears of Frustration’ in N Williams (Ed), *Administrative Law Essays*, Federation Press, 2014 (forthcoming).

6 For an accessible account of legal complexity, with reference to the primary literature, see R Posner, *Reflections on Judging*, Harvard University Press, 2013, Ch 3. Certainly, the Australian law surrounding jurisdictional error ranks highly on the four features of complex legal systems identified by Peter Schuck: ‘density, technicality, differentiation and indeterminacy or uncertainty’: P Schuck, ‘Legal Complexity: Some Causes, Consequences and Cures’ 42 *Duke LJ* 1 (1992), cited by Posner, *ibid*, at 59. That said, the notion of ‘legal complexity’ is itself deceptively complex: see R G White, ‘The Illusion of Simplicity: An Explanation of Why the Law Can’t Just be Less Complex’ 27 *Florida State University L Rev* 715 (2000).

7 Hohfeld regarded ‘property’ as a striking example of ‘the ambiguity and looseness of our legal terminology’: see *Fundamental Legal Conceptions as applied in Judicial Reasoning*, Yale University Press, 1964, p 28 and of course railed against ‘the very broad and indiscriminate use of the term ‘right’: *ibid*, at 38.

8 See text below at n 12.

9 See J McGhee (Ed), *Snell’s Equity*, 30th ed, Sweet & Maxwell, 2000, Preface, cited by Gummow and Hayne JJ in *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51; 197 ALR 153; [2003] HCA 18; BC200301513 at [42]–[43].

jurisdiction . . . encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine'.<sup>10</sup>

That reasoning means that the same error on the same facts, may be both jurisdictional and non-jurisdictional, depending on the body determining it. A court which wrongly agrees with an erroneous approach to a statute by, say, a tribunal, may commit appellable error but may not commit jurisdictional error, unlike the tribunal.<sup>11</sup>

*Kirk* identified two problems with that distinction. The first (and smaller) problem is distinguishing between courts and bodies other than courts. The second (and larger) problem is that the distinction in this context is unhelpful.

The joint judgment in *Kirk* observed that distinguishing between courts and administrative tribunals, at the state level, may not be straightforward. That is undoubtedly true. There is 'no unmistakable hallmark' to identify a 'court'.<sup>12</sup> The name is not to the point: the Dust Diseases Tribunal in New South Wales, the Queensland Civil and Administrative Tribunal and the Upper Tribunal in the United Kingdom are all courts.<sup>13</sup> A tribunal may be a court for a particular purpose (such as the Suitors Fund Act),<sup>14</sup> but not for the purposes of s 77(iii).<sup>15</sup> The sort of blurring which is possible is illustrated by the Mental Health Court established as a superior court of record with a narrow subject matter jurisdiction, but with an investigative function, which is not bound by the rules of evidence unless it decides to be, and normally sits in private and whose hearings can only be open to the public if the parties consent.<sup>16</sup> On the other hand, the (former) New South Wales Administrative Decisions Tribunal in many respects resembled a court: its decisions could be registered in which case they operate as a judgment, it could compel witnesses to answer questions, what would be a contempt of the ADT could be reported to the Supreme Court and treated as such, and it regarded itself, wrongly as it turns

10 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1; BC201000230 at [67]–[68], referring to *Craig v South Australia* (1995) 184 CLR 163; 131 ALR 595; [1995] HCA 58; BC9506437.

11 As was said in *Chase Oyster Bar v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; 272 ALR 750; [2010] NSWCA 190; BC201007088 at [174]:

errors which, if committed by a tribunal, might amount to jurisdictional error will not ordinarily, if committed by an inferior court, have the same result. That arises in part because there is a presumption that tribunals do not have the power to decide authoritatively questions of law (so as to give themselves jurisdiction where it does not exist), whereas this is part of the ordinary work of courts.

Examples may readily be seen in one of the growth areas of judicial review — challenges to decisions of medical assessment panels for jurisdictional error. One instance is *Meeuwissen v Boden* (2010) 78 NSWLR 143; 56 MVR 453; [2010] NSWCA 253; BC201007357 at [35], and see *Wingfoot Australia Partners Pty Ltd v Eyup Kocak* (2013) 303 ALR 64; (2013) 88 ALJR 52; [2013] HCA 43; BC201314108 addressed below.

12 *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 351; [1980] 3 All ER 161; [1980] 3 WLR 109.

13 See Dust Diseases Tribunal Act 1989 (NSW) s 4; Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 164; Tribunals, Courts and Enforcement Act 2007 (UK) s 3(5) (the latter is indeed a superior court of record).

14 *Mahenthirarasa v State Rail Authority of New South Wales* (2008) 6 DDCR 61; [2008] NSWCA 101; BC200803678.

15 *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77; 234 ALR 398; [2006] NSWCA 185; BC200605484 at [50].

16 See Mental Health Act 2000 (Qld) ss 381(1), 404(1) and 414.

out, as a ‘court of a State’ for the purposes of exercising federal jurisdiction invested pursuant to s 77(iii).<sup>17</sup> The fact that different views can be held as to whether a body is a court or tribunal, presents a difficulty with a delineation of jurisdictional error which turns upon that distinction.

For present purposes, the distinction turns on whether statute has conferred authority to decide questions of law (which is close to the s 77(iii) question referred to above). There is no necessary reason why a state tribunal cannot be empowered to do just that, although it may be that very clear language is necessary to do so. What is said to matter is the court or tribunal has power to decide a question of law ‘authoritatively’.<sup>18</sup> The second, and larger, difficulty is that what *that* means is itself problematic upon analysis. The reasons in *Kirk* went on to say:

If ‘authoritative’ is used in the sense of ‘final’, a decision could be described as ‘authoritative’ only if certiorari will not lie to correct error in the decision. To observe that inferior courts generally have authority to decide questions of law ‘authoritatively’ is not to conclude that the determination of any particular question is not open to review by a superior court. Whether a particular decision reached is open to review is a question that remains unanswered. The ‘authoritative’ decisions of inferior courts are those decisions which are not attended by jurisdictional error. That directs attention to what is meant in this context by ‘jurisdiction’ and ‘jurisdictional’. It suggests that the observation that inferior courts have authority to decide questions of law ‘authoritatively’ is at least unhelpful.<sup>19</sup>

Certiorari lies for error of law on the face of the record, and it is common for inferior courts either to be subject to appeals extending to error of law, or for certiorari for error of law on the face of the record (or both). But are the reasons in *Kirk* suggesting that the distinction between jurisdictional error by a tribunal and jurisdictional error by a court whose decisions may be reviewed for error of law on the face of an (expanded) record is to be elided?

Take the (recurring) class of proceedings for judicial review of decisions of the NSW District Court in the exercise of its criminal jurisdiction, hearing and determining appeals from courts exercising a summary jurisdiction such as the Local Court.<sup>20</sup> No appeal lies from the District Court in such cases,<sup>21</sup> but there is an obligation to submit a question of law to the Court of Criminal Appeal,<sup>22</sup>

17 See Administrative Decisions Tribunal Act 1997 (NSW) ss 82, 83, 131 and *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 97 ALD 426; 236 ALR 385; [2006] NSWCA 349; BC200610346. See also *Sunol v Collier* (2012) 81 NSWLR 619; 258 FLR 282; [2012] NSWCA 14; BC201200773.

18 Contrast the position in the United States, where the executive can fix legal meaning to laws within reasonable limits: *Chevron v Natural Resources Defense Council* 467 US 837 (1984); cf *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; 169 ALR 400; [2000] HCA 5; BC200001174 at [39]–[44].

19 (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1; BC201000230 at [70].

20 For example, pursuant to s 11(1) of the Crimes (Appeal and Review) Act 2001 (NSW).

21 The appeal is not an ‘action’ within the meaning of s 127 of the District Court Act 1973 (NSW). A ‘useful rule of thumb’ is that a statutory appeal to the District Court tends not to be an action: *Muldoon v Church of England Children’s Homes Burwood* (2011) 80 NSWLR 282; [2011] NSWCA 46; BC201101466 at [11].

22 Section 5B of the Criminal Appeal Act 1912 (NSW), whose prima facie permissive language has long been construed as obligatory: *Elias v DPP* (2012) 222 A Crim R 286; [2012] NSWCA 302; BC201207370 at [8]; *Ex parte McGavin; Re Berne* (1945) 46 SR (NSW) 58;

and non-compliance with that obligation may attract judicial review.<sup>23</sup> It is easy to conclude that the District Court is not able authoritatively to determine questions of law in the exercise of that criminal jurisdiction; in what respect then is it different from a body which is not a court? More generally, is there a difference between the District Court exercising its criminal jurisdiction, and the District Court hearing and determining actions from which an appeal lies, often as of right, to the Court of Appeal?

What emerges is that the task of identifying ‘jurisdictional error’ where there is error of law irrespective of whether it is styled a court or a tribunal is far from being straightforward. And it is far from clear that the analysis is assisted by the label ‘jurisdictional error’.

### Jurisdictional error and procedural fairness

It is often said to be established that there is jurisdictional error to fail to accord procedural fairness. My purpose is not to question that proposition, but to instead to tease out its full meaning.

There was (and to some extent still is) a large debate whether that is a common law duty or an implication from statute. But an important passage in the reasons of four members of the court in *Plaintiff S10-2011 v Minister for Immigration and Citizenship* may be seen to acknowledge the falseness of the dichotomy:

The principles and presumptions of statutory construction which are applied by Australian courts, to the extent to which they are not qualified or displaced by an applicable interpretation Act, are part of the common law. In Australia, they are the product of what in *Zheng v Cai* was identified as the interaction between the three branches of government established by the Constitution. These principles and presumptions do not have the rigidity of constitutionally prescribed norms, as is indicated by the operation of interpretation statutes, but they do reflect the operation of the constitutional structure in the sense described above. It is in this sense that one may state that ‘the common law’ usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power.<sup>24</sup>

That is to recognise the centrality of statutory interpretation, which is an aspect (in this country) of the common law. Because a statute must be construed in its context, which includes the common law, often little turns upon whether a restriction upon the exercise of power without according procedural fairness is better viewed as a default position which the statute (having been construed) has not abrogated, or alternatively as a result of the

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(1945) 63 WN (NSW) 45. It may be contrasted with the Court of Crown Cases Reserved established in 1848 by 11 & 12 Vict c 78, to which references were discretionary. See P Handler, ‘The Court of Crown Cases Reserved 1848-1908’ 29 *Law and History Review* 259 at 271–8 (2011).

23 Examples are *Landsman v Director of Public Prosecutions* [2013] NSWCA 369; BC201314355 and *Director General, Department of Trade and Investment, Regional Infrastructure and Services v Glennies Creek Coal Management Pty Ltd* [2013] NSWCA 371; BC201314513 at [13] and *Firth v Director of Public Prosecutions* [2013] NSWCA 403; BC201315245.

24 (2012) 246 CLR 636; 290 ALR 616; [2012] HCA 31; BC201206650 at [97].

ordinary process of giving legal meaning to the legislative text. (It would be quite different if there were not a single common law of Australia. In the United States, where there are multiple bodies of common law, there are very substantial theoretical and practical difficulties; it suffices to ask whether a federal court ought to apply the state common law of statutory interpretation.)<sup>25</sup>

To assert that a failure to accord procedural fairness amounts to jurisdictional error runs the risk of leading to error through reasoning by labels. The existence and content of the obligation to accord procedural fairness is a question of statutory construction. It is either a question of whether and the extent to which the statute displaces (with sufficient clarity) the incidents of procedural fairness imposed by the common law, or else it is a direct question of construction of the statute.<sup>26</sup> And if that is necessarily a conclusion following a process of statutory construction, then the ‘jurisdictional error’ to which a failure to comply with it gives rise is likewise, necessarily, a conclusion following that process, as Ronald Sackville has observed.<sup>27</sup> To my mind, that is difficult to reconcile with the same term being a limitation on legislative power, at least if ‘jurisdictional error’ is to play a useful part in determining whether the limitation has been breached. For why would there be an implied limitation on legislative power to deny jurisdiction to review for failure to accord procedural fairness, yet no lack of legislative power to subtract from the content of the obligation to accord procedural fairness? Constitutional limitations or prohibitions are tested by reference to the practical operation of a law, as opposed to its form.<sup>28</sup>

To summarise, undoubtedly there is an implied constitutional limitation, but it may be queried whether ‘jurisdictional error’ is a helpful term to analyse when that limitation has been breached.

Moreover, bodies which are not courts are subject to no minimal obligation

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25 See C Nelson, ‘State and Federal Models of the Interaction between Statutes and Unwritten Law’ 80 *University of Chicago Law Review* 657 (2013). Professor Nelson concludes at 761 that:

individual federal statutes are now presumed to encompass many questions that might once have been thought to lie beyond their domains. [T]he statufication of these questions is at least partly attributable to pressures created by the Erie doctrine (or, where penal statutes are concerned, by the doctrine that there is no federal common law of crimes).

26 There is a private law analogue, highlighted by the work of E Peden, *Good Faith in the Performance of Contracts*, LexisNexis Butterworths, 2003, who emphasises that although it may seem to be conventional to seek to qualify contractual terms by an implied term to act in good faith, a better approach is to deploy good faith at the level of construction rather than implication, thereby avoiding the difficulty that an implied term must not be inconsistent with an express term: *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* (2013) 29 BCL 329; [2012] NSWCA 184; BC201204458 at [146]; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 59; BC200400994 at [194], [198] and [208]. Yet in order to determine whether any implied obligation to act in good faith is inconsistent with an express term, it is necessary to construe the term.

27 R Sackville, ‘The constitutionalisation of State administrative law’ (2012) 19 *AJ Admin L* 127 at 133, citing L McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *PLR* 14 at 18.

28 *Cole v Whitfield* (1988) 165 CLR 360 at 401; 78 ALR 42; [1988] HCA 18; BC8802596; *Ha v New South Wales* (1997) 189 CLR 465 at 489; 146 ALR 355; [1997] HCA 34; BC9703377.



to accord procedural fairness.<sup>29</sup> Of course ordinary principles of construction require a detraction from procedural fairness to be found in ‘plain words of necessary intendment’,<sup>30</sup> if not ‘irresistible clarity’,<sup>31</sup> but there is no necessary reason why that may not be done.<sup>32</sup> If so, then there is no jurisdictional error. Indeed, the supervisory jurisdiction would support an application to *restrain* the tribunal acting in accordance with what otherwise would be the most basic aspects of procedural fairness; the NSW provision for example is cast in terms of a directive to the Administrative Decisions Tribunal (‘the ADT is to ensure that it does not disclose’).<sup>33</sup>

Similarly, take the implication of reasonableness which is the default position as a qualification upon the statutory conferral of power<sup>34</sup> (and of course is readily implied in other contexts, especially the contractual).<sup>35</sup> There is a very similar interplay between the process of construing the statute in a context where Parliament is not readily taken to have authorised unreasonable exercises of power, with the reasoning relating to the existence of the duty to accord procedural fairness and its content. Indeed, the same may be seen throughout the traditional grounds of judicial review, as Stephen Gageler presciently observed a decade ago.<sup>36</sup>

The consequences are twofold. The first is that decisions do not readily translate from one context to a different context. The second is that perhaps the best way of viewing what was held in *Kirk* is not so much a focus upon ‘jurisdictional error’ as a key unifying concept within the Australian legal system, but something simpler: there are some things which cannot be done because they distort or weaken the minimum necessary level of curial review within the system established by the Constitution and in particular ss 73 and

29 Cf *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; 261 ALR 220; [2009] HCA 49; BC200910134 at [54], [88]–[89], [97]–[98] and [155]–[165] in the case of courts.

30 *Annetts v McCann* (1990) 170 CLR 596 at 598; 97 ALR 177; [1990] HCA 57; BC9002899.

31 *Potter v Minahan* (1908) 7 CLR 277 at 304.

32 *Commissioner of Police v Gray* (2009) 74 NSWLR 1; [2009] NSWCA 49; BC200901582 is an example (where the tribunal exercising merits review was forbidden from informing the person whose security guard licence was being removed of the criminal intelligence on which the decision was based). I pass over the constitutional questions which have probably not yet been fully resolved: *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340; 281 ALR 253; [2011] NSWCA 21; BC201103276 at [214]–[232]. Other examples are *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; 267 ALR 204; [2010] HCA 23; BC201004220; *Seiffert v Prisoners Review Board* [2011] WASCA 148; BC201105012, both noted by Sackville, above n 26, at 134.

33 See *Commissioner of Police v Sleiman* (2011) 78 NSWLR 340; 281 ALR 253; [2011] NSWCA 21; BC201103276 at [161]–[163] and cf *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; 242 ALR 191; [2008] HCA 4; BC200800373 at [35], [40] and [44].

34 See especially *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225; (2013) 87 ALJR 618; [2013] HCA 18; BC201302165 at [92] per Gageler J.

35 ‘An implication of a reasonable time when none is expressly limited, is, in general, to be made unless there are indications to the contrary’: *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1 at 13 per Dixon J; [1947] ALR 1; (1946) 20 ALJR 354; BC4600049 and see *Ballas v Theophilos (No 2)* (1957) 98 CLR 193 at 197 per Dixon CJ; (1957) 31 ALJR 917; BC5700750.

36 See S Gageler, ‘The legitimate scope of judicial review’ (2001) 21 *Aust Bar Rev* 279.

75(iii) and (v). Labelling them as ‘jurisdictional error’ comes at the end of, and does not much assist with, the analysis.<sup>37</sup>

### Contrasting jurisdictional and non-jurisdictional error

Non-jurisdictional error in some respects is even more complex than jurisdictional error. It is necessary to identify a conferral of jurisdiction to sustain the authority to decide whether there is judicially reviewable error (for a fortiori, the jurisdiction is not constitutionally entrenched) and it may be that there are qualifications upon the conferral or privative clauses to which it is subject. Having done that, a large question of construction remains, which may be illustrated by two examples.

First, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*,<sup>38</sup> power was conferred to cancel a visa if the Minister reasonably suspected that the person failed the ‘character test’. The statute required the Minister to give notice of the decision, and reasons for it, and the right of review, but also provided that a failure to comply with the requirement did not affect the validity of the decision. The Minister failed to provide adequate reasons, and mandamus would have issued to compel performance of the duty to do so. However, there was no jurisdictional error so as to vitiate the exercise of power. That conclusion was reached following a process of statutory construction, where what was decisive was the fact that the obligation to give reasons post-dated the exercise of power (which made it unlikely that it was a jurisdictional fact!), and the fact that the statute had itself addressed the consequences of failure to perform the duty. The reasons of Gleeson CJ, Gummow and Hayne JJ distinguished between jurisdictional and non-jurisdictional error:

The cancellation decision may still be reviewed under s 75(v) of the Constitution for jurisdictional error otherwise arising. The prosecutor’s attack, albeit unsuccessful, for denial of natural justice is an immediate example. But failure in the notification required by s 501G does not impeach the cancellation decision for jurisdictional error.<sup>39</sup>

A body of law has been established working out those principles, holding that courts<sup>40</sup> and other bodies<sup>41</sup> may make errors of law which do not go to jurisdiction.

Similarly illustrative of the role of statutory construction is the High Court’s

37 I have elaborated upon the nature of the restriction, in general terms, in *Authority to Decide*, Federation Press, 2012, pp 74–83.

38 (2003) 216 CLR 212; 201 ALR 327; [2003] HCA 56; BC200305703.

39 *Ibid*, at [46].

40 *Newman v President of the Industrial Court of Queensland* [2012] QSC 145; BC201203870 at [45] and [52]; similar reasoning may be found in *Parker v President of the Industrial Court of Queensland* [2010] 1 Qd R 255; [2009] QCA 120; BC200903615 at [32]–[38] per Keane JA.

41 *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78; 207 IR 177; [2011] FCAFC 54; BC201102269 at [54]–[58] (Fair Work Australia); *Clyde Bergemann v Varley Power* [2011] NSWSC 1039; BC201107002 at [53]; *Cranbrook School v JA Bradshaw Civil Contracting* [2013] NSWSC 430; BC201302085 at [58]; *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2012] QSC 346; BC201208714 at [8]; *Ooralea Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd* [2013] QSC 254; BC201312954 at [23]–[24] (building adjudications).



recent decision in *Wingfoot Australia Partners Pty Ltd v Eyup Kocak*,<sup>42</sup> where judicial review was sought of the decision of a medical panel established pursuant to state legislation as a barrier, or at least a threshold hurdle, before a court may order damages for a work related injury. The legislation in certain circumstances permitted an injured worker to bring proceedings for common law damages, but only if a court was satisfied that there was a ‘serious injury’. The legislation made the opinion of the medical panel ‘final and conclusive’ and required ‘any court, body or person’ to accept it.

The joint reasons of five members of the court emphasised on three occasions that the function of certiorari was ‘to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power’.<sup>43</sup> They said:

Jurisdictional error constitutes one basis on which the Supreme Court can make an order in the nature of certiorari to remove the purported legal consequences of a purported exercise of power under a State statute. That basis for the Supreme Court making an order in the nature of certiorari is entrenched by the Commonwealth Constitution. Error of law on the face of the record constitutes a separate and distinct basis on which the Supreme Court can make an order in the nature of certiorari to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power under a State statute. That basis for the Supreme Court making an order in the nature of certiorari is not entrenched by the Commonwealth Constitution; its application can be excluded by statute. Where it is not excluded, however, it applies independently of jurisdictional error. That is to say, where error of law on the face of the record is not excluded by statute as a basis for making an order in the nature of certiorari, and where an error of law on the face of the record is found, an order in the nature of certiorari can be made so as to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power irrespective of whether the error of law also constitutes a breach of a condition of the valid exercise of that power.<sup>44</sup>

That passage may need in due course to be reconciled with the undermining in *Kirk* of what had been said in *Craig* about the inutility of finding that a court could decide questions of law authoritatively, especially if one seeks to draw a clear line between jurisdictional and non-jurisdictional error. However, it may be that the same error may be jurisdictional error and error of law on the face of the record, such that judicial review is available either in the entrenched supervisory jurisdiction or in a statutory expansion (as was available in *Wingfoot*). This is not qualitatively different from long entrenched notions of overlap in the Anglo-Australian legal system; ‘the common law is not antipathetic to concurrent liability.’<sup>45</sup> Ancient examples may be seen in trover and assumpsit;<sup>46</sup> in modern law we are accustomed to treat the same conduct as giving rise to tortious, contractual, equitable and statutory causes

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42 (2013) 303 ALR 64; (2013) 88 ALJR 52; [2013] HCA 43; BC201314108.

43 Ibid, at [25], [26] and [31], echoing language of Gageler J in *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225; (2013) 87 ALJR 618; [2013] HCA 18; BC201302165.

44 Ibid, at [26].

45 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193 per Lord Goff; [1994] 3 All ER 506; [1994] 3 WLR 761.

46 See J Ames, ‘The History of Trover’ 11 *Harv Law Rev* 277 at 374 and 386 (1897) (‘The career of trover in the field of torts is matched only by that of assumpsit, the other specialized form of action on the case, in the domain of contract’) and J Randall and

of action, with different elements and remedies.<sup>47</sup>

One dispositive strand in the reasoning in *Wingfoot* was that despite the generality of the conclusive evidence clause in the statute, properly construed it meant merely that the medical panel's opinion was binding upon all courts and persons in the determination of the statutory compensation claim.<sup>48</sup> It said nothing about the claim for common law damages available if there was a serious injury, and in particular did not bind the court determining the threshold question whether there was a serious injury. That was dispositive, because the only proceedings in which the medical panel's determination had consequences (the statutory compensation proceedings) had been brought to an end:

The order in the nature of certiorari made by the Court of Appeal was not available to quash the opinion of the medical panel because that opinion had no continuing legal consequence which could be removed by that order. . . . that is a sufficient reason to allow the appeal.<sup>49</sup>

That demonstrates that the scope of a court's supervisory jurisdiction to review for non-jurisdictional error is likewise highly dependent upon construction. Only because the *prima facie* general words of the legislation were as a matter of statutory construction read down to narrow the effect of the certificate, such that it no longer had any legal effect, was certiorari denied.

To return to the phrase recurring in *Wingfoot*, what does it mean to remove the purported legal consequences of a purported exercise of power? It seems unlikely that the existence of some legal consequence (whether actual or purported) has become a *necessary* element of the exercise of supervisory jurisdiction: there is no mention of, say, the declaratory relief which in fact issued in *Ainsworth v Criminal Justice Commission*<sup>50</sup> where, once again, the report from the commission, although blackening the appellants' reputations and made without accordng natural justice, led to 'no legal consequence or effect' such that certiorari was not available. It also seems unlikely that in repeatedly using the phrase 'remove the purported legal consequences of a purported exercise of power' there has been an elision of the fine distinctions that regularly recur. Should relief be refused in the exercise of discretion? Because of delay or because third party rights have intervened? Because of the availability of appeal or other appellate mechanisms?<sup>51</sup> These aspects can be determinative, especially in the hardest of cases. It is to be recalled that in *Re Wakim*, the winding up order made by the Federal Court without jurisdiction was not quashed, although orders were made preventing further steps being taken by the liquidator pursuant to it. And the preventative detention order

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B Edgeworth, 'Detinue, Trover and Conversion' in J Gleeson, J Watson and E Peden (Eds), *Historical Foundations of Australian Law*, Federation Press, 2013, Vol II.

47 See M Leeming, 'Theories and Principles underlying the Development of the Common Law — The Statutory Elephant in the Room' (2013) 36 *UNSWLJ* 1002 at 1026–8.

48 *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647; 277 ALR 654; [2011] HCA 22; BC201104303 at [34]–[35].

49 See *ibid.*, at [41].

50 (1992) 175 CLR 564; 106 ALR 11; (1992) 66 ALJR 271; [1992] HCA 10.

51 See *Director General, Department of Trade and Investment, Regional Infrastructure and Services v Glennies Creek Coal Management Pty Ltd* [2013] NSWCA 371; BC201314513 at [16]–[17] and [41].

made in *Kable* although made pursuant to an unconstitutional statute and a clear case of jurisdictional error if ever there was one, remained sufficient to deny a claim for false imprisonment.<sup>52</sup>

In short, as Mark Aronson has said:

It is a mistake to assume that jurisdictional errors always lead to the same consequence, namely, nullity. It is also a mistake to assume that nullity represents the same legal consequence (namely, legal non-existence) for all contexts. Nullity does not automatically follow from jurisdictional error, and when it does follow, its effects can vary.<sup>53</sup>

The label ‘jurisdictional error’ therefore is an unhelpful descriptor of the legal character of the impugned exercise of executive or judicial power.

### Jurisdictional error as a conclusion

How large is the class of errors that are ‘jurisdictional’? So far as I can see, no one knows. It might be thought unlikely that a court which makes an error in admitting evidence commits *jurisdictional* error, but in *Kirk* itself one of the jurisdictional errors was a breach of s 17(2) of the Evidence Act, which provides that a defendant is not competent to give evidence for the prosecution. There was a ‘breach on the limits of its power to try the offence’ by acquiescing in a course even though it was one to which the parties consented.<sup>54</sup> As Heydon J put it, the court had ‘jurisdiction to decide whether to fine Mr Kirk after a trial conducted in accordance with the rules of evidence’, but ‘did not have jurisdiction to decide whether to fine the appellants after a trial which was not conducted in accordance with the rules of evidence’.

As Sir Frederick Jordan said, delphicly, ‘there are mistakes and mistakes’;<sup>55</sup> the meaning of that riddle is that the ultimate question is one of power. As Hayne J said in *Aala*,<sup>56</sup> jurisdictional errors concern departures from limits upon the exercise of power, while non-jurisdictional errors do not. The essence of a non-jurisdictional error is that authority is given ‘to go wrong’. French CJ made the same point, extra-judicially:

Ultimately the question of jurisdictional error is, for all intents and purposes, one of power. The question is, did the decision-maker have the power to make the decision or, relevantly to mandamus, did the decision-maker wrongfully decline to fulfil his or her duty to make a decision?<sup>57</sup>

But when are the limits upon power exceeded? Take for example the other jurisdictional error identified in *Kirk*, the failure to identify with specificity

52 *New South Wales v Kable* (2013) 298 ALR 144; (2013) 87 ALJR 737; [2013] HCA 26; BC201302839.

53 M Aronson and M Groves, *Judicial Review of Administrative Action*, 5th ed, Thomson Reuters, 2013, p 686.

54 See (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1; BC201000230 at [76].

55 *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.

56 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; 176 ALR 219; [2000] HCA 57; BC200006927 at [162].

57 ‘Constitutional Review of Executive Decisions: Australia’s US Legacy’ (2010) 35 *UWALR* 35 at 40.

particulars of the charges.<sup>58</sup> Although it is convenient to think of that as a common law rule,<sup>59</sup> it would be more accurate to describe it as the outcome of a series of statutes commencing with Sir John Jervis' Acts and their interpretation by courts.<sup>60</sup> Identifying the limits upon power, breach of which amounts to *jurisdictional* error, turns upon a characterisation of the nature of the error against what in this case is a long history of interaction between common law and statute.

That illustrates why it has often been said that 'jurisdictional error' is a conclusion.<sup>61</sup> It is a 'general concept of undefined, probably undefinable content'.<sup>62</sup> Matthew Groves has said:

Judicial findings of jurisdictional error also have little precedent value because the vague and context dependent process by which limitations and duties are implied rarely provide useful guidance from one legislative context to another. The problem is amplified by the fact that many of the limitations or imperative duties which the courts have declared may give rise to jurisdictional error are implied by judicial interpretation rather than express legislative statement.<sup>63</sup>

With the last sentence of that passage I respectfully disagree but only because in my view it *understates* the position. In *every* case the limitation upon power or the imperative duty imposed upon the donee of power is a consequence of judicial interpretation. That involves necessarily a process of statutory construction to determine both the availability and the content of grounds of judicial review. One of the most basal elements of statutory construction is that the Act is to be read as a whole in its context.<sup>64</sup> That inevitably leads to important questions such as have been noted by John Basten: ought it necessarily to follow that the same considerations govern jurisdictional error where executive power has granted a licence or a planning approval?

Not only is the label imprecise; it is not supported by particular criteria which demonstrate when invalidity results. Indeed, the concept of invalidity itself must be

58 See (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1; BC201000230 at [74].

59 Cf S Ratnapala and J Crowe, 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *MULR* 175 at 205–6.

60 See now Criminal Procedure Act 1986 (NSW) s 16, and *Environment Protection Authority v Truegain Pty Ltd* [2013] NSWCCA 204; BC201312390 at [36]–[40].

61 See, eg, Basten, above n 5, at 105; *Rockdale Beef Pty Ltd v Industrial Relations Commission of NSW* (2007) 165 IR 7; [2007] NSWCA 128; BC200704836 at [80]; J J Spigelman 'Public Law and the Executive' (2010) 34 *Aust Bar Rev* 10 at 16; C Noonan, 'Section 75(v), no-invalidity clauses and the rule of law' (2013) 36 *UNSWLJ* 437 at 450, and, especially and most influentially, Aronson and Groves, above n 53, pp 17–19 and 681ff. See also the case specific inquiry to which Robertson J referred in *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; 302 ALR 572; [2013] FCA 317; BC201301698 at [77].

62 Spigelman, *ibid*, at 17; M Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Fed L Rev* 399 at 415.

63 Groves, *ibid*, at 415–16.

64 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28; BC9801389 at [69]; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; 293 ALR 412; [2012] HCA 56; BC201209680 at [24], [28], [70], [88]; *Axiak v Ingram* (2012) 82 NSWLR 36; 62 MVR 59; [2012] NSWCA 311; BC201207471 at [3]; *Smalley v Motor Accident Authority of New South Wales* [2013] NSWCA 318; 65 MVR 82; BC201313236 at [2], [44]–[45].

used with caution; broadly it connotes not merely an incorrect exercise of a power, but a mistake as to its nature or existence. Jurisdictional error therefore includes agenda-setting mistakes that involve a failure to formulate correctly the issue to be determined and procedural mistakes, such as denying the unsuccessful party an opportunity to be heard. It will include a failure to exercise the power in good faith for the purposes for which it was conferred. Further, invalidity usually refers in this context to the absence of adverse legal consequences for the person directly affected and not to indirect effects on third parties.

In each case, it is necessary to determine, by reference to the relevant legislative purpose, whether it has been demonstrated that an established error was intended to spell invalidity. Simply to assert “jurisdictional error” will fail to identify how the principles of statutory interpretation should apply to a particular subject matter in a specific statutory context. The legal analysis underlying the applicants’ contentions involves several steps, which need to be articulated.<sup>65</sup>

Once again, the invocation of ‘jurisdictional error’ merely distracts from the correct legal analysis.

## Conclusion

The areas touched upon above all illustrate that while some absolute propositions involving jurisdictional error may be readily stated, they may be of limited utility. An example may perhaps be seen in *Wainohu v New South Wales*,<sup>66</sup> where a very broadly worded privative clause in the Crimes (Criminal Organisations Control) Act 2009 (NSW) purported to exclude judicial review of declarations made by an eligible judge. Four Justices said that ‘The effectiveness of that exclusion is denied by the decision in *Kirk*’. That is unquestionably so. But what is the extent to which judicial review continues to lie? The answer ‘jurisdictional error’ is not necessarily enlightening. Does it forbid declaratory relief? What is the extent of the jurisdiction protected by *Kirk*? In other words, the proposition is correct, but is only the beginning of the legal analysis.

Ultimately, the questions of statutory construction of the particular legislation, and the principles by which what is jurisdictional or non-jurisdictional error fall to be determined, are questions of common law in the sense stated in *Plaintiff S10-2011*. There is a single common law in Australia. It follows that ultimately, or as was said in *Kirk* ‘in the end’,<sup>67</sup> it will be determined in accordance with principles determined by the High Court. But I think it is unhelpful to say that the unifying theme is ‘jurisdictional error’. Like the riddle considered by Chief Justice Traynor half a century ago, ‘jurisdictional error’ is an answer to a question, or an element in legal reasoning, that does not much assist legal analysis. Jurisdictional error is a label — albeit a very convenient label — masking the variety of ways in which the process of construction is central to delineating the scope and content of the constitutionally recognised supervisory jurisdiction of the High Court and the Supreme Courts. Although a single label is used to unify many vitally important concepts of administrative and constitutional law in the

<sup>65</sup> *Area Concrete Pumping Pty Ltd v Inspector Barry Childs (WorkCover)* (2012) 223 IR 86; [2012] NSWCA 208; BC201204952 at [76]–[77].

<sup>66</sup> (2011) 243 CLR 181; 278 ALR 1; [2011] HCA 24; BC201104388 at [89].

<sup>67</sup> (2010) 239 CLR 531; 262 ALR 569; [2010] HCA 1; BC201000230 at [99].

Australian legal system, behind it lies a process of construing the individual statute in its context and in light of its purpose. And not only is it ‘neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error’,<sup>68</sup> but also the distinctions are highly contestable. (The private law analogies sprinkled none too subtly throughout this article are intended to provoke the thought that this is not too different from other areas of law.)

Jurisdictional error will amount to a failure to comply with an essential precondition or limit to the valid exercise of power, irrespective of whether the precondition or the power arises under the general law or under statute.<sup>69</sup> But what is essential and what goes to the existence of power as opposed to the manner of its exercise? These are contestable, qualitative questions that turn upon the statute as a whole in its context. That is why in any novel case there is limited utility in relying on propositions relating to jurisdictional error in respect of a different statutory scheme. What goes to the existence of power as opposed to the manner of its exercise is likely to be different if the context is deporting an asylum seeker or prosecuting for murder, as opposed to a decision not to renew a licence or not to permit a residential building. The principled way forward in a novel case is to turn to analyse the statute as a whole and in its context to determine the limits qualifying the conferral of power. It will always be possible to do so without using the term ‘jurisdictional error’, and it is respectfully suggested that eschewing that term is apt to enhance the quality of the analysis.

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<sup>68</sup> *Ibid.*, at [71].

<sup>69</sup> *Spanos v Lazaris* [2008] NSWCA 74; BC200802890 at [15].