FOR NOW WE SEE FACE TO FACE: THE CONSTITUTIONAL DIVIDE

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Whilst it may be that the High Court has turned its face against intense scrutiny of substantive merits in executive decision making, recent cases establish how determined the Court has been to prevent unwarranted executive interference in the exercise of judicial power.

The use of privative clauses

To declare what the law is has always been an important part of the judicial function. Yet Parliament, whether Federal or State, has frequently sought to close off appellate and review avenues by the use of privative clauses. In recent times the High Court has become increasingly vigilant in ensuring that avenues of judicial review are preserved where it is deemed necessary to prevent finality.

Last year in *Kirk v Industrial Relations Commission*[1] the High Court reviewed the law relating to privative clauses in both the Federal and State jurisdictions and efficacy of such privative clauses as applied to both Courts and Tribunals. Where a privative clause is found, the question arises as to whether there is 'jurisdictional error' of such a kind that the privative clause will not protect against a superior court intervening to review the findings of the decision maker. As the plurality said in *Kirk* 'the principles (of jurisdictional error and its related concept of jurisdictional fact) are used in connection with the control of tribunals of limited jurisdiction on the basis that a tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction'[2].

Jurisdictional error before tribunals

In *Kirk*, the Court referred to its earlier decision in *Craig v South Australia*[3] in which it had been said:

> if .... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it[4].

It was reiterated in *Kirk* that the above reasoning was not to be 'a rigid taxonomy of jurisdictional error'.[5] For example, it was recognised that in some cases failure to give reasons may constitute a failure to exercise jurisdiction.[6] So too, natural justice requires that both sides be heard.

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Jurisdictional error before courts

Conversely, a failure by an inferior Court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction, or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such question, will not ordinarily involve jurisdictional error[7].

However, an inferior court falls into jurisdictional error 'if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises jurisdiction does exist'.[8]

Section 179(1) of the *Industrial Relations Act (NSW)* provided that a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any Court or Tribunal'; this section was held to be invalid.

The basis of the distinction between Courts and Administrative Tribunals was identified, in *Kirk*, in the lack of authority of an Administrative Tribunal to determine authoritatively questions of law or to make an order or decision otherwise than in accordance with the law.[9]

Commonwealth legislation

In 2002, the Howard Government had sought by a privative clause to prohibit appeals from decisions made by the Refugee Review Tribunal to the Federal Court, and then onto the High Court by way of judicial review. In *Plaintiff S157/2002 v the Commonwealth*[10] Gleeson CJ said that a privative clause may involve a conclusion that a purported decision is not a 'decision .... under this Act'. The majority said that a privative clause cannot protect against a failure to make a decision required by the legislature, which decision on its face exceeds jurisdiction.[11] If a privative clause conflicts with another provision, pursuant to which some action has been taken or decision made, its effect will depend upon the outcome of its reconciliation with that other provision.[12] A specific intention in legislation as to the duties and obligations of the decision maker cannot give way to the general intention in a privative clause to prevent review of the decision.[13] Their Honours said that the expression 'decisions... made under this Act' must be made so as to refer to claims which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction. An administrative decision which involves jurisdictional error is 'regarded in law as no decision at all'.[14] Section 474(2) of the *Migration Act 1958 (Cwth)* required that the decision in question be 'made under [the] Act', and where the decision made involved jurisdictional error such a decision was held not to be a decision protected against judicial review.[15]

In *Plaintiff S157/2002* it was said with reference to section 75(v) of the Constitution, which authorised prerogative relief against a Commonwealth officer:

> First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[16]

State legislation

In *Kirk*, the Court considered how far, under State legislation, it was necessary to take account of the requirements under Ch III of the *Constitution*. The Court said that at Federation each of the Supreme Courts had a jurisdiction that included that of the Court of Queen's Bench in England and, whilst statutory privative provisions had been enacted by

Colonial legislatures which had sought to cut down the availability of certiorari in *Colonial Bank of Australasia v Willan*[17], the Privy Council said of such provisions:

> It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.

In *Kirk,* the Court said that: 'legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'[18].

Both at Federal and State levels the scope of judicial review affords scope to Courts exercising a supervisory jurisdiction to ensure that procedural fairness as expressed in the principles governing jurisdictional error, is observed both by courts and tribunals.

Recently, in *MIMIA v SGLB*[19] the Court considered once more the question of whether a privative clause was consistent with the obligation of a decision maker to discharge 'imperative duties' or to observe 'inviolable limitations or restraints'.

The Court said in other cases the nature of the alleged error will turn upon the legislative criteria in the jurisdiction, making the construction of the legislation the primary and essential task.

Prior to *Plaintiff S157/2002* it had been thought that the three provisos[20] referred to by Dixon J in *R v Hickman*[21] constituted the only basis upon which a privative clause might be defeated, but, as the Court said in *SGLB*[22], they formed a minimum requirement that unless they were satisfied a privative clause would be rendered ineffectual, and it did not follow that if they were satisfied the provision would always be sufficient.

Procedural fairness in serious and organised crime legislation

Where the High Court has believed that the executive is intruding too markedly upon the exercise of a judicial power, such as directing a Court to eschew natural justice as expressed in procedural fairness, the Court has struck down offending legislation. Traditionally the Court has been reluctant to find invalid State legislation. In large part this is because there is no recognised separation of powers under the State *Constitutions*.

The natural justice principle may be viewed as an integral part of the Ch III judicial power under the Commonwealth *Constitution*.

In *Leeth v the Commonwealth* Mason CJ, Dawson and McHugh JJ said:

> It may well be that any attempt on the part of the (Commonwealth) legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers[23].

Until recently any State legislature's encroachment upon the exercise of judicial functions appeared to be treated with some forbearance by the High Court. In *Kable v DPP of New South Wales*[24] *ad hominem* legislation directed at conscripting the New South Wales judiciary to exercise powers inconsistent with the normal and appropriate judicial process

against Mr Kable was held to be invalid legislation and, as such, impugned the institutional integrity of the State Court. It was there said that since State Courts were clothed with the exercise of Federal powers there was an obligation upon the State Courts to preserve their institutional integrity and not to allow that reputation to 'be borrowed by the political branches to cloak their work in the neutral colours of judicial action'.[25]

However, it was thought for many years that *Kable* might be 'a constitutional guard dog that would bark but once'.[26] In 2009, it barked for a second time with *International Finance Trust Company v New South Wales Commission and Ors*[27] and by a narrow majority of four to three section 10 of the *Criminal Assets Recovery Act 1990 (NSW)* was held invalid. This provision enables a Court to make a restraining order freezing the assets of a person suspected of a serious crime. An application can be made 'ex parte' accompanied by an affidavit of an authorised officer, stating that the officer suspects a person has engaged in a 'serious crime', and where a Court considers that the affidavit discloses reasonable grounds for any such suspicion a freezing order may be made against the suspect property. Such an application must be heard, if the Commission so directs, by the Court without permitting a hearing to the person affected. Although ex parte orders are unexceptional, the majority considered that this legislation set up a special regime, and did not provide an appropriate mechanism for dissolving the ex parte order at a later time, and thereby did not provide the party against whom the application was directed an opportunity to be heard before the order was made.

French CJ said in *International Finance Trust*:

> Procedural fairness or natural justice lies at the heart of the judicial function. In the Federal Constitutional context, it is an incident of the judicial power exercised pursuant to Ch III of the *Constitution.* It requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it[28].

His Honour considered that for a State Court to be required to hear and determine an application for a restraining order, without notice to the party affected, is incompatible with the judicial function of the Court and that, in directing the Court as to the manner of its jurisdiction, the legislation distorted the institutional integrity of the Court and affected its capacity as a repository of Federal jurisdiction.[29] Gummow and Bell JJ said a court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the State, and the legislation did not provide for a clear means for curial supervision of the duty to disclose material facts on an ex parte application.[30]

Heydon J, the fourth member of the majority, cited Megarry J in *John v Rees*[31]:

> It may be that there are some that would decry the importance which the Courts attach to the observance of the rules of natural justice. .... [A]s everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, some how, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Of the last sentence Lord Hoffmann had observed: 'most lawyers will have heard of or read or even experienced such cases, but will also know how rare they are. Usually, if evidence appears to an experienced tribunal to be irrefutable, it is not refuted'. Heydon J said that both Megarry J and Lord Hoffmann may have been guilty of a little exaggeration, but even if Lord Hoffmann's reasoning is completely correct it did not destroy McGarry J's point.[32]

A similar argument to that which succeeded in the *International Finance Trust* case was raised in *Director of Public Prosecutions (Cth) v Kamal*[33] in relation to Commonwealth Proceeds of Crime legislation in the WA District Court. Eaton DCJ ruled the Commonwealth

legislation invalid, but the DPP was successful on appeal to the Full Court and Mr Kamal decided not to apply for special leave to appeal to the High Court.

The bikie cases

Last year in *South Australia v Totani*[34] South Australian legislation permitted the State Attorney General to make a declaration in respect of an organisation if satisfied the members of the organisation associated for the purpose of engaging in serious criminal activity, and the organisation represented a risk to public safety and order. Section 14 of the *Serious and Organised Crime (Control) Act 2008 (SA)* said that the Magistrates Court must, on application by the Commissioner of Police, make a control order placing restrictions on freedom of association of a defendant if satisfied the defendant was a member of a declared organisation under s10(1) of that Act. In the earlier decision of Gypsy Jokers[35], Gummow, Hayne, Heydon and Keifel JJ had said legislation which purports to direct the Courts as to the manner and outcome of the exercise of jurisdiction is apt impermissibly to impair the character of the Courts as independent and impartial tribunals.[36] In *Totani* it was now held that s14(1) of the Act was invalid because the Magistrates Court was called upon, effectively, to act at the behest of the Attorney General to an impermissible degree, and thereby to act in a fashion incompatible with the proper discharge of its Federal judicial responsibilities and with its institutional integrity.[37] Only Heydon J dissented from this conclusion.

In *Wainohu v New South Wales*[38] the Crimes *(Criminal Organisations Control) Act 2009* (NSW) provided that the Attorney General may, with the consent of a Judge, declare a Judge of the Supreme Court to be an 'eligible Judge', for the purposes of the Act. The Commissioner of Police may apply to an 'eligible Judge' for a declaration that a particular organisation is a 'declared organisation' and the Judge may make a declaration that this is so, if satisfied that members of a particular organisation are engaged in serious criminal activity and that the organisation 'represents a risk to public safety and order'. The Act said that the eligible Judge is not required to provide any grounds or reasons for making a declaration and once made, the Supreme Court may, on the application of the Commissioner of Police, make a control order against individual members of the club. The Act was held to be unconstitutional in that it impaired the institutional integrity of the Supreme Court.

Mr Wainohu was a member of the Hells Angels Motorcycle Club. Under the Act there was no appeal from the Judge's decision, and a broadly expressed privative clause purported to prevent a decision by an eligible Judge from being challenged in any proceedings, though it was acknowledged by counsel that this would not protect the decision against jurisdictional error in light of the earlier *Kirk* decision[39]. A declaration may be made partly upon information and submissions not able to be disclosed to the members of the club. It was said by French CJ and Kiefel J:

> A state legislature cannot, consistent with Ch III, enact a law which purports to abolish the Supreme Court of a State or which excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State. Application of the *Kable* principle has the result that the State legislatures cannot validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a Court; which would authorise the executive to enlist a court to implement the decisions of the executive in a manner incompatible with that court's institutional integrity; or which would confer upon any court a function (judicial or otherwise) incompatible with the role of that court as a repository of federal jurisdiction[40].

Gummow, Hayne, Crennan and Bell JJ adopted what Gaudron J had said earlier, that confidence reposed in judicial officers 'depends on their acting openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matters in issue'.[41] Heydon J dissented.

It can be seen therefore that the High Court is looking at the exercise of judicial power with emphasis upon the need for procedural fairness, manifested in an obligation to provide a fair hearing to a party and observance of a requirement for reasons to be given.

In *Polyukhovich v The Commonwealth*, Deane J, in a dissenting judgment, said: 'the provisions of Ch III are based on an assumption of traditional judicial procedures, remedies and methodology'[42].

The recent decisions of the High Court reveal an intention that the State legislature, notwithstanding the absence of a formal separation of powers at the State level, permits the State Courts to observe the same traditional judicial procedures and methodology as are required at the Commonwealth level.

Liberty before security

In his book 'The Rule of Law', the late Lord Bingham, the Senior Law Lord, said that the former English Prime Minister, Mr Blair, on leaving office had an article published in which he described it as a 'serious misjudgement' to put civil liberties first. Mr Blair said that to do so was 'misguided and wrong'.

Lord Bingham said: 'while neither he nor other ministers have, I think, quoted Cicero directly, their guiding principle has been Cicero's phrase '*Salus populi suprema est lex'* (the safety of the people is the supreme law) ... and his successor, Mr Gordon Brown, paraphrased Cicero when he said: 'The first priority of any Government is to ensure the security and safety of the nation and all members of the public'.

This is a view which many support, in Britain and the United States but John Selden (1584 – 1654), who did not lack experience of civil strife, observed 'There is not any thing in the world more abused than this sentence'. A preferable view to Cicero's, perhaps, is that attributed to Benjamin Franklin, that 'he who would put security before liberty deserves neither'. We cannot commend our society to others by departing from the fundamental standards which make it worthy of commendation'.[43]

The observance of the principles of natural justice must surely be numbered amongst those 'fundamental standards'.

Endnotes

1 2010 HCA 1.
2 *Kirk* supra French CJ, Gummow, Hayne, Crennan, Keifel & Bell JJ at [64].
3 *Craig v South Australia* (1995) 184 CLR 180.
4 *Kirk* supra at [67].
5 *Kirk* supra at [74].
6 *Kirk* supra at [63].
7 *Craig v South Australia* (1995) 184 CLR 163, 180.
8 *Kirk* supra at [72].
9 *Kirk* supra at [68].
10 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
11 *Plaintiff S157/2002* per Gleeson CJ at [57].
12 *Plaintiff S157/2002* at [60].
13 *Plaintiff S157/2002* at [65].
14 *Plaintiff S157/2002* at [76].
15 *Plaintiff S157/2002* at [86].
16 *Plaintiff S157/2002* at [98].
17 *Colonial Bank of Australasia v Willan* (1874) LR 5PC 417, 442.
18 *Kirk* supra at [100]. See also *Seddon v Medical Assessment Panel* [2011] WASC [53]-[61] for analysis on how jurisdictional error may arise.
19 *MIMIA v SGLB* (2004) 207 ALR 12.