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THE MINIMUM ENTRENCHED SUPERVISORY REVIEW JURISDICTION OF STATE SUPREME COURTS: *KIRK V INDUSTRIAL RELATIONS COMMISSION (NSW)* (2010) 239 CLR 531

ABSTRACT

Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531 ('*Kirk*')[1] is one of the most important constitutional and administrative law authorities in recent times. The High Court in *Kirk* added substance to the constitutional expression 'the Supreme Court of any State' contained in s 73(ii) of the *Constitution* to develop the minimum entrenched supervisory review jurisdiction of state supreme courts. The supervisory review jurisdiction ensures that decisions made by inferior courts and administrative bodies at state level with jurisdictional error can no longer be regarded as immune from judicial review because of a privative clause. The supervisory review jurisdiction is considered to be a fundamental characteristic of Chapter III courts. It is beyond the legislative power of a state to alter the character of its supreme court so that it ceases to meet its constitutional description. A privative clause is capable of so altering the constitutional description of a state supreme court by preventing the exercise of its minimum entrenched supervisory review jurisdiction. *Kirk* is not an application of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. *Kirk* applies its own substantive doctrine. As a result of *Kirk*, the approach to privative clauses at state level is now much the same as it is at federal level.

I INTRODUCTION

On 3 February 2010, the High Court handed down its judgment in *Kirk*. Chief Justice French, Gummow, Hayne, Crennan, Kiefel and Bell JJ delivered a joint judgment ('joint judgment'). Justice Heydon dissented only on minor issues. *Kirk* impacts upon Australian administrative law by establishing an understanding of the constitutional minimum entrenched supervisory review

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1 (2010) 239 CLR 531. The judgment is described as a 'landmark': 'Developments' (2010) 21 *Public Law Review* 141, 145.

jurisdiction of state supreme courts. This jurisdiction is a limitation on state legislative power. The entrenchment of the doctrine results in a 'convergence' of the state approach with the Commonwealth approach to supervisory review.[2] The convergence has been achieved through a similar interpretation of s 73(ii) to s 75(v) of the *Constitution*.[3] The focus of Australian administrative law is now whether a decision is made with jurisdictional error or an error of law on the face of the record.[4] That said, the distinction between inferior courts and administrative tribunals for the purpose of jurisdictional error remains.[5]

This article will discuss the facts, procedural history and outcome of *Kirk* before the High Court. The jurisdictional errors identified by the High Court in *Kirk*, namely the misconstruction of the *Occupational Health and Safety Act 1983* (NSW) ('the *OHS Act*') and the failure to adhere to the rules of evidence, resulted in the Industrial Court of New South Wales ('Industrial Court') misapprehending the limits of its functions and powers. The article concludes that the *Kirk* decision can be reconciled with the non-exhaustive categories of jurisdictional error identified in *Craig v South Australia* ('*Craig*').[6] The article highlights that *Kirk* is not simply a case concerning jurisdictional error but also a case where there was an error of law on the face of the record. The concept of error of law on the face of the record is briefly discussed and it is noted, interestingly, that the High Court conceded that the common law meaning of 'record' may be abrogated by statute. The article discusses the separate judgment of Heydon J which raises two additional issues to that of the joint judgment. These are the impossibility of compliance with the *OHS Act* as a result of the Industrial Court's construction of ss 15 and 16, and the Industrial Court's asserted dominion. Justice Heydon considered these issues resulted in a fundamental infringement of the rule of law. The article then discusses how the High Court added substance to the constitutional expression 'the Supreme Court of any State' contained in s 73(ii) to develop an understanding of the entrenched minimum supervisory review jurisdiction of state supreme courts. The article considers whether the development of the entrenched minimum supervisory review jurisdiction is the result of an application of *Kable v Director of*

2 Chief Justice James Spigelman, 'The Centrality of Jurisdictional Error' (Speech delivered at the AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010). I note the speech of Chief Justice Spigelman is now published: Hon James Spigelman AC, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77. The speech version is used throughout. Chris Finn, 'State Privative Clauses: The High Court Decision in Kirk' (2010) 32 *Law Society Bulletin South Australia* 35, 35.

3 Chief Justice Spigelman, above n 2.

4 *The Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2010] SASC 93 (9 April 2010), [37], [38] (Gray J with whom Nyland and Vanstone JJ agreed); *Director General, New South Wales Department of Health v Industrial Relations Commission of New South Wales* [2010] NSWCA 47 (22 March 2010), [15] (Spigelman CJ with whom Tobias JA and Handley AJA agreed); *Hall v State of South Australia* [2010] SASC 219 (22 July 2010), [49] (Gray J); Chief Justice Spigelman, above n 2; Finn, above n 2, 35.

5 *Kirk*, 580 (joint judgment); *Craig v South Australia* (1995) 184 CLR 163, 174, 177, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

6 (1995) 184 CLR 163.

Public Prosecutions (NSW) ('*Kable*').[7] It is concluded that *Kirk* is not an application of *Kable* but the application of a separate substantive doctrine. The article outlines the law relating to privative clauses at state level and how *Kirk* makes the approach to overcome a privative clause at state level the same as it is at federal level, as understood in *Plaintiff S157/2002 v Commonwealth*.[8] Finally, the article considers the impact of the *Kirk* decision by examining selected cases that have applied or considered the *Kirk* doctrine.

II Background

Kirk Group Holdings Pty Ltd ('the Kirk Company') owned a small farm in New South Wales. Mr Kirk was a director of the company who took no active part in the running of the farm. Management of the farm was delegated to Mr Graham Palmer, an employee of the Kirk Company. On the recommendation of Mr Palmer, the Kirk Company purchased an All Terrain Vehicle. Whilst delivering three lengths of steel to a paddock at the far end of the property, Mr Palmer took the ATV down the side of a hill where it overturned and killed him.[9]

At first instance, Walton J of the Industrial Court convicted Mr Kirk and the Kirk Company ('the appellants') for breaches of ss 15,[10] 16[11] and 50 of the *OHS Act*.[12] The appellants were both subject to pecuniary penalties.[13] The appellants appealed against conviction and sentence to the New South Wales Court of Criminal Appeal and applied to the New South Wales Court of Appeal for prerogative relief in the nature of certiorari and prohibition.[14] The appeals were all dismissed.[15] The appellants then sought leave to appeal to the Full Bench of the Industrial Court against the decision of Walton J at first instance. The Full Bench granted leave to appeal on the limited ground of whether the Judge had addressed the submission that the Kirk company had fulfilled its duty to the farm manager, but ultimately

7 (1996) 189 CLR 51.

8 (2003) 211 CLR 476.

9 Ibid 550 (joint judgment).

10 *Occupational Health and Safety Act 1983* (NSW) s 15:

> (1) Every employer shall ensure the health, safety and welfare at work of all the employer's employees.

11 *Occupational Health and Safety Act 1983* (NSW) s 16:

> (1) Every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employers undertaking while they are at the employers place of work.

12 *Workcover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166.

13 Mr Kirk received a financial penalty of $11,000 and $110,000 against the Kirk Company. Both Mr Kirk and the Kirk Company were also ordered to pay the prosecutor's costs: *Workcover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2004) 137 IR 462.

14 The New South Wales Court of Criminal Appeal and New South Wales Court of Appeal sat together to resolve the appeal: *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 66 NSWLR 151.

15 *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 66 NSWLR 151 (Spigelman CJ, Beazley and Basten JJA).

dismissed the appeal.[16] The appellants applied to the New South Wales Court of Appeal for an order of certiorari. The Court of Appeal found no jurisdictional error to warrant prerogative relief.[17] The appellants applied for, and were granted, special leave to appeal to the High Court.[18]

In the High Court, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ quashed the appellants' convictions.[19] Justice Heydon, in a separate judgment, agreed in substance with the joint judgment but departed on the particular orders to be made. Two significant jurisdictional errors were identified and were found not to be outside the purview of supervisory review notwithstanding the privative clause contained in s 179(1) of the *Industrial Relations Act 1996* (NSW) ('*IR* Act').

III Jurisdictional Error in Misconstruction of the OHS Act

The Kirk Company was charged with, and convicted of, strict liability offences contained in ss 15[20] and 16[21] of the *OHS Act*. Although they were offences of

16 *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 158 IR 281; *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2007) 164 IR 146.

17 *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2008) 173 IR 465.

18 *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 93, [700] – [705] (French CJ).

19 *Kirk*, 550 (joint judgment).

20 *Occupational Health and Safety Act 1983* (NSW) s 15(1) and:

> (2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails:
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> (a) to provide or maintain plant and systems of work that are safe and without risks to health,
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> (b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances,
>
> (c) to provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of the employer's employees,
>
> (d) as regards any place of work under the employer's control:
>
> (i) to maintain it in a condition that is safe and without risks to health, or
>
> (ii) to provide or maintain means of access to and egress from it that are safe and without any such risks,
>
> (e) to provide or maintain a working environment for the employer's employees that is safe and without risks to health and adequate as regards facilities for their welfare at work, or
>
> (f) to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information:
>
> (i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health, or
>
> (ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.

21 *Occupational Health and Safety Act 1983* (NSW) s 16(1).

strict liability,[22] statutory defences were available in s 53 of the *OHS Act*.[23] When examining the charges, the High Court discovered that the information stated in the charges simply restated ss 15 and 16 of the *OHS Act* and did not particularise any offending conduct. As the charges did not specify offending conduct, the statutory defences under s 53 of the *OHS Act* could not be used by the appellants. This revealed a misconstruction of the *OHS Act* by the Industrial Court as they had convicted the appellants for unidentified acts or omissions and robbed them of their ability to defend the charges. It was clear that such a construction could not have been the intention of Parliament.

The High Court held that the particulars stated in the charges against the appellants lacked specificity as they failed to identify an act or omission that contravened the *OHS Act* and what measures Mr Kirk had not taken to alleviate the risk.[24] The lack of specificity rendered the particulars deficient as they omitted the necessary step of identifying the 'measure which the employer should have taken as relevant to the offence'.[25] The analysis in the joint judgment revealed a consistency between the decision of the Industrial Court in this case and in others, which were 'said to establish the proposition that a prosecutor is not required to demonstrate that particular measures should have been taken'.[26] The following passage of the joint judgment illustrates what was held to be the erroneous approach of the Industrial Court, which ultimately led to a misconstruction of the *OHS Act*:

> The approach taken by the Industrial Court fails to distinguish between the content of the employer's duty, which is generally stated, and the fact of the contravention in a particular case. It is that fact, the act or omission of the employer, which constitutes the offence. Of course it is necessary for an employer to identify risks present in the workplace and to address them, in order to fulfil the obligations imposed by ss 15 and 16. It is also necessary for the prosecutor to identify the measures that should have been taken.[27]

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22 Note Mr Hatcher SC had made mention of the appellants intention to raise the *Proudman v Dayman* (1941) 67 CLR 536 'honest and reasonable mistake' common law defence to strict liability: *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 93, [695] (Mr Hatcher SC). This appears to have been the appellant's strategy as the statutory defences were impossible to rely on.

23 *Occupational Health and Safety Act 1983* (NSW) s 53:

(1) It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:
   (a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, or
   (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.

24 *Kirk*, 558, 561 (joint judgment).

25 Ibid 560 (joint judgment).

26 Ibid.

27 Ibid 561 (joint judgment).

It may be that the strict requirement for a prosecutor to include particulars places employers in occupational health and safety litigation in 'a better position to argue', where appropriate, that it was not reasonably practicable to comply with occupational health and safety obligations in the circumstances.[28] Without requiring the respondent to detail particulars of the charges, the appellant was in effect denied any opportunity to rely on the operation of the statutory defences. The joint judgment identified this conundrum:

> the appellants could not have known what measures they were required to prove were not reasonably practicable.[29]

The lack of particulars stated in the charges was held to be a jurisdictional error. The framing of the charges with such a lack of specificity highlighted the Industrial Court's misconstruction of ss 15 and 16 resulting in the 'wrong understanding of what constituted an offence … and how the defence under s 53(a) was to be applied'.[30]

In *Craig*, the High Court identified a number of categories of jurisdictional error. The third category is where an inferior Court, while acting within its jurisdiction, does 'something which it lacks authority to do'.[31] Consistent with this category of jurisdictional error identified in *Craig*, the Industrial Court misapprehended the nature of its functions or powers.[32] This misapprehension led the Industrial Court to convict the appellants with unidentified offending conduct.[33]

Having concluded that the Industrial Court lacked the power to convict the appellants for an unidentified act or omission, the High Court also formulated the jurisdictional error in terms of the Industrial Court convicting the appellants where it 'had no power' to do so.[34] This particular formulation of jurisdictional error is consistent with the first category identified in *Craig*, namely that the Industrial Court acted 'outside the general area of its jurisdiction' by making a decision that lies 'outside…the theoretical limits of its functions and powers'.[35]

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28 See Joe Catanzariti, 'High Court Examines NSW OH&S Laws' (2010) 48 *Law Society Journal* 46.

29 *Kirk*, 558 (joint judgment).

30 Ibid 561 (joint judgment).

31 *Craig*, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

32 Rebecca Heath and Paul Walker, 'Casenotes: Kirk v Industrial Relations Commission of NSW' (2010) 17 *Australian Journal of Administrative Law* 122, 123.

33 *Kirk*, 574 (joint judgment).

34 Ibid 574–5 (joint judgment).

35 *Craig*, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

IV Jurisdictional Error through Breaching Rules of Evidence

The High Court identified a second jurisdictional error of the Industrial Court. The Industrial Court failed to adhere to the rules of evidence and had, therefore, acted outside of its jurisdiction. As with the first identified jurisdictional error, this error can be understood as falling within the third category identified in *Craig*.

Mr Kirk was called before Walton J of the Industrial Court to give evidence for the prosecution. Under s 17(2) of the *Evidence Act 1995* (NSW) ('*Evidence Act*'), a defendant is not a competent witness for the prosecution.[36] It was clear by s 163(2) of the *IR* Act that it was Parliament's intention for proceedings of the Industrial Court to be conducted in accordance with the rules of evidence. The High Court considered that the rule in s 17(2) was not one that could be waived under s 190 of the *Evidence Act*. The High Court considered the calling of Mr Kirk as a witness for the prosecution to be a 'fundamental' breach of the rules of evidence, constituting the second jurisdictional error.[37]

Extrajudicially, Spigelman CJ, reflecting on the *Kirk* decision on this point, has posited that there is now a lingering question after *Kirk* as to 'whether other rules of evidence or procedure are of equal significance to criminal trials and, perhaps, other trials'.[38] It is submitted a breach would have to be 'fundamental' in order for it to constitute a jurisdictional error worthy of review.[39] Otherwise, the efficiency and convenience of inferior courts would be critically undermined.

The breach of the rule of evidence in *Kirk* was so fundamental that it resulted in a jurisdictional error. The jurisdictional error occurred as the Industrial Court misapprehended 'a limit on its powers'.[40] The High Court considered that the Industrial Court's power to try criminal charges was 'limited to trying the charges applying the laws of evidence'.[41] Like the first jurisdictional error, this error can be

36 Similar legislation exists throughout Australia in both the uniform evidence legislation and its variants, mostly in the context of criminal law: *Evidence Act 1929* (SA) s 18; *Evidence Act 1995* (Cth) s 17(2); *Evidence Act 2008* (Vic) s 190(1)(a); *Evidence Act 1977* (Qld) s 8; *Evidence Act 1906* (WA) s 8(1)(a); *Evidence Act 1939* (NT) ss 9(1), 2(a); *Evidence Act 2001* (Tas) s 17(2). For discussion of the common law principle and its application see Justice Dyson Heydon, *Cross on Evidence* (LexisNexis Butterworths, 8th ed, 2010) [13075–85] and Andrew Ligertwood, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis Butterworths, 5th ed, 2010) 429–30 [5.110–2]. Interestingly, the *Evidence Act 1995* (NSW) s 17(2) uses the word 'defendant' whereas the *Evidence Act 1929* (SA) s 18 uses the words 'accused persons'.

37 Neil Foster, 'Case Note on *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings v Workcover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 Feb 2010)' (Working paper No 76, National Research Centre, 2010) 2.

38 Chief Justice Spigelman, above n 2.

39 *Kirk*, 575 (joint judgment).

40 Ibid, 585–6 (Heydon J).

41 Ibid 575 (joint judgment).

understood as falling into the third category identified in *Craig*.[42] In this way, *Kirk* does not advance our understanding as to what constitutes jurisdictional error. The contemporary approach to jurisdictional error remains as it was expressed in *Craig*.

V The Craig Categories of Jurisdictional Error

As *Kirk* does not develop our understanding of what errors are regarded as jurisdictional, it would seem prudent to consider what the *Craig* categories are and how they operate. *Craig* has been described as 'standing in the way' of an award of certiorari for jurisdictional error in *Kirk*, as it was a case the High Court had to consider.[43] In *Craig*, the High Court maintained the difference between jurisdictional and non-jurisdictional error, contrary to the contemporary position in the United Kingdom.[44] The Court recognised a distinction between errors made by an inferior court and those made by an administrative tribunal ('the *Craig* distinction').[45] For an inferior court, the High Court adopted a restrictive approach

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42 *Craig*, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

43 In *Craig*, Brennan, Deane, Toohey, Gaudron and McHugh JJ delivered a joint judgment, ('the Court'); Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End Of Hickman?' (2010) 21 *Public Law Review* 92, 94.

44 The House of Lords abolished the distinction between jurisdictional error and error within jurisdiction in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 174 (Lord Reid). The House of Lords also abolished the distinction between jurisdictional and non-jurisdictional error. United Kingdom judicial review now focuses on errors of law and errors of fact. The former is reviewable, the latter is not. *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682, is the pinnacle case abolishing jurisdictional and non-jurisdictional error, and upholding error of law as the key to judicial review. Lord Griffiths summarised as follows:

> It is in my opinion important to keep the purpose of judicial review clearly in mind. The purpose is to ensure that those bodies that are susceptible to judicial review have carried out their public duties in the way it was intended they should. In the case of bodies other than Courts, in so far as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of the law.
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> In the case of inferior Courts, that is, Courts of a lower status than the High Court, such as the justices of the peace, it was recognised that their learning and understanding of the law might sometimes be imperfect and require correction by the High Court and so the rule evolved that certiorari was available to correct an error of law of an inferior Court: *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682, 693 (Lord Griffiths).

Spigelman CJ has suggested as a result of *Kirk*, the 'practical difference with *Anisminic* may be small': Chief Justice Spigelman, above n 2. In this respect, convergence of the Australian approach with that of the United Kingdom may be forthcoming. A potential convergence with the United Kingdom approach was envisaged as early as 2005: Denise Meyerson, 'State and Federal Privative Clauses: Not So Different After All' (2010) 16 *Public Law Review* 39, 50–3.

45 *Craig*, 176 (The Court).

to jurisdictional error, confining reviewable errors to those where the inferior court 'mistakenly asserts or denies the existence of jurisdiction' or 'misapprehends or disregards the nature or limits of its functions or powers'.[46] *Craig* posited four categories of error that constitute jurisdictional error in the decision of an inferior court. These are where an inferior Court 'acts wholly or partly outside the general area of its jurisdiction' by making a decision that lies 'wholly or partly outside… the theoretical limits of its functions and powers'; where an inferior Court, while acting within jurisdiction, does 'something which it lacks authority to do'; where an inferior Court 'disregards or takes into account of some matter', which should have been taken into account or ignored for the purposes of correctly exercising jurisdiction; or where an inferior Court 'misconstrues' a statute or instrument causing it to misconceive 'the nature and function' of its power.[47] This categorisation left many errors of law to be non-jurisdictional, meaning that they were outside the purview of judicial review.[48] With respect to tribunals, *Craig* posited that any error of law made in the exercise of a tribunal's jurisdiction could be a jurisdictional error.[49] Under the *Craig* distinction, therefore, it is possible for an inferior Court to err in the course of the exercise of its jurisdiction without actually exceeding its jurisdiction.[50]

There is support for the contention that the jurisdictional errors in *Kirk* do not extend the *Craig* categories.[51] The High Court in *Kirk* did not directly challenge *Craig* but did reduce the *Craig* categories to mere examples, paving a way for future development of the concept of jurisdictional error:

> As this case demonstrates, it is important to recognise that the reasoning in *Craig* that has just been summarised is not to be seen as providing a rigid taxonomy of jurisdictional error. The three examples given in further explanation of the ambit of jurisdictional error by an inferior court are just that – examples. They are not to be taken as marking the boundaries of the relevant field. So much is apparent from the reference in *Craig* to the difficulties that are encountered in cases of the kind described in the third example.[52]

Chris Finn suggests that comments in the joint judgment about the doubt of the distinction between inferior courts and administrative tribunals should be considered strictly as obiter.[53] It is also clear from the above quotation that the High Court did not challenge the distinction between inferior courts and administrative

46 Ibid 177 (The Court).
47 Ibid.
48 Ibid 179 (The Court).
49 Ibid.
50 See Chris Finn, 'Jurisdictional Error: Craig v South Australia' (1996) 3 *Australian Journal of Administrative Law* 177.
51 Finn, above n 43, 96.
52 *Kirk*, 574 (joint judgment).
53 Finn, above n 43, 96.

tribunals for the purposes of jurisdictional error. This may help explain why post-*Kirk* cases have continued to apply the *Craig* distinction.[54]

Another suggestion, posited extrajudicially by Spigelman CJ, is that '[t]he effect of *Kirk* [may] be that the full range of jurisdictional error must remain open at both Commonwealth and State levels'.[55] It is submitted that this may be so in the context of administrative tribunals but perhaps not in relation to inferior courts, should the *Craig* distinction remain. It must also be borne in mind that *Kirk* itself only considered jurisdictional error made by an inferior court, not an administrative tribunal. As the *Craig* distinction appears to remain and because *Kirk* reduced the *Craig* categories to examples, it is more difficult than ever to define the precise scope of jurisdictional error.

VI Error of Law on the Face of the Record

At common law, certiorari may be ordered where a decision is vitiated by an error of law on the face of the record.[56] The High Court in *Craig* adopted a restrictive approach as to what constitutes the 'record'. *Craig* considered that the 'record' in this context does not mean 'reasons for decision' or a 'transcript of proceedings'.[57] To permit these as records would 'go a long way towards transforming certiorari into a discretionary general appeal for error of law'.[58] What the common law considers to be the 'record' for these purposes is no more than 'the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings and adjudication'.[59] The High Court in *Kirk* accepted that the common law definition of 'record', as understood in *Craig*, could be modified by statute. In *Kirk*, s 69(4) of the *Supreme Court Act 1970* (NSW) defined 'record' to include 'the reasons expressed by the Court or tribunal for its ultimate determination'. The High Court accepted this expansion of the common law definition of the 'record'. Therefore, the two errors of law identified by the High Court in *Kirk* were both jurisdictional errors and errors on the face of the record.[60]

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54 *Director General*, [24] (Spigelman CJ), *Hall*, [53] (Gray J).

55 Chief Justice James Spigelman, above n 2.

56 *Kirk*, 576 (joint judgment).

57 *Craig*, 181 (The Court).

58 Ibid (The Court).

59 Ibid 182 (The Court). For a useful and detailed analysis of what constitutes the 'record' for the purposes of certiorari, see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 232–7 [4.220–35]. See also Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 105–6.

60 *Kirk*, 566 (joint judgment).

VII Justice Heydon

Justice Heydon agreed with the joint judgment in substance, but departed on minor issues such as costs orders.[61] In his separate judgment he placed significant emphasis on two areas – the impossibility of complying with the legislative scheme, and the Industrial Court's asserted dominion. Justice Heydon found Walton J's finding that Mr Kirk '[d]id not supervise the daily activities of the employees or contractors working on the farm' to be unrealistic.[62] Justice Heydon considered that the obligation of daily supervision of employees and contractors, even by the owners of small farms, was 'an astonishing one'.[63] Interestingly, Heydon J found it to be offensive to 'a fundamental aspect to the rule of law' that the 'imposed obligations … were impossible to comply with'.[64] The impossibility included the fact that the statutory defences could never be relied on and that, therefore, a conviction would almost always be entered without specificity or defence. Justice Heydon found that the Industrial Court was acting within its own dominion. The Full Bench of the Industrial Court had described the appellants' earlier application to the New South Wales Court of Appeal as 'forum shopping'.[65] Justice Heydon considered this to be 'an assertion of exclusive dominion over the fields within its jurisdiction'.[66] His Honour considered that specialist Courts possess a tendency 'to lose touch with the traditions, standards and mores of the wider profession and judiciary'.[67] For Heydon J the assertion of exclusive dominion further offended the rule of law.[68]

VIII Ch III Entrenched Supervisory Jurisdiction

Although *Kirk* did not extend the *Craig* categories of jurisdictional error, the case did establish that there exists, as a result of s 73(ii) and its place within Ch III of the Constitution, a minimum entrenched supervisory review jurisdiction of state supreme courts. This is the aspect of the judgment in which *Kirk* develops its own substantive doctrine. The state supreme court minimum entrenched supervisory review jurisdiction is, at least partially, the result of a culmination of earlier High Court cases and an emerging trend of adding substance to constitutional phrases to give them a modern understanding.

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61 Ibid 585 (Heydon J). See also: Jeffrey Phillips SC, *The End of Revolutionary Justice* (2010) <http://www.jeffreyphillipssc.com/kirk-anor-ats-workcover-authority-of-new-south-wales/> at 2 June 2010. The joint judgment ordered that Workcover NSW pay for only a portion of the costs of the overall proceedings. Heydon J would have allowed Mr Kirk to have costs from Workcover on an indemnity basis, signalling his disapproval of the conduct of the litigation. For discussion of this see Foster, above n 37.

62 *Kirk*, 587 (Heydon J).

63 Ibid.

64 Ibid.

65 Ibid 588 (Heydon J).

66 Ibid 587 (Heydon J).

67 Ibid 589 (Heydon J).

68 Ibid.

There has been an inclination in constitutional case law for the High Court to add substance, where appropriate, to constitutional expressions and create new entrenched concepts and characteristics.[69] Justice Gummow considered in *Kable v Director of Public Prosecutions (NSW)*[70] that the 'Supreme Court of a State' was a constitutional expression that could not be diminished by legislation. In *Forge v Australian Securities and Investments Commission*,[71] Gleeson CJ considered that state supreme courts have substantive criteria that are constitutionally enshrined, and as such they 'must continue to answer the description of "Courts"'.[72] In *Forge* Gummow, Hayne and Crennan JJ considered inferior Courts to be subject to the supervisory review of state supreme courts through the grant of prerogative relief.[73] These cases paved way for the High Court in *Kirk* to develop an understanding of what constitutes the minimum entrenched supervisory review jurisdiction of state supreme courts.

It is against this background that in *Mitchforce Pty Ltd v Industrial Relations Commission NSW*,[74] a case not discussed by the High Court in *Kirk*, Spigelman CJ posed the question of whether or not Ch III of the *Constitution* creates an entrenched minimum supervisory review jurisdiction due to the position of state supreme courts in the federal hierarchy, with the High Court at its apex.[75] It has been suggested that *Kirk* answers Spigelman CJ's question in the affirmative.[76]

Prior to *Kirk*, Gleeson CJ in *Forge* considered that state supreme courts have constitutionally entrenched substantive characteristics. His Honour stated:

> It follows from Ch III that State Supreme Courts must continue to answer the description of 'courts'. For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the Constitution.[77]

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69 Chief Justice Spigelman outlines a number of constitutional words and phrases which have been interpreted so as to constitutionally entrench not only the words themselves, but their definitions and criteria. Examples of such phrases include 'trial by jury' under s 80 in *Brownlee v The Queen* (2001) 207 CLR 278, [7], [33], 'trading and financial corporations' under s 51(xx) in *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, [58], and 'jurisdiction' under Ch III in *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations* (1995) 184 CLR 630, 653: Chief Justice Spigelman, above n 2.

70 *Kable,* 141–2 (Gummow J).

71 (2006) 226 CLR 45 ('*Forge*').

72 Ibid 69 (Gleeson CJ).

73 Ibid 82 (Gummow, Hayne and Kiefel JJ). Note that this obiter was in the context of discussing the essential features of an 'inferior Court' for the purposes of determining which errors would be reviewable.

74 (2003) 57 NSWLR 212, ('*Mitchforce*').

75 Ibid 237–8.

76 Leighton McDonald, 'The Entrenched Minimum Provision Of Judicial Review And The Rule Of Law' (2010) 21 *Public Law Review* 14, 34.

77 *Forge*, 69 (Gleeson CJ).

In *Forge*, Gummow, Hayne and Crennan JJ, similarly stated:

> inferior State courts, particularly the courts of summary jurisdiction, [are] subject to the general supervision of the Supreme Court of the State, through the grant of relief in the nature of prerogative writs.[78]

A *The Kirk Doctrine*

The Chapter III issue in *Kirk* was first identified by Gummow J, who questioned whether the Industrial Relations Commission received federal jurisdiction.[79] It was clear that it was exercising federal jurisdiction as its jurisdiction was derived from the New South Wales Supreme Court – a Court capable of being vested with federal judicial power. It was submitted by Mr Hatcher SC that as the Industrial Court was capable of receiving federal jurisdiction it ought to have regard to judgments of the High Court, rather than an application of its own jurisdiction.[80] It was clear this was not happening. At 5 March 2010 the conviction rate for defendants charged under the *OHS Act* in the Industrial Relations Court was 98.4%.[81] It was obvious that the statutory defences under s 53 of the *OHS Act* were of little or no effect and that the Industrial Court was applying its own law without regard to decisions of the High Court, which it was bound to follow due to its position in the federal hierarchy and its ability to receive federal jurisdiction.

In *Kirk*, by force of s 73(ii) of the Constitution, an entrenched minimum supervisory jurisdiction of state supreme courts was found. At Federation, state supreme courts had the jurisdiction of the Court of Queen's Bench, which had power to issue the writ of certiorari to any inferior court in the state.[82] The joint judgment concluded that the power of supervisory review at Federation 'was … *and remains*' the mechanism for the determination of the exercise of state executive and judicial power by persons and bodies other than the supreme court.[83] In constitutional terms, the joint judgment concluded:

> In considering State legislation, it is necessary to take into account of the requirement of Ch III of the Constitution that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary

78 Ibid 82 (Gummow, Hayne and Kiefel JJ). Note that this obiter was in the context of essential features of an 'inferior court' for the purposes of determining which errors would be reviewable.

79 *Kirk v Industrial Relations Commission of New South Wales* [2009] HCA Trans 093, [235] (Gummow J).

80 Ibid [250] (Mr Hatcher SC).

81 Jeffrey Phillips SC, *The End of Revolutionary Justice* (2010) <http://www.jeffreyphillipssc.com/kirk-anor-ats-workcover-authority-of-new-south-wales/> at 2 June 2010.

82 *Kirk*, 580 (joint judgment).

83 Ibid. For an extensive history of the Supreme Court common law jurisdiction see Mark Aronson, above n 59, 20–2 [2.10] and the references there cited, and Peter Cane, above n 59, 17–43 and the references there cited.

> that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.[84]

The supervisory review jurisdiction of state supreme courts confers to the courts power to grant orders of prohibition, certiorari and mandamus.[85] The High Court considered the role of state supreme courts in issuing constitutional writs 'was, and is', a defining characteristic of those courts.[86] This is significant as previously privative clauses were able to confine what writs were available upon review.

The minimum entrenched supervisory review jurisdiction of state supreme courts was stated by the High Court in the following terms:

> A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within their authority to decide by granting relief in the nature of prohibition and mandamus, and … also certiorari, directed to inferior courts and tribunals on the grounds of jurisdictional error.[87]

A justification for the entrenchment of this minimum jurisdiction is that if a legislature or executive was able to curtail the constitutional description of a s 73(ii) state supreme court, it would 'create islands of power immune from supervision and restraint'.[88] This concern resonates in the judgment of Heydon J, who recognised serious impediments to the rule of law if this practice was allowed to continue.[89] Thus, the s 73(ii) state supervisory review jurisdiction is analogous to the federal supervisory review jurisdiction under s 75(v) that the High Court identified in *Plaintiff S157/2002 v Commonwealth*.[90]

IX Kirk and the Kable Principle

The *Kable* principle is a limit on state legislative power to not confer power onto state supreme courts that is 'repugnant to or incompatible with their exercise of the judicial power of the Commonwealth'.[91] The premise of the *Kable* principle is

84 *Kirk*, 580 (joint judgment) considering the principle in *Forge*, 76 (Gummow, Hayne and Crennan JJ).

85 *Kirk*, 580 (joint judgment).

86 Ibid 580–1 (joint judgment).

87 Ibid 566 (joint judgment).

88 Ibid 581 (joint judgment).

89 Ibid 587–9 (Heydon J).

90 (2003) 211 CLR 476 ('*Plaintiff S157*'). Chief Justice Spigelman, above n 2. Importantly, the Supreme Courts of the territories are not recognised in Ch III, and the 'territories power' in s 122 of the *Constitution* does not afford them the minimum entrenched supervisory jurisdiction: *Spratt v Hermes* (1965) 114 CLR 226, 250. See also Rebecca Heath and Paul Walker, 'Casenotes: *Kirk v Industrial Relations Commission of NSW*' (2010) 17 *Australian Journal of Administrative Law* 122, 126.

91 *Kable* 102 (Gaudron J).

that because state supreme courts are capable of exercising federal judicial power, state parliaments cannot pass legislation that confers the exercise of non-judicial power onto the judiciary. While *Kirk* is not an application of *Kable*, there are similar nuances in the two cases that suggest there may be a separation of at least supreme court judicial power at state level, which cannot be curtailed by legislation. However, the independence of state judiciaries would seem more correctly understood on an institutional integrity analysis rather than a separation of powers analysis.

Although the majority in *Kable* confirmed that there is no strict separation of powers at state level,[92] McHugh J envisaged that Ch III of the *Constitution* was capable of necessitating a separation of powers at state level to ensure that there is a limit on state legislative power:

> in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution's plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way that might undermine public confidence in the impartial administration of the judicial functions of State courts.[93]

However, as Chief Justice French recently explained in *South Australia v Totani*:

> There was at Federation no doctrine of separation of powers entrenched in the constitutions of the States. Unsuccessful attempts to persuade courts of the existence of such a doctrine were made in New South Wales, Western Australia and South Australia in the 1960s and 1970s, and Victoria in 1993, relying, inter alia, upon the decision of the Privy Council in *Liyanage v The Queen* [[1967] 1 AC 259]. The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.[94]

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92 Ibid 92 (Toohey J), 109 (McHugh J). Prior to this, only State courts had enunciated the principle. See, eg: *R v McKay* (1998) 148 FLR 212, 216 (Crispin J); and *De Domenico v Marshall* (1999) 153 FLR 437, 441 (Miles CJ). Duncan Kerr SC, 'The Federal and State Courts on Constitutional Law: The 2006 Term' (Speech presented at the Gilbert and Tobin Centre of Public Law 2007 Constitutional Law Conference, Sydney, 16 February 2007).

93 *Kable,* 118 (McHugh J).

94 (2010) 85 ALJR 19, 41–2. Footnoted citations omitted.

Kirk is not an application of the *Kable* principle.[95] In *Kirk*, the New South Wales Parliament was not trying to confer incompatible powers on the Court as in *Kable*, but was rather attempting to remove a 'defining characteristic' — the supervisory review jurisdiction. However, Spigelman CJ has stated extrajudicially that the basis of the *Kable* doctrine is the 'preservation of the institutional integrity of State Courts, because of their position in the Australian legal system required by the Commonwealth Constitution'.[96] In this way, Spigelman CJ suggests that *Kirk* may extend the *Kable* doctrine 'beyond matters of procedure and appearance to matters of substance'.[97]

The notion that 'the Supreme Court of a State' is a constitutional expression that cannot be diminished by legislative power was first considered by Gummow J in *Kable*.[98] This was confirmed by the joint judgment in *Forge*.[99] The challenge of adding substance to the phrase 'the Supreme Court of a State' is clear in these cases.[100] This substantive trend begs the question of how much substance is left to be 'discovered' before state supreme courts are regarded as federal courts – cemented by their role and significance at and before Federation. It may well be that the High Court will continue this trend and, over time, continue to discover new constitutionally entrenched characteristics of state supreme courts that further reveal their federal nature.

X Privative Clauses

As a result of the entrenched minimum supervisory review jurisdiction of state supreme courts outlined in *Kirk*, a new understanding of the approach to the treatment of privative clauses in state legislation was discerned and applied. For decades in Australia, the approach courts took to determine the applicability of privative clauses was governed by the principle stated by Dixon J in *R v Hickman; Ex parte Fox and Clinton*[101] ('the *Hickman* principle'). The *Hickman* principle prevented courts from overcoming privative clauses in Commonwealth legislation if the administrative decision maker acted outside of its power in a bona fide

95 Finn, above n 43, 106.

96 Chief Justice Spigelman, above n 2. The notion of 'institutional integrity' was discussed by Gaudron J in *Kable* where she emphasised the 'necessity to ensure the integrity of the judicial process and the integrity of the Courts': *Kable*, 102 (Gaudron J).

97 Chief Justice Spigelman, above n 2.

98 *Kable*, 141–2 (Gummow J).

99 *Forge*, 76 (Gummow, Hayne and Crennan JJ).

100 Since the time of writing this case note, it would appear that the *Kable* doctrine concerning Ch III of the *Constitution* has been used to limit the extent of legislative power over the criminal law: *South Australia v Totani* (2010) 271 ALR 662. Although outside the scope of this case note, it is interesting to see that Ch III of the *Constitution* is capable of placing a limit on State legislative power over laws which are formed under the reserve powers of the *Constitution*.

101 (1945) 70 CLR 598 ('*Hickman*').

attempt to properly exercise its power.[102] The *Hickman* principle, as outlined by Dixon J, is as follows:

> 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, it relates to the subject matter of the legislation, and it is reasonably capable of reference to the power given to the body.[103]

The principle allowed a court or administrative body to make a decision outside of its power so long as it was a bona fide attempt at exercising a legitimate power. This was termed by Dixon J as the 'expansionist theory' of jurisdiction.[104]

In *Kirk*, the High Court was faced with the privative clause contained in s 179 of the *IR* Act. Section 79(1), read in conjunction with s 179(5), provided that a decision of the Industrial Court was final and could not be appealed against, reviewed, quashed or called into question in any court or tribunal — whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.[105] Section 179(4) extended the privative clause to cover 'purported decisions'.[106] The High Court read the provision down to the point of constitutional validity so that it was unable to prevent review of jurisdictional error where the New South Wales Supreme Court was exercising the entrenched minimum supervisory review jurisdiction under Chapter III.

The most significant reconsideration of the *Hickman* principle was in *Plaintiff S157*, where the High Court used the principle as an initial step to facilitate the 'reconciliation of apparently conflicting statutory provisions'.[107] In this way, the principle was used to ascertain what 'protection [a privative clause] purports to afford'.[108] Ultimately, the Court in *Plaintiff S157* held that a privative clause will be invalid if it ousts the 'entrenched minimum provision of judicial review' of the

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102 The Hickman principle as stated by Dixon J was that an administrative decision will be protected by a privative clause so long as it is 'a bona fide attempt to exercise its power, it relates to the subject matter of the legislation, and it is reasonably capable of reference to the power given to the body': *Hickman*, 615 (Dixon J). In this way, a body would be able to act within its jurisdiction by exercising power outside of its jurisdiction if the latter exercise satisfied the Hickman principle. This effectively expanded the jurisdiction conferred upon the body. See Mark Aronson, above n 59, 969–75 [17.70–100] and Peter Cane, above n 59, 200–5.

103 *Hickman*, 615 (Dixon J).

104 Ibid.

105 *Kirk*, 581 (joint judgment).

106 Ibid, 582 (joint judgment).

107 *Plaintiff S157*, 501 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See Aronson, above n 59, 969–75 [17.80–100] and Cane, above n 59, 205–7.

108 Ibid 504, 510 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

High Court as conferred by s 75(v) of the *Constitution*.[109] The Court in *Plaintiff S157* disagreed with Dixon J's expansionist theory.[110] In *Plaintiff S157*, the High Court ultimately read down the privative clause contained in s 474 of the *Migration Act 1958* (Cth) to make it consistent with constitutional limits on Commonwealth legislative power. It was held that the privative clause would only validly operate to cover administrative decisions that 'involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act'.[111] This was determined by reference to jurisdictional error in terms of a failure to discharge 'imperative duties' or to observe 'inviolable limitations or restraints'.[112] At Commonwealth level, as a result of *Plaintiff S157*, a privative clause will no longer protect a purported decision.

Until *Kirk*, *Mitchforce* was perhaps the leading case on the approach to the reviewability of jurisdictional error at state level when faced with a privative clause.[113] In *Mitchforce*, attention turned to s 179 of the *IR* Act – the same privative clause considered in *Kirk*. It is surprising that there is no mention of *Mitchforce* in *Kirk*. Chief Justice Spigelman attempted to apply *Plaintiff S157* but found difficulties on the basis that there is no strict separation of powers at state level.[114] The Chief Justice concluded that the privative clause would not cover a 'purported decision' that did not satisfy the *Hickman* principle.[115] Applying *Plaintiff S157*, a jurisdictional fact, which is a jurisdictional error, was held not to be in breach of an 'inviolable limitation' and the relevant decision was therefore protected by the privative clause as a purported decision. Chief Justice Spigelman went as far as to say: 'Parliament intended the Industrial Commission to be the sole judge of its jurisdiction'.[116] In this way, *Mitchforce* may have been understood as a quasi revival of Dixon J's expansionist theory established in *Hickman*. However, such an approach is inconsistent with the rejection of the expansionist theory in *Plaintiff S157*. On this basis, there is room for the argument that *Mitchforce* may have been 'wrongly decided'.[117]

The treatment of the privative clause in *Kirk* demonstrates that Dixon J's expansionist approach to jurisdiction is not the contemporary understanding of jurisdiction at state or federal level. Contrary to *Mitchforce*, the addition of the word 'purported' in the privative clause faced in *Kirk* was held to not add substance to the word 'decision'.[118] An attempt to exercise jurisdiction was not equated to the actual, proper exercise of jurisdiction. The joint judgment in *Kirk* concluded that legislation which removes a defining characteristic of a state supreme court

109 Ibid 498, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
110 Ibid 502 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
111 Ibid 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
112 Ibid.
113 See Cane, above n 59, 210–12.
114 *Mitchforce*, 229, 230 (Spigelman CJ).
115 Ibid 233 (Spigelman CJ).
116 Ibid 235 (Spigelman CJ).
117 Finn, above n 43, 102.
118 *Kirk*, 582 (joint judgment).

would be beyond state legislative power.[119] Therefore, s 179(1) of the *IR* Act was read down to the point of constitutional validity so that the word 'decision' could not include a decision made with jurisdictional error.[120] In this way, the High Court deprived the privative clause of effect in much the same way as it did in *Plaintiff S157*.[121] The High Court in *Kirk* granted an award of certiorari for jurisdictional error, notwithstanding the presence of the privative clause.[122]

As a result of *Kirk*, the issue of whether an administrative decision can be challenged, despite there being a privative clause in state legislation attempting to oust judicial review, is determined by investigating whether the decision was made with jurisdictional error. If the decision was made with jurisdictional error, or an error of law on the face of the record, the privative clause will not protect the decision from review. The words 'Supreme Court of a State' in s 73(ii) of the Constitution confer a limitation on state legislative power as they contain a defining characteristic of state supreme courts — the minimum supervisory review jurisdiction.

XI Selected Application Cases

As *Kirk* established the entrenched minimum supervisory review jurisdiction and altered the treatment of privative clauses contained in state legislation, it is prudent to ascertain how state supreme courts are applying the *Kirk* doctrine. A brief summary of three cases illustrates that the *Craig* distinction between inferior courts and administrative tribunals remains. However, privative clauses are being read down so as to not oust the entrenched minimum supervisory review jurisdiction.

Kirk was first considered in South Australia by the Full Court of the South Australian Supreme Court in *The Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning*.[123] In *Cheltenham*, the appellant, the Cheltenham Park Residents Association Incorporated, sought judicial review of a decision of the respondent, the Minister for Urban Development and Planning to approve an amendment to a Development Plan. The key contention of the appellant was that in granting approval to amend the Development Plan, the respondent failed to consider potential stormwater management issues, including storage and re-use and the prevention of flooding. At first instance, the Trial Judge dismissed the appellant's claims on the basis that the Minister was not required to take flood plan mapping into account and that the decision was not manifestly unreasonable. On appeal, Gray J stated that '[w]hen a decision made fails to take into account a relevant consideration in the exercise of a discretion, a jurisdictional error is committed'.[124] A privative clause contained in s 22(10) of the *Development*

119 Ibid 583 (joint judgment).
120 Ibid 582 (joint judgment).
121 Chief Justice Spigelman, above n 2.
122 Kirk, 583 (Joint judgment).
123 [2010] SASC 93 (9 April 2010) ('*Cheltenham*').
124 *Cheltenham*, [10] (Gray J).

Act 1993 (SA)[125] refused judicial review on the basis of a development plan or an amendment to a development plan being inconsistent with the relevant planning strategy.[126] Justice Gray stated in obiter that, as a result of *Kirk*, s 22(10) was beyond state legislative power as it sought to deny the South Australian Supreme Court of its entrenched supervisory review jurisdiction.[127] The appeal was ultimately dismissed for a lack of evidence and no order was made to invalidate the legislation.

The South Australia Supreme Court again considered *Kirk* in *Hall v State of South Australia*.[128] The plaintiff and applicant, Mr Hall, was issued with a number of notices of inquiry regarding his position as an officer of the public service from the Chief Executive of the Attorney-General's Department ('the Chief Executive'). It was alleged that Mr Hall had accessed a large number of pornographic websites using a computer allocated to him for the purposes of his employment. Mr Hall made application for judicial review seeking declaratory relief from the Chief Executive's decision to issue him with notices of inquiry. The Chief Executive issued a notice of inquiry pursuant to s 58 of the *Public Sector Management Act 1995* (SA) ('*Public Sector Management Act*')[129] and by that notice sought to suspend Mr Hall from duty pursuant to s 59(1)(b) and (c). Section 58(1) of the *Public Sector Management Act* made it an essential precondition to the issue of a s 58 notice of inquiry for the Chief Executive to 'suspect on reasonable grounds that an employee was liable to disciplinary action'. It was also an essential precondition to suspension for the Chief Executive to issue a 'notice of disciplinary inquiry' under s 59(1)(c). The issue to be determined was whether the notice of enquiry was valid for these purposes. Before considering whether the Chief Executive's administrative decision to issue a notice of inquiry to Mr Hall contained jurisdictional error, Gray J determined the applicability of a privative clause contained in s 59(9) of the *Public Sector Management Act*. His Honour stated that s 59(9) was invalid on the basis that it infringed the entrenched minimum supervisory review jurisdiction established in *Kirk*. Justice Gray stated:

> to the extent that a 'decision to suspend' is challenged by the within application for judicial review, it is challenged on a jurisdictional basis. That basis is an alleged misconstruction on the part of the Chief Executive of section 58 of the Act, and an allegation that it was beyond the Chief Executive's power to issue a notice of inquiry in the circumstances that he did. In this respect, the alleged error falls into a recognised category of jurisdictional error; namely, a misapprehension of or disregard to the 'nature or limits of [his functions or powers]' [*Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [72] citing the well established example set out in *Craig v*

125 Section 22(10) of the *Development Act 1993* (SA) stated: 'No action can be brought on the basis— (a) that a Development Plan, or an amendment to a Development Plan, approved under this Act is inconsistent with the Planning Strategy; …'

126 *Cheltenham*, [36] (Gray J).

127 Ibid [39] (Gray J).

128 [2010] SASC 219 (22 July 2010) ('Hall').

129 Repealed by the *Public Sector Act 2009* (SA).

> *South Australia* (1995) 184 CLR 163 at 177]. This is particularly so when regard is had to the class of the relevant decision-maker: an individual administrative decision-maker with powers conferred under a statute. It is settled that the concept of jurisdictional error as it relates to administrative tribunals is wider than in the case of inferior Courts.[130]

Justice Gray found that there was sufficient evidence to support the conclusion that the Chief Executive formed the requisite suspicion under s 58(1) to issue the notice of inquiry and that, therefore, no jurisdictional error had occurred in the decision to issue the notice of inquiry.[131] No other jurisdictional error was identified and the appeal was ultimately dismissed.

The Full Court of the New South Wales Supreme Court applied *Kirk* in *Director-General, New South Wales Department of Health v Industrial Relations Commission of New South Wales*.[132] The case is seen as a 'firm assertion by the Court of Appeal of its supervisory jurisdiction'.[133] An employee was summarily dismissed for misconduct in public employment. At first instance, Schmidt J of the Industrial Relations Commission dismissed the application for failing to demonstrate that the decision to dismiss was harsh, unjust or unreasonable.[134] On appeal, the Full Bench found in favour of the appellant. An appeal was sought against the Full Bench, but the same privative clause as overcome in *Kirk* prevented review. The New South Wales Court of Appeal quashed the decision of the Full Bench. Chief Justice Spigelman, with whom Tobias JA and Handley AJA agreed, fell short of outright rejecting the *Hickman* principle, and overcame the privative clause by applying the *Kirk* doctrine.[135] In this way, *Kirk* may be viewed as the latest understanding of the *Hickman* principle. Jurisdictional errors and errors on the face of the record were identified.[136] The Court of Appeal exercised the 'broader basis of intervention' on the ground that it was a decision of the Industrial Relations Commission.[137] Chief Justice Spigelman concluded:

> I apply the test for exercising a supervisory jurisdiction over an inferior court. It appears to me that when sitting as the Commission, rather than the Industrial Court, the broader basis of intervention with respect to a tribunal is applicable.[138]

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130 *Hall*, [53] (Gray J).

131 Ibid, [63], [66–9] (Gray J).

132 [2010] NSWCA 47 (22 March 2010).

133 Jeffrey Phillips SC, *Captain Kirk Strikes Again* (2010) <http://www.jeffreyphillipssc.com/kirk-v-industrial-relations-commission/> at 2 June 2010.

134 *Cesari v Sydney North West Area Health Service (No 2)* [2008] NSWIRComm 240 (Schmidt J).

135 *Director General*, [13] – [14] (Spigelman CJ).

136 Ibid, [21], [22] (Spigelman CJ).

137 Ibid [24] (Spigelman CJ).

138 Ibid. The broader basis of intervention Spigelman CJ refers to, are the non exhaustive errors listed by Lord Reid in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 170 (Lord Reid). These errors include a decision made 'in bad

This appears to be acknowledgment that the *Craig* distinction remains. The matter was ultimately remitted back to the Industrial Relations Commission.

XII Conclusion

By adding substance to the constitutional expression 'Supreme Court of a State' in s 73(ii) of the *Constitution*, the High Court entrenched the minimum supervisory review jurisdiction of state supreme courts. The supervisory jurisdiction is a limit on state legislative power similar to, but not the same as, the *Kable* principle. Accordingly, it is beyond state legislative power to enact privative clauses that protect decisions made with jurisdictional error. The *Kirk* supervisory review jurisdiction creates a convergence of the state approach to reviewability of jurisdictional error with the Commonwealth approach outlined in *Plaintiff S157*. Whilst the High Court defined the minimum entrenched supervisory review jurisdiction of state supreme courts, it did not outline, with any precision, what errors are considered jurisdictional. The most that can be said about this aspect of the case is that the *Craig* categories were reduced to 'examples'. This leaves room for the High Court to develop the current understanding of jurisdictional error, which would now, after *Kirk*, modify the scope of supervisory review at both state and federal level.

faith', a decision made without power, a failure to comply with natural justice, a misconstruction of the provisions giving the tribunal power to act, a failure to take into account a relevant consideration, and the taking into account an irrelevant consideration.