

THE CENTRALITY OF JURISDICTIONAL ERROR

KEYNOTE ADDRESS

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The emergence of a constitutional dimension, indeed a constitutional foundation, for administrative law has been one of the most important developments of the last decade. The primary effect has, of course, been on Commonwealth administrative law. Notwithstanding the divergence between the constitutional dimension applicable to Commonwealth decision-making and the common law dimension applicable to State decision-making, a process of convergence is apparent. The former influences the latter by a process of what I have described on previous occasions as “gravitational pull”.¹

This process of convergence has taken a dramatic step forward in the High Court’s recent judgment in *Kirk v Industrial Relations Commission* [2010] HCA 1. It is not always the case

that, when the High Court overturns one of my own decisions, I respond with unmitigated admiration. That is, however, the case with *Kirk*. That is so, I suppose, in part, because none of the points on which the appellant succeeded were agitated in the Court of Appeal. The High Court expressly identified the particular issues that were argued in the Court of Appeal.² It is noteworthy, at least to me, that none of these issues are mentioned again in the High Court's judgment.

Kirk involved the exercise by the Industrial Court of New South Wales of its criminal jurisdiction under the *Occupational Health and Safety Act* 1983 ("the OH&S Act"). The Court found breaches of the Act had occurred when the manager of a family farm died. The employer company, and Mr Kirk its director, were convicted.

Two matters were raised by the High Court with counsel for the appellant. Each of them was held to be an error of law, indeed a jurisdictional error. The High Court proceeded to consider the constitutional validity of the privative clause in s 179 of the *Industrial Relations Act* 1996. It held that if this clause prevented

review for jurisdictional error, which as a matter of statutory interpretation it did not, it would be invalid.

In substance, the High Court has equated State administrative law, in this respect, with the position under s 75(v) of the Constitution. The gravitational force has done its work. Newton's apple is on the ground. In this address I wish to pick it up, polish it a little and check it for worms.

A Constitutional Expression

The central constitutional proposition in *Kirk* is that the phrase "The Supreme Court of any State" in s 73(ii) of the Commonwealth Constitution is a constitutional expression. It is not merely a descriptive term. The joint judgment in *Kirk* states that Chapter III of the Constitution requires "that there be a body fitting the description 'the Supreme Court of a state'" and that no legislation of a State Parliament can alter the character of a Supreme Court so that it ceases to "meet the constitutional description".³

In the landmark decision of *Kable*, which first imposed a limit arising from the Commonwealth Constitution upon a State

Parliament with respect to the jurisdiction of State courts, Gummow J characterised, as far as I am aware for the first time, the reference to “Supreme Court” in s 73(ii) of the Constitution as a “constitutional expression”. His Honour said the expression “identifies the highest court for the time being in the judicial hierarchy of the State and entrenches a right of appeal from that court to this Court”.⁴ This approach was affirmed in the joint judgment of Gummow, Hayne and Crennan JJ in *Forge*, when their Honours said:

“It is beyond the legislative power of a State so to alter the constitutional character of its Supreme Court that it ceases to meet the constitutional description.”⁵

In *Kirk* the High Court unanimously applied this textual characterisation and gave it substantive content. The idea that certain terms of the Constitution must be understood in a distinct constitutional sense has been an important development in recent High Court constitutional jurisprudence.

It reflects, in the context of constitutional interpretation, a fundamental proposition. In order to interpret the words of any text, it is always necessary to have in mind the nature of the

document being interpreted. A commercial contract requires a business like approach. A statute requires an understanding of the institutional structure of which it is a manifestation. A constitution is an instrument of government. As one US academic put it: “We ought not read the Constitution like a last will and testament, lest it becomes one”.⁶

The High Court has identified the significance of the constitutional dimension of a number of different terms found in the Commonwealth Constitution, including: “trial by jury” in s 80;⁷ “process” in s 51(xxiv) with respect to service and execution of process;⁸ “trading or financial corporations” in 51(xx);⁹ “subject of the Queen” in s 34(ii) and s 117;¹⁰ “acquisition of property” and “just terms” in s 51 (xxxi);¹¹ “trade, commerce and intercourse among the States” in s 92;¹² and “aliens” in s 51(xix).¹³ All of these terms have been characterised as constitutional expressions in recent years. Similarly, the word “jurisdiction” in Chapter III had been characterised as a “constitutional term”.¹⁴

Of particular significance for administrative law, of course, has been the re-characterisation of the remedies identified in s 75(v) of the Commonwealth Constitution as “constitutional writs”,

rather than in the traditional appellation of “prerogative writs”. This was originally proposed in a joint judgment of Gaudron and Gummow JJ.¹⁵

In an important extra judicial address, Justice Gummow has summarised the emergence of these “constitutional expression” references, without expressly acknowledging his own role, under the subheading “The Symbiotic Relationship”.¹⁶ This was a reference to some observations of Brennan J:

“ ... The Constitution and the common law are bound in a symbiotic relationship: though the Constitution itself and laws enacted under the powers it confers may abrogate or alter rules of the common law, the common law is a matrix in which the Constitution came into being and which informs its text.”¹⁷

The focus of the constitutional expression case law is on that part of the symbiotic relationship in which the Constitution changes or channels or preserves the common law. In administrative law that effect is not, after *Kirk*, confined to Commonwealth legislative or judicial power. A State Parliament cannot act so as to impinge on the constitutional idea of a Supreme Court of a State. I note, in

passing, that the term “Parliament of a State” is also a constitutional expression (eg, in s 51(xxxvii)), no doubt with parallel restraints.

The introduction and elaboration of the concept of a “constitutional expression” as a textual foundation for imbuing many constitutional provisions with new substantive content is one of Justice Gummow’s important contributions to constitutional jurisprudence.

The Kable Principle

As was made clear in *Fardon*,¹⁸ and re-emphasised in *Forge*,¹⁹ the fundamental basis for the *Kable* principle is the preservation of the institutional integrity of State courts, because of their position in the Australian legal system required by the Commonwealth Constitution.²⁰ As the joint judgment said in *Forge*:

“[63] ... [T]he relevant principle is one which hinges upon maintenance of ... the defining characteristics of a State Supreme Court. It is to these characteristics that the reference to ‘institutional integrity’ alludes.”

In *International Finance Trust Co Limited v New South Wales Crime Commission* [2009] HCA 49; (2009) 84 ALJR 31 the High Court applied the *Kable* doctrine. The Court adopted the statement by Gummow J in *Kable* that it is not constitutionally permissible to confer on a State court capable of exercising federal jurisdiction a jurisdiction which is “repugnant to the judicial process in a fundamental degree”.²¹

Until *International Finance Trust*, *Kable* was a dog that had only barked once. This was the characterisation of *Kable* deployed by Kirby J during the course of argument in *Forge*, a case concerned with the use of acting judges in the Supreme Court of New South Wales. On the second day, Kirby J repeated to Stephen Gageler SC, not yet Solicitor General, his observation on the first day that, “I suppose you say this is a dog that only barked once”. Gageler replied: “Yes, but in *Kable* it barked at a stranger. Now it has turned on the family”. The particular beauty of this witticism is that it went to the pith of the case. With the judgment in *Kirk*, this dog may need a bark collar.

Kirk extends the *Kable* doctrine beyond matters of procedure and appearance to matters of substance. The Court concluded

that it was constitutionally impermissible for the Parliament of a State to deprive a Supreme Court of a State of its supervisory jurisdiction with respect to both inferior courts and tribunals. It did so on the basis that it was a requirement of Chapter III of the Constitution that “there be a body fitting the description ‘the Supreme Court of a State’”.²²

Their Honours’ analysis was based on the essential characteristics of the constitutional concept of a Supreme Court:

“[98] The supervisory jurisdiction of the Supreme courts was at Federation, and remains, the mechanism for the determination and the enforcement of the limits of the exercise of State executive and judicial power by persons and bodies other than the Supreme courts. That supervisory role of the Supreme courts exercised through the grants of prohibition, certiorari, and mandavis (and habeas corpus) was, and is, a defining characteristic of those courts ...

[99] ... To deprive a State Supreme court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by

persons and bodies other than that court would be to create islands of power immune from supervision and restraint ... It would remove from the relevant State Supreme court one of its defining characteristics.”

The recognition of this constitutional limitation on the power of a State Parliament is expressed in terms of the text of the Constitution by applying to the words ‘State Supreme court’ an understanding of the “defining” characteristics of this constitutional concept, to use the terminology from *Forge* and *Kirk* that I have quoted.

As the Court has said on another occasion:

“ ... an essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision makers.”²³

With respect to any constitutional expression, the critical issue is the identification of the core content of the term. This may involve characterising a head of legislative power or identifying the characteristics which must be present in order to ensure that the

relevant matter answers the constitutional description. This latter task has often been expressed in terms of the identification of the “essential features” or “essential” or “defining characteristics” of the relevant constitutional expression.

This terminology can be traced back to *Huddart Parker and Moorehead*²⁴ and was first applied in contemporary constitutional jurisprudence in the joint judgment in *Cheatle*,²⁵ with respect to the constitutional expression “trial by jury”.²⁶ This terminology was later applied to the “constitutional writs” in s 75(v) in *Ex parte Aala*.²⁷ *Kirk* has now applied this terminology to the expression “State Supreme court”.

In the Mason court, such an analysis may have been characterised in terms of implications of the Constitution. However, the contemporary jurisprudence of the Court exhibits a proclivity to clearly anchor significant constitutional developments in the text and structure of the Constitution. The concept of a “constitutional expression” provides a textual basis for and, therefore, an aura of orthodoxy to, significant changes in constitutional jurisprudence. That aura dissipates when the Court undertakes the unavoidably creative task of instilling substantive

content to the constitutional dimension of a constitutional expression by identifying its “essential” features or characteristics.

The Effect of Kirk

The effect of *Kirk* is that there is, by force of s 73, an “entrenched minimum provision of judicial review” applicable to State decision-makers of a similar, probably of the same, character as the High Court determined in *Plaintiff S157* to exist in the case of Commonwealth decision-makers by force of s 75(v) of the Constitution.²⁸ In *Plaintiff S157*, the High Court referred to the constitutional writs as providing “textual reinforcement”,²⁹ for the reasoning of Dixon J in the *Communist Party* case, that the rule of law forms an assumption underlying the text of the Constitution.³⁰ The same assumption now extends to the States.

On earlier occasions, I have indicated that, because of the constitutional dimension of Commonwealth administrative law, authorities on s 75(v) must “be treated with care” before applying them to cases arising in State jurisdictions.³¹ No doubt, care is still advisable, but not as much as before. There is a line of authority which suggests that the “constitutional writs” are not necessarily attended by the same incidents as the prerogative writs.³² The

continuing authority of these cases is not clear. In recent years the High Court has rarely overruled earlier decisions. They are simply superseded.

I give one example of the differences. It has been suggested that the fact that the prerogative writ although “not a writ of course ... is a writ which goes of right” is based on the “prerogative features of the writ” because the impugned conduct encroached on the royal prerogative.³³ Have these remedies in State administrative law lost these “prerogative features” because of the new constitutional foundation for them? The answer is probably not because these features would remain part of the “constitutional expression” of a State Supreme court. The position is not, however, clear. It may be necessary to review at some stage the case law which indicates that, at common law, the prerogative writs go as of right, but that the writs in s 75(v) are discretionary.³⁴ In this, as in other respects, *Kirk* will engage administrative lawyers for many years.

Kirk requires a reappraisal of the legal options available to persons affected by administrative decisions in the contexts hitherto protected from judicial review by privative provisions.

Most would have been read down by traditional techniques of interpretation so as not to protect from review for jurisdictional error. However, the impact of *Kirk* will not be confined to s 179 of the *Industrial Relations Act*.

Until the judgment in *Kirk* there was, as far as I am aware, no judicial or academic commentary doubting the ability of a State Parliament to restrict review for jurisdictional error, within limits, by means of a properly drafted privative clause³⁵. The position was as stated in the joint judgment of Gaudron and Gummow JJ in *Darling Casino Limited v NSW Casino Control Authority* (1997) 191 CLR 602 at 633-634:

“A clause which provides only a decision may not be called into question in a court of law is construed as not as excluding review on the ground that the decision involved jurisdictional error, at least in the sense that it involved a refusal to exercise jurisdiction or that it exceeded the jurisdiction of the decision-maker. However and provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in

question is entirely beyond review so long as it satisfies the *Hickman* principle.”

Over the years much ink has been spilt over the *Hickman* principle. It appears that, as a result of *Kirk*, the principle has little if any work to do at a State level. *Plaintiff S157* did that at a Commonwealth level, at least for the High Court.

The concept underlying the *Hickman* principle is that there was a core content of jurisdictional error, narrower than the full range of jurisdictional error, which would remain subject to judicial review, almost by way of a conclusive presumption of the law of statutory interpretation. The effect of *Kirk* will be that the full range of jurisdictional error must remain at both Commonwealth and State levels.

The solution that the High Court has now reached is principled and clear. Nevertheless, you will permit a certain element of nostalgia for all of the hours that I have myself had to spend struggling with the *Hickman* principle, eg, identifying imperative duties, inviolable restraints and determining whether conduct was reasonably capable of reference to the power.

For over a century, a privative provision had been contained in New South Wales industrial legislation and it had received, in its various formulations, a consistent interpretation. Prohibition of review of a “decision” of the Industrial Court or Commission had from the outset not been understood to protect from review for jurisdictional error.³⁶

In 1995, the ouster provision was re-enacted in a new form which extended the terminology from a “decision” to a “purported decision”. The introduction of the word “purported” was of potential significance, as suggested in a joint judgment of Gaudron and Gummow JJ in the *Darling Casino* case where their Honours drew a clear distinction between a decision “under” the Act and a decision “under or purporting to be under” the Act.³⁷ The distinction between a decision and a purported decision had been drawn in a number of other authorities. They were probably derived from a well-known passage of Jordan CJ,³⁸ which has frequently been cited by the High Court,³⁹ referring to a “purported” exercise of jurisdiction. Perhaps most relevantly for the 1995 legislation, the previous year the word was deployed in a

judgment of the Court of Appeal on an important application for judicial review of the Industrial Commission of New South Wales.⁴⁰

In view of this legislative history, the introduction of the word “purported” by way of an amendment to the longstanding reference to “decision” appeared to me to be intended to extend the provision so as to cover jurisdictional error. The result was that in New South Wales the issue that fell for consideration by reason of the application of s 179 was not whether there was jurisdictional error but whether the *Hickman* principle had been contravened.⁴¹

It is difficult to know what more the Parliament could have done to signal an intention to insulate the Industrial Commission from review for jurisdictional error. However, even inserting the word “purported” proved ineffective. The High Court held that the addition of the word “purported” did not extend the scope of s 179 beyond the word “decision”.⁴² *Kirk* affirmed this interpretation.⁴³ In substance, the privative provision was deprived of effect with respect to jurisdictional error, in the same way as the privative clause in the *Migration Act* 1958 (Cth) was so deprived in *Plaintiff S157*.⁴⁴

State privative clauses can no longer protect from jurisdictional error. The principal focus of attention, in both Commonwealth and State administrative law, is now the identification in any particular case of whether or not an error is jurisdictional.

Jurisdictional Error

Kirk is the most recent affirmation by the High Court of the resilience of the distinction between jurisdictional and non-jurisdictional error. The first emphatic confirmation of this traditional common law distinction was the High Court judgment in *Craig*,⁴⁵ which identified both the significance of this distinction and set out a list, affirmed in *Kirk* not to be a comprehensive list, of matters which constitute jurisdictional error.

It was in *Craig* that the High Court first refused to adopt the reasoning of the House of Lords in *Anisminic*,⁴⁶ which is generally understood to abolish the distinction between jurisdictional error and an error within jurisdiction.⁴⁷ The joint judgment of *Craig* did not, however, refer to the House of Lords subsequent affirmation of the reasoning in *Anisminic* as part of the ratio of its decision in

Page,⁴⁸ which has come to be regarded as the leading British authority on this issue. The reaffirmation of the distinction in Australian administrative law will mean that our law will continue to develop differently from that of other common law nations.

The constitutional dimension of the distinction between jurisdictional and non-jurisdictional error places it at the centre of our administrative law jurisprudence. The distinction is necessitated, in Australian law, by our separation of powers doctrine which is, in many respects more definitive, some would say more rigid, than that adopted by the constitutional law of other nations, including that of the United States. This is so despite the fact that Article III of their Constitution was the model for our Chapter III.

With respect to Commonwealth legislation, as acknowledged in *Kirk* itself,⁴⁹ the centrality of jurisdictional error was re-emphasised in *Plaintiff S157* where the joint judgment identified a “fundamental constitutional proposition” in the following terms:

“[98] ... 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.”⁵⁰

In *Kirk* the joint judgment extended this proposition to the Parliaments of the States, supplying constitutional reinforcement to the significance of the distinction at common law affirmed in *Craig*. After noting that there could be a valid privative provision enacted by State parliaments, the Court added in *Kirk*:

“[100] ... The observations made about the constitutional significance of the supervisory jurisdiction of the State’s Supreme courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.”

The concept of what is or is not “jurisdictional” has long eluded definition. Justice Felix Frankfurter once described the idea of jurisdiction as “a verbal coat of too many colours”.⁵¹ On another occasion he referred to the “morass” in which one can be led by “loose talk about jurisdiction” and concluded that “‘jurisdiction’ competes with ‘right’ as one of the most deceptive legal pitfalls”.⁵²

Perhaps the most sustained attack on the distinction between jurisdictional and non-jurisdictional error came from the pen of D M Gordon with respect to jurisdictional facts.⁵³ Lord Cooke of Thorndon extended the attack to the distinction between jurisdictional and non-jurisdictional errors of law, commencing with his 1954 unpublished PhD thesis at Cambridge University,⁵⁴ and sustained by him in the New Zealand Court of Appeal and in the House of Lords. Justice Kirby on the High Court frequently reiterated this proposition.⁵⁵

It can readily be accepted that there is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined.⁵⁶

Nevertheless, as Chief Justice Gleeson pointed out: “Twilight does not invalidate the distinction between night and day”.⁵⁷

Furthermore, as Justice Hayne put it in *Ex parte Aala*:

“The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error when the decision-maker makes a decision outside the limits of the functions and powers conferred on her or him, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision-maker is authorised to decide is an error within jurisdiction ... The former kind of error concerns departures from limits upon the exercise of the power the latter does not.”⁵⁸

This approach reflects the most frequently cited general proposition underlying contemporary Australian administrative law a proposition which, in the light of *Kirk*, must now be understood to apply both to the Commonwealth and State jurisdictions. I refer to

the frequently cited reasoning of Brennan J in *Attorney General v Quin*.⁵⁹

“The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the Court avoids administrative injustice or error, so be it, but the Court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent to which they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.”

This is a vital and indeed, in my opinion, central distinction often expressed in terms of the difference between merits and legality. As I have indicated on earlier occasions, in my opinion, it is a distinction that can be described in terms of the maintenance of the institutional integrity of courts, tribunals and executive decision-makers. I note that the concept of “institutional integrity” has been advanced as the explanation of the *Kable* doctrine in subsequent authorities, notably *Fardon*.

My own views on the integrity function were expressed in the *National Lecture Series* which I delivered on behalf of the Australian Institute of Administrative Law in 2004. In those lectures I emphasised that the idea of institutional integrity connoted an unimpaired or uncorrupted state of affairs. The function of integrity institutions, including judicial review by courts, was to ensure that the community-wide expectation of how governments should operate in practice was realised. This idea of integrity goes beyond matters of “legality”. Integrity encompasses maintenance of fidelity to the public purposes for the pursuit of which an institution is created and the application of the public values, including procedural values, which the institution is expected to obey.⁶⁰

The central proposition remains that there is a distinction between ensuring that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised, on the one hand, and the reasonableness or appropriateness of the decisions made in the exercise of such powers on the other hand. Reasonable minds can and will differ as to where the line is to be

drawn. The former is an integrity function which is inherent in the concept of “jurisdictional error”.

Whatever the criticism that may be made about where this line can be drawn, Australian lawyers cannot refuse to attempt to do so. This has been clear for some time with respect to Commonwealth administrative law. It is now equally clear with respect to the whole of Australian administrative law.

Just as *Craig* affirmed the central significance of jurisdictional error, so the High Court judgment in the *City of Enfield*⁶¹ reaffirmed the viability of the concept of jurisdictional fact which may give rise to one kind of jurisdictional error. Indeed, Professor Mark Aronson referred to “the resurgence of jurisdictional facts”.⁶² As *Kirk* now makes clear, the “resurgence” of jurisdictional error is over. A more appropriate description is to use the word “triumph”.

The basic test has been formulated in numerous different ways as to whether or not the relevant element is:

- “A condition of jurisdiction”.⁶³

- “A preliminary question on the answer to which ... jurisdiction depends”.⁶⁴
- The “criterion, satisfaction of which enlivens the power of the decision-maker”.⁶⁵
- An “event or requirement” constituting “an *essential* condition of the existence of jurisdiction”.⁶⁶

The process of identifying what facts or opinions or procedural steps or judgments are jurisdictional is a matter which turns, primarily, on a process of statutory interpretation. All of the relevant principles of the law of statutory interpretation apply. The fact that different judges may reach different conclusions with respect to matters of this character is not surprising in view of the significant range of elements that must be taken into account.

The difficulty of determining whether a fact is jurisdictional, or whether an error of law constitutes a jurisdictional error, will always be with us. It is a matter which requires the judgment always involved in statutory interpretation. As Sir Frederick Jordan once said, such an issue:

“ ... commonly arises in relation to a statute conferring jurisdiction in which the legislature has made no express

pronouncement on the subject, and in which its intention has therefore to be extracted from implications found in inferences to be drawn from the language it has used.”⁶⁷

Shortly before the judgment of the High Court in *City of Enfield*, I expressed the view in *Timbarra* that the appellation “jurisdictional fact” was a convenient way of expressing a conclusion – the result of a process of statutory interpretation.⁶⁸ I remain of that opinion. The point has often been made, sometimes by way of criticism of the concept of jurisdictional error. It is, nevertheless vital for many reasons, now including constitutional reasons.

The issue is twofold. First, whether or not on the proper construction of the relevant power, a fact referred to must exist in fact, a test of objectivity. Secondly, whether the Parliament intended that the absence or presence of the fact would invalidate action under the statute, a test of essentiality.⁶⁹ Similarly, with respect to jurisdictional error of law, the test of essentiality can be stated in the form of whether or not Parliament intended that an error of that character was of sufficient significance to result in the invalidity of the decision.

The position is, in my opinion, the same as the High Court determined to be the case when discussing the question of breach of a procedural condition in the *Project Blue Sky* case.⁷⁰ The joint judgment adopted the analysis of the New South Wales Court of Appeal in *Tasker v Fullwood* and said:

“The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning ... a better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.”⁷¹

Language of essentiality, extending as it does to words like “mandatory” and “jurisdictional”, directs attention to matters that are appropriately described as issues of institutional integrity. It directs attention away from the quality of the actual outcome which, save in exceptional circumstances, is not relevant to the inquiry.

The determination of whether or not a particular fact, matter or process has the requisite jurisdictional quality, namely the requisite element of essentiality, depends on the statute and the circumstances of the case. These are matters on which reasonable minds may differ.

As the joint judgment put it in *Project Blue Sky*, with respect to the question of whether it was “a purpose of the legislation that an act done in breach of the provision should be invalid”:

“Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.”⁷²

As Gummow J said in the course of a special leave application from *Timbarra*, which was refused and which was heard after argument in *The City of Enfield* case but before the Court handed down judgment in that case:

“The principles as to how one determines whether something is a jurisdictional fact are settled but necessarily imprecise. That must be so.”⁷³

Determining whether a fact or event, or combination of such, has the requisite quality of essentiality to be classified as jurisdictional, always requires a multiplicity of factors to be considered. Different judges may reach divergent conclusions. Such divergence is the result of the difficulties attendant on determining the will of Parliament when that is not readily apparent. I have attempted on other occasions to discuss the range of relevant matters.⁷⁴ The indicators and factors that have been developed in the case law lead me to the conclusion that the determination of whether a statutory reference or element is jurisdictional in the relevant sense is a principled process. It is not, contrary to some criticisms that have been made, a blank cheque to the judiciary to intervene whenever a judge believes the outcome to be undesirable. In my view the understanding that what is involved is the institutional integrity of the process assists in ensuring that proper boundaries are observed.

The Scope of Jurisdictional Error

An important aspect of the judgment in *Kirk* is the identification of the two distinct matters which were said to constitute both jurisdictional error and error of law on the face of the record. The proceedings in the Industrial Court involved alleged contraventions of the OH&S Act with respect to the alleged failure on the part of an employer to “ensure” a safe system of work. Certain defences were available to the employer. The matters found to constitute jurisdictional errors were first, misinterpretation of the Act manifest by the failure to provide proper particulars and, secondly, the admission of evidence that ought to have been excluded.

The High Court referred to the particulars that had been given. It concluded that they did not identify an act or omission which constituted a contravention of the two relevant sections of the OH&S Act, nor did they identify what measures the employer could have taken but did not take.⁷⁵ The absence of particulars was significant because, it was the act or the omission of the employer which constituted the offence and, for that reason, it was “necessary for the prosecutor to identify the measures which should have been taken”.⁷⁶

The joint judgment in *Kirk* referred to the identification in *Craig* of what constituted jurisdictional error in the case of an inferior court. It referred first to the general proposition from *Craig* that there is jurisdictional error on the part of an inferior court:

“If it mistakenly asserts or denies the existence of jurisdictional error or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist.”⁷⁷

The Court repeated the reference in *Craig* that jurisdictional error is most obvious:

“Where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision or order of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*.”⁷⁸

The Court went on to say that despite the word “theoretical” the limits were real and went on to give the following three examples

from *Craig* of a court entertaining a matter outside the limits of its functions or powers:

- “(a) The absence of a jurisdictional fact;
- (b) Disregard of a matter that the relevant statute requires be taken into account as condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and
- (c) Misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.”⁷⁹

The Court emphasised that the examples in *Craig* were “just that – examples”.⁸⁰

The Court held that the Industrial Court had committed the jurisdictional error identified in *Craig* in terms of “misapprehending the limits of its functions and powers”. This was because:

“[74] ... Misconstruction of s 15 of the OH&S Act led the Industrial Court to make orders convicting and sentencing Mr Kirk and the Kirk Company where it had

no power to do so. It had no power to do that because no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk Company were convicted and for which they were sentenced. And the failure to identify the particular act or omission, or set of acts of omissions, alleged to constitute the contravening conduct followed from the misconstruction of s 15. By misconstruing s 15 of the OH&S Act the Industrial Court convicted Mr Kirk and the Kirk Company of offences when what was alleged and what was established did not identify offending conduct.

[75] The explanation just offered also demonstrates that the error made by the Industrial Court was not only an error about the limits of its functions or powers. It was an error which led to it making orders convicting Mr Kirk and the Kirk Company where it had no power to do so. The Industrial Court had no power to do that because an offence against the OH&S Act had not been

proved. It follows that the Industrial Court made orders beyond its powers to make.”

The approach applied in *Kirk* is reminiscent of the reasoning of Jordan CJ in a classic case:⁸¹

“A magistrate has no jurisdiction to convict a person except for a statutory offence and it is contrary to natural justice to convict a person of a statutory offence with which he has not been charged.”

However, nothing in *Kirk* suggests that its reasoning is directed only to criminal proceedings. If misinterpretation of a statute is a step leading to the making of an order or other exercise of power, then it is a jurisdictional error. The practical difference with *Anisminic* may be small.

The second jurisdictional error arose from the fact that Mr Kirk, the director of the employer, who was himself the subject of charges in that capacity, was called by the prosecution as a witness. This apparently occurred by consent and in accordance with the usual practice in the Industrial Court. This was found to contravene s 17(2) of the *Evidence Act* 1995, which provides that

a defendant is not competent to give evidence as a witness for the prosecution. This was not a provision that could be waived by consent pursuant to s 190 of the *Evidence Act*.⁸²

Mr Kirk could not give evidence with respect to the charge against himself. However, it may be that his evidence could have been adduced against the company, as the prohibition in s 17(3) with respect to evidence from an “associated defendant” applies a not “compellable test” rather than a not “competent” test. This subsection was not discussed in *Kirk*.

The High Court held that:

“[76] ... The Industrial Court misapprehended a limit on its powers by permitting the prosecution to call Mr Kirk at the trial. The Industrial Court’s power to try charges of criminal offences was limited to trying the charges applying the laws of evidence. The laws of evidence permit many forms of departure from the rules that are stated. Many, perhaps most departures from the strict rules of evidence can be seen as agreed to parties at least implicitly. But calling the accused as a witness for the prosecution is not permitted, even if the accused

consents to that course. The joint trial of Mr Kirk and the Kirk Company was not a trial conducted in accordance with the laws of evidence. The Industrial Court thus conducted the trial of Mr Kirk and the Kirk Company in breach of the limits on its power to try charges of a criminal offence.”

It was of significance, as I have indicated above, that s 190 of the *Evidence Act* did not permit an accused to consent to waive s 17(2). As the High Court indicated, most of the rules of evidence are more flexible. Nevertheless, the conclusion that the conduct of a trial in contravention of this particular rule of evidence constituted jurisdictional error, because the Industrial Court had no power to try charges in this manner, may give rise to questions as to whether other rules of evidence or of procedure are of equal significance in the conduct of criminal trials and, perhaps, other trials. It may well be that some of the learning on “inviolable restraints”, developed in the context of the *Hickman* principle, may have a resonance here as a form of jurisdictional error capable of being raised by way of judicial review, notwithstanding the consent of the parties to a particular course of conduct at trial.

Time Bar Clauses

A matter of considerable practice significance that will arise from the *Kirk* judgment is the impact of that case on other forms of statutory restriction on judicial review. I will first consider time bar clauses, ie, clauses which require proceedings to be brought within a certain period. Time bar clauses are frequently found in State legislation and they vary considerably in their strictness.

In *Plaintiff S157* the High Court found that the privative clause inserted into the *Migration Act* 1958 (Cth) in 2001 did not apply to jurisdictional error. However, s 486A of the *Migration Act* required an application to the High Court to be made within 35 days of the notification of the decision under that Act and provided that the High Court could not extend that time. This section did not need to be dealt with by the majority in *Plaintiff S157*. Callinan J expressed the view that the provision may not provide enough time.⁸³ This approach appeared to conflict with earlier decisions that suggested that time bar clauses did not raise jurisdictional issues.⁸⁴

After *Plaintiff S157*, no doubt based on Callinan J's reasons, s 486A of the *Migration Act* was amended to provide for a 28 day

limit, in lieu of the original limit of 35 days, and to permit a 56 day extension if the High Court considered it to be in the interests of justice.

In *Bodruddaza*⁸⁵ the High Court unanimously found that s 486A was invalid. The joint judgment put forward as a general proposition:

“ ... A law with respect to the commencement of proceedings under s 75(v) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applications to seek relief under s 75(v) as to be inconsistent with the place of that provision in the constitutional structure ...”⁸⁶

The High Court went on to deal with the particular structure of the section but warned that for Parliament to itself formulate “a rule precluding what is considered by the legislature to be an untimely application ...” was a “path ... bound to encounter constitutional difficulties”.⁸⁷

By parallel reasoning, time bar provisions contained in State legislation could not validly compromise the capacity of a State

Supreme court to exercise its supervisory jurisdiction given constitutional protection by *Kirk*. The position of State courts may differ, in this respect, from that of federal courts other than the High Court. It has been held that the decision in *Bodruddaza* did not apply to the Federal Court's time limit under s 477 of the *Migration Act*, because the jurisdiction of the Federal Magistrates Court was statutory not constitutional.⁸⁸

The practical significance of time bar clauses is highlighted by the jurisprudence that has developed in this State in the context of environmental planning appeals. The *Environmental Planning and Assessment Act* 1979 (the "EP&A Act") provides in s 101 that the validity of any consent or certificate cannot be questioned except in proceedings commenced before the expiration of three months from the date on which public notice was given. Similarly, s 35 of the EP&A Act provides that the validity of an environmental planning instrument cannot be questioned except in proceedings commenced within three months of the date of publication on the New South Wales website of the instrument. *Kirk* may require further attention to the validity of these sections.⁸⁹

In *Woolworths Limited v Pallas Newco Pty Ltd*⁹⁰ the New South Wales Court of Appeal held that the characterisation of the use in a development application was a jurisdictional fact. This was a matter of considerable practical importance because of the social and commercial disruption that could occur if consents were successfully challenged long after they had been granted or, indeed, implemented.

The judgment limited the practical scope of the inconvenience capable of arising from the finding that characterisation of a development was a jurisdictional fact by holding that, as a matter of interpretation, the time bar in s 101 was intended to protect decisions from jurisdictional error.⁹¹ (Subject, however, to the application of the *Hickman* principle on the basis of this Court's analysis of *Hickman* before *Kirk*.⁹²)

Although I cannot express a concluded view, in the context of the particular statutory framework, I think it likely that the three month limit in both s 33 and s 101 is permissible. However, I expect that, in the light of *Kirk*, this may be tested.

It is, however, clear that the long line of authority which suggests that time bar clauses are effective to protect from jurisdictional error, subject to the application of the *Hickman* principle, must now be regarded as doubtful.⁹³ These cases must be reviewed in the light of the constitutional conception of the Supreme Court and the preservation of its supervisory jurisdiction as determined in *Kirk*.

No Invalidity Clause

A second example of the identification of the line between an impermissible intrusion on the minimum provision for judicial review, at both the Commonwealth and State level, arises from what has been described as a “no invalidity clause”.⁹⁴ Such a clause does not expressly deprive a court of its jurisdiction. It states that some act or decision that may be in breach of a statutory requirement or, perhaps some principle or administrative law, does not have the consequence that the act or decision is invalid. As a matter of substance, clauses of this character deprive the affected citizen of any substantive right to review for jurisdictional error, by removing the basis upon which that course could be undertaken. In effect, this extends the jurisdiction retrospectively to whatever happened.

The issue has arisen in the High Court judgment in *Futuris*.⁹⁵ The case came before the High Court as an appeal from an application for judicial review. The allegation that the decisions had been vitiated by jurisdictional error had to face the provisions of s 175 of the *Income Assessment Act* 1936 (Cth), which provided:

“The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.”

However, the Act expressly allowed a merits review to the Administrative Appeals Tribunal and also appeals to the Federal Court. It is also significant that the taxpayer had in fact instituted an appeal to the Federal Court from the relevant assessment. Although the proposition does not emerge with clarity from the High Court reasoning it is, in my opinion, of critical significance that an appeal on the merits lay, indeed had been instituted, with respect to the substance of the decision, an aspect of which was sought to be challenged by way of judicial review.

In *Futuris* s 175 was found to implement the approach accepted in *Project Blue Sky*.⁹⁶ In many such cases, of course, the issue will be resolved by a process of reading down a “no invalidity” clause.

It was suggested in *Futuris* that the Commissioner had deliberately issued an assessment which he knew to be invalid. This was rejected on the facts. However, the joint judgment in the High Court did indicate that s 175 would not be construed to “encompass deliberate failures to administer the law according to its terms”.⁹⁷ This is equivalent to the reading down of the privative provision in *Plaintiff S157, Batterham and Kirk*.

There remains plenty of scope for disputation. One has only to think of the wide range of possible denials of procedural fairness to recognise that drawing the line between a procedural breach which is validated by a no invalidity clause and a breach which, either as a matter of interpretation or as a matter of constitutional requirement, is of such significance that it cannot be validated, is fraught with difficulty.

Where, as was the case in *Futuris*, the structure of the legislative scheme is such that there is a clear right of appeal capable of correcting error, indeed not just jurisdictional error, it can hardly be suggested that a restriction on judicial review is, as a matter of practical reality, such as to infringe the constitutional protection of a minimum requirement of judicial review for jurisdictional error. This must apply at both a Commonwealth and State level. This distinction is only implicit in the reasoning of the joint judgment in *Futuris*, but appears to me to be an important aspect of the explanation of the result in that case.⁹⁸

The Land and Environment Court has been invested with the supervisory jurisdiction of the Supreme Court by way of judicial review pursuant to s 20(2)(b) of the *Land and Environment Court Act* 1979. Furthermore by s 71(1) of that Act, proceedings of that character “may not be commenced or entertained in the Supreme Court”. *Kirk* could be seen to call in question the validity of s 71(1) of the *Land and Environment Court Act*. However, although again I cannot express a concluded view, the fact that decisions of the Land and Environment Court are subject to appeal to the Court of Appeal would probably save this particular provision.

This issue will, however, become more acute in a legislative context where there is restriction on the ability to institute an appeal or seek review on the merits. The courts will then be required to determine the significance of the matters which would not be able to be agitated in proceedings other than by way of judicial review. Either the interpretation of a “no invalidity clause” or its permissible constitutional scope will then fall for decision.

Conclusion

One salutary effect of *Kirk* is to bring into alignment the principles of administrative law applicable at a State level and those applicable at a Commonwealth level. There has been some divergence between the two due to the development of the concept of constitutional writs. That divergence has now been significantly diminished if not, for all practical purposes, removed. This will facilitate the further development of Australian administrative law.

As I have indicated, I have long believed that the Commonwealth constitutional jurisprudence on this matter would exercise a gravitational pull on State administrative law. That gravitational force has now done its work. Indeed, it may well be

that the appropriate metaphor is not gravity but magnetism. It may even be the case that the High Court has developed a unified field of all forms of force: gravity, electro-magnetism and nuclear. This was a task which eluded even Albert Einstein, but it is possible the High Court has accomplished it.

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- ¹ See, eg, *Bros Bins Systems Pty Ltd v Industrial Relations Commission of NSW* [2008] NSWCA 292; (2008) 178 IR 28 at [30]; J J Spigelman ‘Jurisdiction and Integrity’, The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law (2004) at 26; J J Spigelman ‘The Significance of the Integrity System’ (2008) 4(2) *Original Law Review* 39 at 47, reprinted in Tim D Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008), CS2N Publishing at 326; J J Spigelman ‘The Equitable Origins of the Improper Purpose Ground’ in Linda Pearson, Carol Harlow and Michael Taggart *Administrative Law in a Changing State: Essays in Honour of Mark Aronson*, (2008) Hart Publishing, Oxford at 149.
- ² See *Kirk v Industrial Relations Commission* [2010] HCA 1 at [48]; (2010) 84 ALJR 154.
- ³ *Kirk* supra at [96].
- ⁴ See *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 141-142.
- ⁵ *Forge v Australian Securities and Investments Commission* [2006] HCA 44; (2006) 228 CLR 45 at [63].
- ⁶ Quoted in Eugene W Hickok Jr (ed) *The Bill of Rights: Original Meaning and Current Understanding* (1991) University of Virginia Press at 21.
- ⁷ See *Brownlee v The Queen* [2001] HCA 36; (2001) 207 CLR 278 at [7], [33]; *Ng v The Queen* [2003] HCA 20; (2003) 217 CLR 521 at [9].
- ⁸ See *Dalton v New South Wales Crime Commission* [2006] HCA 17; (2006) 227 CLR 490 at [34] and [40].
- ⁹ *New South Wales v Commonwealth (Work Choices Case)* [2006] HCA 52; (2006) 229 CLR 1 at [58].
- ¹⁰ *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; (2003) 218 CLR 28 at [14] and [20].
- ¹¹ *Wurridjal v Commonwealth* [2009] HCA 2; (2009) 237 CLR 309 at [200] and [266]. See also *Copyright Agency Limited v New South Wales* [2008] HCA 35; (2008) 233 CLR 279.
- ¹² *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322 at [401].
- ¹³ *Singh (an infant) by her next friend Singh v Commonwealth* [2004] HCA 43; (2004) 222 CLR 322 at [151], [158].
- ¹⁴ See *Re McJannet; Ex parte Minister for Employment Training and Industrial Relations* (1995) 184 CLR 620 at 653.
- ¹⁵ *In Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [21].
- ¹⁶ The Honourable W M C Gummow AC, “The Constitution: Ultimate Formulation of Australian Law?” (2005) 79 *Australian Law Journal* 167 at 172.
- ¹⁷ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141.
- ¹⁸ *Fardon v Attorney General (Qld)* [2004] HCA 46; (2004) 223 CLR 575.

19 *Forge* supra at [63].

20 *Fardon* supra at [15], [23], [37], [41], [101]-[102] and *Forge* supra at [65]-[66].

21 See *Kable* supra at [132] as applied in *International Finance Trust Company v New South Wales Crime Commission* [2009] HCA 49; (2009) 84 ALJR 31 at [56], [98] and [140].

22 *Kirk* supra at [96].

23 *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at [43]. See also *Bodruddaza v MIMA* [2007] HCA 14; (2007) 228 CLR 651 at [46].

24 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 per O'Connor J.

25 *Cheatle v The Queen* (1993) 177 CLR 541 at 549, 560.

26 See also *Ng v The Queen* supra at [9]; *Brownlee v The Queen* supra at [6]-[7], [21]-[22], [33]-[34] and [52]-[57].

27 See *Ex parte Aala* supra at [24]-[25], [34].

28 *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [103].

29 *Ibid.*

30 See *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 and see *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Act Case)* (1998) 195 CLR 337 at [89].

31 *Solution 6 Holdings Ltd v Industrial Relations Commission (NSW)* [2004] NSWCA 200; (2004) 60 NSWLR 558 at [129]-[134].

32 See *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association* (1986) 60 ALJR 588 at 594; *Ex parte Aala* supra at [19]-[23].

33 See *Ex parte Aala* supra at [44], [146]-[149].

34 Compare *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 118-119; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194-195 and 217-218; and *Ex parte Aala* supra at [5], [49]-[56], [145].

35 My attention has since been drawn to an article by the Hon Duncan Kerr MP, 'Privative Clauses and the Courts: why and how Australian courts have resisted attempts to remove the citizen's right to judicial review of unlawful executive action' (2005) 5 (2) *Queensland University of Technology Law and Justice Journal* 195 at 212-215. I am grateful for the reference.

36 See *Clancy v Butcher's Shop Employees Union* (1904) 1 CLR 181; *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114; *Brown v Rezitis* (1970) 127 CLR 157.

37 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 635.

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

39 See, eg, *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 267-268; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 144.

40 See *Walker v Industrial Court of New South Wales* (1994) 53 IR 121 at 150.

41 See *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)* [2003] NSWCA 151; (2003) 57 NSWLR 212 esp at [61]-[92].

42 See *Batterham v QSR Limited* [2006] HCA 23; (2006) 225 CLR 237.

43 See *Kirk* supra at [103]-[105] and cf the analysis in *Kirk Group Holdings Ltd v Workcover Authority (NSW)* [2006] NSWCA 172; (2006) 66 NSWLR 151 at [30]-[34].

44 See C Beaton-Wells ‘Judicial Review of Migration Decisions: Life After S157’ (2005) 33(1) *Federal Law Review* 141.

45 See *Craig v South Australia* (1995) 184 CLR 163.

46 See *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147 at 171.

47 See *Craig v South Australia* supra at 178-179.

48 See *Page v Hull University Visitor* [1993] AC 682; [1993] 1 All ER 97.

49 See *Kirk* supra at [95].

50 See *Plaintiff S157/2002* supra at [98].

51 *United States v L A Tucker Truck Lines* 344 US 33 [1952] at 39.

52 *City of Yonkers v United States* 320 US 685 [1944] at 695.

53 Commencing in (1929) 45 *Law Quarterly Review* 459 and (1931) 47 *Law Quarterly Review* 386.

54 See Mark Aronson ‘The Resurgence of Jurisdictional Facts’ (2001) 12 *Public Law Review* 17 at ft 14.

55 See *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; (2001) 206 CLR 57 at 123; *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* [2001] HCA 76; (2001) 185 ALR 504 at [22]; *Re McBain; Ex parte Australian Catholic Bishops Conference* [2002] HCA 16; (2002) 209 CLR 372 at 439; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 77 ALJR 1165.

56 See, eg, Paul Craig, *Administrative Law* (6th ed, 2008) Sweet & Maxwell, Ch 14.

57 A M Gleeson ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4 at 11.

58 See *Ex parte Aala* supra at [163].

59 *Attorney General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 35-36.

60 See generally J J Spigelman AIAL National Lecture Series supra. I note that the first lecture in the series was published as J J Spigelman ‘The Integrity Branch of Government’ (2004) 78 *Australian Law Journal* 724.

61 *Corporation of the City of Enfield* supra.

62 Mark Aronson, ‘The Resurgence of Jurisdictional Facts’ supra.

63 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429-430.

64 *The Queen v The Judges of the Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125.

65 *Corporation of City of Enfield* supra at 148.

66 *Craig v South Australia* supra at 177.

67 *Ex parte Mullen; Re Hood* (1935) 35 SR (NSW) 289 at 298.

68 *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; (1999) 46 NSWLR 55 at [39].

69 *Timbarra* supra at [37]-[39].

70 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93].

71 *Project Blue Sky* supra at [93]; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-24.

72 *Project Blue Sky* supra at [91]; See also Louis Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953 at 961-2; *Ex parte Redgrave; Re Bennett* (1945) 46 SR (NSW) 122 at 125 per Jordan CJ.

73 *Ross Mining NL v Timbarra Protection Coalition Inc* (S 26/1999, 14 May 1999); [1999] HCATrans 145.

74 See, eg, *Timbarra* supra at [42]-[60]; J J Spigelman 'Jurisdiction and Integrity' supra at 32-34.

75 See *Kirk* supra at [28].

76 See *Kirk* supra at [34].

77 *Kirk* supra at [72].

78 *Kirk* supra at [72].

79 *Kirk* supra at [72].

80 See *Kirk* supra at [72]-[73] referring to *Craig v South Australia* supra at 177-178.

81 *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at 173.

82 See *Kirk* supra at [51].

83 *Plaintiff S157/2002* supra at [173]-[176].

84 See, eg, *Parisiennes Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 esp at 385, 388-389; *Bell v Stewart* (1920) 28 CLR 419 at 424; *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194.

85 *Bodruddaza* supra.

86 *Bodruddaza* supra at [53].

87 *Bodruddaza* supra at [59].

88 See *SZAJB v Minister for Immigration and Citizenship* [2008] FCAFC 75; 168 FCR 410.

89 See also *Maitland City Council v Anambah Homes Pty Ltd* [2005] NSWCA 455; (2005) 64 NSWLR 695.

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- 90 *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422; (2004) 61 NSWLR 707.
- 91 See *Woolworths v Pallas Newco* supra at [79]-[80].
- 92 See *Woolworths v Pallas Newco* supra at [81]-[85].
- 93 See, eg, *Smith v East Elloe Rural District Council* (1956) AC 736; *R v Secretary of State for the Environment; Ex parte Ostler* [1977] 1 QB 122; *R v Cornwall County Council; Ex parte Cornwall and Isles of Scilly Guardians ad litem and Reporting Officers Panel* [1992] 1 WLR 427 and on appeal (1994) 1 All ER 694; *Vanmeld Pty Ltd v Fairfield City Council* [1999] NSWCA 6; (1999) 46 NSWLR 78 esp at [143], [150]; *Woolworths v Pallas Newco* supra at [82], [84]; *Maitland City Council* supra at [2], [21].
- 94 See Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.
- 95 *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32; (2008) 237 CLR 146.
- 96 See *Futuris* supra at [23]-[24].
- 97 *Futuris* supra at [55].
- 98 See the analysis by McDonald, 'The Entrenched Minimum Provision' supra at 29-31 and the commentary on the article by Mark Aronson in (2010) 21 *Public Law Review* 35 at 38-39 and by Alan Robertson SC in (2010) 21 *Public Law Review* 40 at 42.