

# **An Elegant Convergence? The Constitutional Entrenchment of 'Jurisdictional Error' Review in Australia**

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*In 2010 the Australian High Court overturned a state health and safety prosecution by means of a constitutional law advance not seen since the free speech cases and the Kable decision of the mid 1990s. Pursuant to this decision, Kirk v Industrial Court (NSW), the core supervisory jurisdiction of the Australian State Supreme Courts (over jurisdictional error) is now constitutionally protected against legislative ouster. In the ensuing rush of interest in this constitutional extension, the role and readiness of the other partner to the emerging public law collaboration – administrative law and its notoriously unsteady notion of 'jurisdictional error' – has been somewhat neglected. This article attempts to draw together the threads of the constitutional development behind Kirk, and then proceeds to reassess the increasingly pivotal notion of jurisdictional error. It examines the High Court's recent forays into this administrative law conundrum, attempts to re-phrase the problem as a tension between 'internal' and 'external' approaches, and seeks to construct a solution.*

## **Introduction**

The High Court decision in *Kirk v Industrial Court (NSW)*<sup>1</sup> has quickly risen to prominence in professional and academic legal consciousness in Australia. It is a decision that impacts at many levels and for that reason earns a place amongst the most significant Australian cases of the decade. In basic terms the High Court overturned a state Industrial Court prosecution, in a manner that had some awkward immediate ramifications for the administration and ongoing development of occupational health and safety law (in New South Wales and nationally).<sup>2</sup> The decision's broader and longer term contribution is an ostensibly more elegant one, and it marks something of a tipping point in Australian legal development. It also indicates that the current High Court is pursuing symmetry and coherency in Australian public law, building upon the distinctiveness of its underlying structures in a progressive and positive way.

The critical component of *Kirk* was the manner in which the High Court<sup>3</sup> (on appeal from the New South Wales Supreme Court<sup>4</sup>) side-lined a long-prominent feature of the New

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<sup>1</sup> (2010) 239 CLR 531 ('*Kirk*').

<sup>2</sup> For analysis and contrasting views, see eg Neil Foster, 'General Risks or Specific Measures? The High Court Decision in *Kirk*' (2010) 23 *Australian Journal of Labour Law* 230 and Kelly Godfrey, 'The High Court Finishes Workcover's Sport with Mr Kirk But the Game is Not Over Yet!' (2010) 38 *Australian Business Law Review* 196.

<sup>3</sup> French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J generally agreed with substance of reasoning in the joint judgment, but dissented as to orders (including as to costs).

<sup>4</sup> *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

South Wales legal landscape - a privative clause protecting its Industrial Court.<sup>5</sup> This was achieved, in part, via a constitutional conclusion that the immutable 'defining characteristics' of a state Supreme Court included its power to confine inferior courts and tribunals within the limits of their authority by granting relief on the ground of jurisdictional error.<sup>6</sup> The High Court determined that the privative clause did not (and could not validly) exclude that jurisdiction.<sup>7</sup> As early Australian commentary has noted, the broad implications of this conclusion are profound; we find here an evolution and solidification in the state Supreme Courts' constitutional personality (which has been applied and developed further in the recent High Court case of *Wainohu v New South Wales*<sup>8</sup>), and a notable advance in the collaboration between Australian constitutional and administrative law that came to particular prominence in migration decision of *Plaintiff S157/2002 v Commonwealth*.<sup>9</sup>

Despite the appealing simplicity of the reasoning in *Kirk*, a broader lens reveals that the case dips deeply into some important and difficult issues in both constitutional and administrative law. In terms of the protected constitutional personality of the state Supreme Courts, *Kirk* is part of a recent tide of High Court cases (including *South Australia v Totani*,<sup>10</sup> *Hogan v Hinch*<sup>11</sup> and *Wainohu*<sup>12</sup>) which have significantly advanced the jurisprudence relating to Chapter III of the Commonwealth Constitution (**Constitution**). Yet beyond the constitutional dimension there are a number of other issues that are yet to be fully explored. The most important of these, given the precise point of public law intersection in *Kirk*, is the question of whether we are now any closer to a settled position on the elusive notion of 'jurisdictional error'. This concept has of course survived in Australia, despite its effective expiry elsewhere.<sup>13</sup> It has remained important here in the handling of privative clauses generally; in assessments of the precise legal effect of error and the availability of particular judicial review remedies; and in the delimitation of the constitutionally-conferred original judicial review jurisdiction of the High Court. Now it is heavily implicated in the design of an immutable jurisdiction for the state Supreme Courts. It is fair to say, however, that as jurisdictional error's star has continued to rise in Australia, so too has the quiet resignation that it is an intractably uncertain concept.

The *Kirk* decision marks a return by the High Court to the more difficult end of the jurisdictional error confusion; it had for some years dealt largely with matters that allowed it to follow specific well-trodden precedential paths. The importance of this

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<sup>5</sup> Section 179(1) of the *Industrial Relations Act 1996* (NSW), which provided that relevant decisions were 'final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal' – such protection purportedly extending (under s 179(5)) to proceedings for any relief or remedy (whether by order in the nature of writ, equitable remedy or otherwise).

<sup>6</sup> (2010) 239 CLR 531, [100]. Traditional interpretive principles by themselves would indicate that the s 179 privative clause did not protect jurisdictional errors (at least since its retreat from 'purported decisions' in 2005), however the High Court was clearly pursuing the larger question of whether States *could* effectively protect such errors – see further below and the discussion in Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010) 6.

<sup>7</sup> *Kirk* (2010) 239 CLR 531, [54]ff.

<sup>8</sup> *Wainohu v New South Wales* (2011) 85 ALJR 746 ('*Wainohu*').

<sup>9</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157*').

<sup>10</sup> *South Australia v Totani* (2010) 85 ALJR 19 ('*Totani*').

<sup>11</sup> *Hogan v Hinch* (2011) 85 ALJR 398 ('*Hinch*').

<sup>12</sup> *Wainohu* (2011) 85 ALJR 746.

<sup>13</sup> See eg *R v Hull University Visitor; Ex parte Page* [1993] AC 682, 696, 702; Lord Diplock, 'Administrative Law: Judicial Review Reviewed' (1974) 33 *Cambridge Law Journal* 233.

return has been somewhat lost in the broader and grander implications of *Kirk*, and in the brevity of the High Court's conclusions on the central administrative law issues. Yet on close inspection those conclusions do reveal some ongoing conceptual tension, and indeed confirm the opaque and very contestable nature of the standard measures (the 'Craig formulas'<sup>14</sup>) employed by the courts in identifying jurisdictional error. Unfortunately attention has now returned, via some important migration cases,<sup>15</sup> to the relatively more settled concept of 'jurisdictional fact'. And given the extremely politically-charged nature of these cases, the professional and academic focus may remain there for sometime.

Prominent among the supporters of the High Court's decision in *Kirk* is the Chief Justice of New South Wales, who has expressed 'unmitigated admiration' for its contribution.<sup>16</sup> This may seem surprising, given Chief Justice Spigelman's role in the overturned Supreme Court decision below, until it is recalled that his Honour has been entangled in a number of difficult decisions in this field of administrative law and hence no doubt sees the appeal of simplicity as an end in itself. The New South Wales Chief Justice has also noted that his earlier prediction of ongoing constitutional 'pull' upon state administrative law<sup>17</sup> has come to pass: 'The gravitational force has done its work. Newton's apple is on the ground.'<sup>18</sup> He has thus proceeded, writing extra judicially, to 'pick [the apple] up, polish it a little and check it for worms'.<sup>19</sup>

Spigelman CJ's analogy is an engaging one, however the poetry recedes as we begin to examine the significant questions freshly disturbed. *Kirk* is part 2 of an important contemporary administrative law story, and roughly part 8 of a constitutional one. Both are unfinished, and the elegant convergence belies the complexity of the trajectories involved and the interesting fragility of the intersection. This article first endeavours to draw together the threads of the relevant Australian constitutional law development and commentary, and then proceeds to probe its sharpening point of intersection with Australian administrative law – the concept of 'jurisdictional error'. Has this critical notion, having long tormented lawyers in Australia, matured sufficiently in the contemporary High Court jurisprudence to sustain its increasingly central role? If it is still conspicuously lacking in clarity, is there a suitable path ahead? An attempt is made here to distil a new explanation of one of the core conceptual tensions, to query the ongoing relevance of traditional Australian approaches, and to fully construct a new internally-focused statutory intention based methodology.

## ***The Constitutional Backdrop***

Despite the prominence and reasonably self-contained nature of *Kirk*'s constitutional conclusions, close examination reveals that they represent more an evolution of existing understandings than a new stream of authority. It is a highly significant evolution given its impact upon state administrative law, however it is important to place the *Kirk*

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<sup>14</sup> See *Craig v South Australia* (1995) 184 CLR 163 ('Craig').

<sup>15</sup> Most particularly, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011); but see also *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

<sup>16</sup> Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 77.

<sup>17</sup> See eg Chief Justice Spigelman, 'Jurisdiction and Integrity' (The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, 5 August 2004) 26.

<sup>18</sup> Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 77.

<sup>19</sup> *Ibid.*

decision in its proper constitutional law context so that its contribution can be clearly understood and further developed in a principled manner.

### ***Kirk's Constitutional rationale***

The key constitutional aspect to *Kirk* is the recognition of the Australian state Supreme Courts' indelible supervisory jurisdiction in respect of jurisdictional error.<sup>20</sup> The joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ based this recognition on two initial premises. First, their Honours asserted that s 73 of the *Commonwealth Constitution*<sup>21</sup> requires the continuing existence of the Supreme Courts from which appeals can proceed to the High Court (subject to exceptions enacted by the Commonwealth Parliament).<sup>22</sup> Second, they argued that a state Parliament lacks the power to 'alter the constitution or character of its Supreme Court' such that it loses the quality of being a 'Supreme Court of a State' as envisaged by Chapter III of the *Constitution*.<sup>23</sup>

To these principles the Court added the critical idea that the 'supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts'.<sup>24</sup> This constitutionalisation of administrative law review at the state level represents a significant development on past authority. The prevailing understanding appears for some time to have been that, although it was not easy in view of niggardly statutory interpretation principles, state parliaments *could* potentially screen jurisdictional error from judicial interference. This was of course the central point in the pre-*Kirk* New South Wales decision of *Mitchforce v Industrial Relations Commission*<sup>25</sup> (discussed below). And in the important High Court decision of *Darling Casino*, Gaudron and Gummow JJ prominently argued, in obiter, that a clear statutory intention could result in a state privative clause 'preclud[ing] review for errors of any kind' except the serious manifest errors identified in the old decision of *Hickman*.<sup>26</sup> However, the majority in *Kirk* clearly pushed passed the narrow *Hickman* supervisory preserve, apparently on the basis that

<sup>20</sup> This finding has been most recently affirmed in *Totani* (2010) 85 ALJR 19, [26] (French CJ), [128] (Gummow J) ('*Totani*').

<sup>21</sup> It provides: 'The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences: (i) of any Justice or Justices exercising the original jurisdiction of the High Court; (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council; (iii) of the Inter-State Commission, but as to questions of law only; and the judgment of the High Court in all such cases shall be final and conclusive....'

<sup>22</sup> *Kirk* (2010) 239 CLR 531, [55], [96]. For earlier authority confirming this point see: *Australian Securities Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [69] (Gleeson CJ, Gaudron and Gummow JJ).

<sup>23</sup> *Kirk* (2010) 239 CLR 531, [55] and [96] quoting *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) ('*Forge*').

<sup>24</sup> *Kirk* (2010) 239 CLR 531, [98].

<sup>25</sup> *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212 ('*Mitchforce*').

<sup>26</sup> (1997) 191 CLR 602, 633-634. (The decision in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 is discussed further below.) For further commentary see: Denise Meyerson, 'State and Federal Privative Clauses: Not So Different After All' (2005) 16 *Public Law Review* 39, 43-44; Michael Sexton and Julia Quilter, 'Privative Clauses and State Constitutions' (2003) 5(4) *Constitutional Law & Policy Review* 69, 73, 74; Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010) 5.

the 'constitutional significance of the supervisory jurisdiction of the State Supreme Courts' requires jurisdictional error review at state level to be given the kind of constitutional protection which previously was assumed to be reserved for the High Court under s 75(v) of the *Constitution*.<sup>27</sup>

The *Kirk* majority based this conclusion on the *Constitution's* express use of the term 'Supreme Court of a State' and the profile of such courts at the time of Federation. The Supreme Courts of the colonies were noted to have inherited the relevant jurisdiction of the Court of Queen's Bench, and the colonial Courts' jurisdiction was said to extend to the power to grant the writ of certiorari even in the face of a privative clause.<sup>28</sup> This, it was apparently thought, remained important to the constitutional notion of a Supreme Court post-federation, and the relevant jurisdiction remained 'the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court'.<sup>29</sup>

This constitutional explanation, based on the history of the state Supreme Court function, has not been wholeheartedly accepted. Several commentators have noted the sparseness of the judicial authority cited to support the asserted centrality of the Supreme Courts' supervisory jurisdiction,<sup>30</sup> some particularly questioning the High Court's heavy reliance on the early decision of *Colonial Bank of Australasia v Willan*.<sup>31</sup> While there is perhaps room for argument as regards some of the alternative readings of *Willan*,<sup>32</sup> the concerns underline the fact that this 1874 decision, given the intervening years and developments, could only offer somewhat fragile support for this vital new legal principle.

Perhaps with some anticipation of these concerns, the majority's protection of the Supreme Courts' supervisory jurisdiction was also supported by a strengthening emphasis upon the role of the Supreme Courts within Chapter III of the *Constitution*. With this new emphasis, labelled by some commentators as 'policy' flavoured,<sup>33</sup> their Honours concluded that consequences flow from the fact that s 73 of the *Constitution* contemplates that the High Court will continue as an avenue of appeal from the state

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<sup>27</sup> *Kirk* (2010) 239 CLR 531, [100].

<sup>28</sup> *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 ('*Willan*'). See *Kirk* (2010) 239 CLR 531, [97].

<sup>29</sup> *Kirk* (2010) 239 CLR 531, [96], [98].

<sup>30</sup> Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92, 99; Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010) 7; Leslie Zines, 'Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of New South Wales & South Australia v Totani*' (CCCS/AACL Seminar, Melbourne Law School, Melbourne, 26 November 2010); George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (Gilbert & Tobin Centre for Public Law 2011 Constitutional Law Conference, Sydney, 18 February 2011) 8.

<sup>31</sup> *Willan* (1874) LR 5 PC 417.

<sup>32</sup> The argument that *Willan* only supports a guarantee of supervisory jurisdiction over *Hickman* type errors perhaps takes the Privy Council's emphasis upon the term 'manifest' too far from the context in which it was used (and of course the notion of 'jurisdictional error' was in those times itself a narrower one). Moreover, whilst it is fair to say that *Willan* does not expressly contradict the since dominant view that the Supreme Courts' review jurisdiction rests entirely upon the interpretation of the interposed privative clause, it similarly does not offer much support to that view. Ultimately it would seem that *Willan* was essentially a case about the reviewability of factual findings which were clearly within the province of the inferior court.

<sup>33</sup> Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92, 100; Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010) 7.

Supreme Courts.<sup>34</sup> Ultimately, while the Commonwealth Parliament could introduce relevant 'exceptions' and 'regulations',<sup>35</sup> it was said that state Parliaments are not able to interfere with this constitutionally referenced appellate channel. Further, the majority felt that the stripping of the Supreme Courts' jurisdiction to issue prerogative writs would create 'islands of power immune from supervision and restraint'.<sup>36</sup> This, it was felt, would compromise the existence of the 'one common law of Australia'<sup>37</sup> as well as the 'constitutional framework for the Australian judicial system'.<sup>38</sup> This view emphasises that the constitutional effect of s 73 is that the High Court sits as the ultimate Australian appellate body across state and federal jurisdictions. And, as asserted by Zines, if 'the supervisory and appellate jurisdiction of state Supreme Courts can be reduced the position of the High Court at the apex of the state's judicial system is also reduced'.<sup>39</sup> In essence, the Court in *Kirk* took the view that without the entrenchment of these judicial review powers of the Supreme Courts, the Australian curial framework would not operate as the *Constitution* envisaged.<sup>40</sup>

### ***The Kable heritage***

The reasoning in *Kirk* resonates with some of the state constitutional law principles developed in the pioneering decision of *Kable v Director of Public Prosecutions*,<sup>41</sup> particularly in relation to the constitutional constraints which flow from the integrated Australian court system.<sup>42</sup> In *Kable*, it was held that state courts played a part in the constitutional structure 'beyond their status and role as part of the State judicial systems'.<sup>43</sup> Even without a clear separation of powers at the state level, as s 77(iii) of the *Constitution* enabled Supreme Courts to act as repositories of federal judicial power,<sup>44</sup> it was found that a conferral by the New South Wales Parliament of functions on its Supreme Court which resulted in loss of public confidence in that Court would thereby taint the operations of Chapter III of the *Constitution*.

<sup>34</sup> *Kirk* (2010) 239 CLR 531, [98].

<sup>35</sup> *Constitution*, s 73 para 1, although cf para 3. The requirement of special leave for an appeal to the High Court provides a good example of such a regulation, see: *Carson v John Fairfax & Sons* (1991) 173 CLR 194, 217.

<sup>36</sup> *Kirk* (2010) 239 CLR 531, [99].

<sup>37</sup> *Ibid*. See also *Breavington v Godleman* (1988) 169 CLR 41, 121 (Deane J); *Lipohar v The Queen* (1999) 200 CLR 485, [45] (Gaudron, Gummow and Hayne JJ); Leslie Zines, 'Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of New South Wales & South Australia v Totani*' (CCCS/AACL Seminar, Melbourne Law School, Melbourne, 26 November 2010) 12.

<sup>38</sup> *Kirk* (2010) 239 CLR 531, [93].

<sup>39</sup> Leslie Zines, 'Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of New South Wales & South Australia v Totani*' (CCCS/AACL Seminar, Melbourne Law School, Melbourne, 26 November 2010) 12, 13.

<sup>40</sup> See also Justice J Gilmour, 'Kirk: Newton's Apple Fell' (2010 Conference of the Samuel Griffith Society, Perth, 29 August 2010) 18.

<sup>41</sup> *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 ('*Kable*'). This link is intimated by French CJ and Kiefel J in the subsequent case of *Wainohu* (2011) 85 ALJR 746, [46]. For an early prediction of this line of reasoning based on *Kable* and s 73 of the *Constitution* see: Dan Meagher, 'The Status of the Kable Principle in Australian Constitutional Law' (2005) *Public Law Review* 182, 186.

<sup>42</sup> See Leslie Zines, 'Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of New South Wales & South Australia v Totani*' (CCCS/AACL Seminar, Melbourne Law School, Melbourne, 26 November 2010) 10.

<sup>43</sup> *Kable* (1996) 189 CLR 51, 114 (McHugh J).

<sup>44</sup> It provides that the Commonwealth 'Parliament may make laws.... (iii) investing any court of a State with federal jurisdiction'.

This constitutional principle has evolved such that, while state courts are not to be equated constitutionally with federal courts, the capacity of such state courts to exercise federal jurisdiction requires that state parliaments cannot confer on these courts functions incompatible with their 'institutional integrity'.<sup>45</sup> However, even with this modification, for over a decade the High Court seemed loathe to reapply *Kable*. In a long line of decisions including *Fardon, Forge v Australian Securities and Investment Commission*,<sup>46</sup> *Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police*<sup>47</sup> and *K-Generation Pty Ltd v Liquor Licensing Court*,<sup>48</sup> the Court determined that the exceptional legislative circumstances of *Kable* were not replicated. The constitutional wind changed however, in 2009, initially in the criminal confiscation case of *International Finance Trust Co Ltd v New South Wales Crime Commission*.<sup>49</sup> Soon after, in *Totani*,<sup>50</sup> the High Court (by 6:1) activated the *Kable* principle in the context of the *Serious and Organised Crime (Control) Act 2008* (SA) because of the substantial incompatibility of s 14 of that Act (which pre-emptively required the Magistrates Court to make 'control orders') with that Court's institutional integrity. Even more recently, organised crime legislation was again invalidated by a similar 6:1 split across the High Court in *Wainohu*. The New South Wales legislation there conferred upon Supreme Court judges (as *personae designatae*) the administrative function of making declarations in relation to certain organisations - but imposed no obligation to give reasons, which the Court felt compromised the institutional integrity of the Supreme Court.<sup>51</sup>

*Kirk* was handed down in the midst of these significant advances. Interestingly, the judgments in *Kirk* did not refer directly to *Kable* and were not, as in *Kable*, focused on the continued effective investiture of federal judicial power in state courts.<sup>52</sup> *Kable* did however feature extensively in argument before the High Court<sup>53</sup> and Heydon J, in responding to counsels' submissions, linked the *Kirk* context directly with *Kable*'s federal jurisdictional emphasis.<sup>54</sup>

<sup>45</sup> See eg, *Baker v The Queen* (2004) 223 CLR 513, 534 (McHugh, Gummow, Hayne and Heydon JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ('*Fardon*'); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 355 [56] (French CJ) ('*International Finance Trust*').

<sup>46</sup> *Forge* (2006) 228 CLR 45.

<sup>47</sup> *Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police* (2008) 234 CLR 532 ('*Gypsy Jokers*').

<sup>48</sup> *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K-Generation*').

<sup>49</sup> *International Finance Trust* (2009) 240 CLR 319.

<sup>50</sup> (2010) 85 ALJR 19.

<sup>51</sup> *Wainohu* (2011) 85 ALJR 746, [69] (French CJ), [109] (Gummow, Hayne, Crennan and Bell JJ).

<sup>52</sup> Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 239 (1 October 2009) (S McLeish SC). Cf the unsuccessful submission put to the New South Wales Court of Appeal in this regard in *Mitchforce* (2003) 57 NSWLR 212.

<sup>53</sup> Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 237 (29 September 2009) (Mr G Hatcher SC); Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 238 (30 September 2009) (Mr Hatcher); Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 239 (1 October 2009) (S Gageler SC); Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 239 (1 October 2009) (S McLeish SC).

<sup>54</sup> Heydon J questioned whether a Supreme Court 'white anted' of its powers of review and sidelined from involvement in most curial activity could remain an appropriate repository for federal judicial power: Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 239 (1 October 2009).

In any case, there is multifaceted symmetry between *Kirk* and *Kable*; a symmetry which to some extent may have been obfuscated, in the interests of unanimity, in bringing together the 6 judge majority in *Kirk*.<sup>55</sup> French CJ and Kiefel J appear to more clearly associate *Kirk* with *Kable* in their separate judgment in the recent *Wainohu* decision.<sup>56</sup> Acknowledging this symmetry makes sense for two reasons. First, *Kirk* clearly draws on ideas which surfaced in the majority judgments in *Kable*.<sup>57</sup> For example, in *Kable* McHugh J emphasised that s 73 of the *Constitution* and the constitutionally enshrined appellate structure prevented Supreme Courts from ceasing to exist at the state 'apex'.<sup>58</sup> While his view has received some criticism,<sup>59</sup> his Honour expressly linked this to the supervisory role of superior state courts in his obiter comments:

a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.<sup>60</sup>

Similarly, Gummow J in *Kable* explained that the reference in s 73 to the states' 'Supreme Court[s]' would prevent the segregation of state courts 'into a distinct and self-contained stratum within the Australian judicature'<sup>61</sup> as, constitutionally, they must remain the uppermost court in 'the judicial hierarchy of the State'.<sup>62</sup>

Recognition of the *Kable* – *Kirk* connection is also encouraged by the fact that in *Kable* Gummow J identified s 73's mention of 'Supreme Court[s]' as a 'constitutional expression'.<sup>63</sup> Detailed analysis of the history of this tactic of using the constitutional text to 'imbu[e]...constitutional provisions with new substantive content'<sup>64</sup> is beyond the scope of this article. However, certainly this approach has proven popular as regards the notion of a 'Supreme Court'. In *Gypsy Jokers* Crennan J indicated that state legislation cannot 'alter the constitution or character of a Supreme Court of a State so as to impair its institutional integrity' and 'preclude that court from answering the constitutional description "Supreme Court of [a] State"'.<sup>65</sup> And in *Forge*, Gummow, Hayne and Crennan JJ noted that *Kable* had affirmed that state Supreme Courts were a constitutional necessity<sup>66</sup> and:

Because Ch III requires that there be a body fitting the description "the Supreme Court of a State", it is beyond the legislative power of a State so to alter the constitution or

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<sup>55</sup> For a discussion of judicial minimalism in the US context see: Cass Sunstein, *One Case at a Time – Judicial Minimalism on the Supreme Court* (1999) 11-14.

<sup>56</sup> *Wainohu* (2011) 85 ALJR 746, [44]-[46].

<sup>57</sup> Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 237 (29 September 2009) (Mr G Hatcher SC) where Mr Hatcher SC argued that the 'principles that emerge from the judgment [in *Kable*]...are wide-ranging'.

<sup>58</sup> *Kable* (1996) 189 CLR 51, 111. See Gummow J agreeing at 139-140.

<sup>59</sup> For example, Michael Sexton and Julia Quilter, 'Privative Clauses and State Constitutions' (2003) 5(4) *Constitutional Law & Policy Review* 69, 74.

<sup>60</sup> *Kable* (1996) 189 CLR 51, 114.

<sup>61</sup> *Ibid* 143.

<sup>62</sup> *Ibid* 141.

<sup>63</sup> *Ibid*.

<sup>64</sup> Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 79.

<sup>65</sup> *Gypsy Jokers* (2008) 234 CLR 532, [161] (Crennan J).

<sup>66</sup> *Forge* (2006) 228 CLR 45, [57].

character of its Supreme Court that it ceases to meet the constitutional description...the relevant principle is one which hinges upon maintenance of the defining characteristics of a “court”, or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court.<sup>67</sup>

The majority in *Kirk* followed this thinking in referring to the need for Supreme Courts to continue in existence and to do so in such a way as to remain true to their constitutionally recognised form.<sup>68</sup> The point was further pursued in *Wainohu* by French CJ and Kiefel J.<sup>69</sup>

There is, at one level, some attraction in the proposition that *Kirk* produces a retroversion of the *Kable* principle - by focusing on what cannot be *taken away* from a Supreme Court by a state parliament as opposed to what functions it cannot be *given*.<sup>70</sup> Yet the distinction is a difficult one to sustain. As a simple initial point, in bestowing upon a court an unconventional curial function, the parliament may (in effect) be removing an aspect of the conventional judicial process in that context.<sup>71</sup> More importantly however, the symmetry in the cases is clear and unavoidable; the consistent focus of *Kable* and subsequent case law has been the maintenance of institutional integrity - the core of what makes an institution a ‘court’. Whether this core is jeopardised by addition or subtraction is somewhat beside the point. The sustained constitutional purpose here is the retention of the essential character of state courts forming part of the Australian court hierarchy, to ensure that they remain able to operate in a manner that is consistent with their constitutional functions.<sup>72</sup> The *Kirk* decision is clearly a direct example of that. It reflects the High Court’s dissatisfaction with the possibility that a ‘Supreme Court’ may be ‘white-anted’,<sup>73</sup> so that it lacks the basic elements required for it to retain the title of, and fulfil the constitutional functions of, ‘Supreme Court of a State’.<sup>74</sup>

Ultimately *Kirk* is best understood, in constitutional law terms, as a graft of the decision handed down in *Kable*, with both ultimately deriving from the integrated court structure held up by Chapter III. *Kirk* builds, self-assuredly, on the notion that state Supreme Courts have a constitutionally defined place in the Australian court hierarchy. The wider implications of this constitutional role for the composition, operation and regulation of such courts is considered briefly in the next section. However, it should be emphasised

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<sup>67</sup> Ibid [63].

<sup>68</sup> *Kirk* (2010) 239 CLR 531, [96].

<sup>69</sup> (2011) 85 ALJR 746, [47]-[47].

<sup>70</sup> See, Chief Justice Marilyn Warren, ‘The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States’ (Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 14-15.

<sup>71</sup> This was borne out in the facts in *Wainohu* where the majority discerned that the *Crime (Criminal Organisations Control) Act 2009* (NSW) ‘support[ed] inscrutable decision-making’ by Supreme Court judges (acting in a personal capacity) in not requiring reasons to be given: (2011) 85 ALJR 746, [109] (Gummow, Hayne, Crennan and Bell JJ). See also at [69] (French CJ, and Kiefel J).

<sup>72</sup> This, of course, does not require them to have the same constitutional characteristics and judicial functions as federal courts: *K-Generation* (2009) 237 CLR 501, [88] (French CJ); Chief Justice Marilyn Warren, ‘The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States’ (Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 14-15.

<sup>73</sup> Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 239 (1 October 2009) (Heydon J).

<sup>74</sup> The High Court has made it clear that it is the substance of the Court more than the name which is important: Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 238 (30 September 2009) (French CJ). See also *Parkin v James* (1905) 2 CLR 315, 330 (Griffith CJ, Barton and O’Connor JJ).

here that the particular contribution of *Kirk* is an enormously important one for broader public law purposes. The constitutional responsibility identified here for the Supreme Court represents what many consider to be a fundamental component of the rule of law.<sup>75</sup> Its theoretical and practical entrenchment in *Kirk* ensures that in the vast expanses of state executive activity and lower court process, powers will be exercised within basic legal boundaries.<sup>76</sup>

### **Future Directions?**

*Kirk* has, in the state Supreme Court context, made a significant contribution to an accumulating list of constitutionally-protected curial attributes. While *Kirk*'s identified attribute is unique to Supreme Courts,<sup>77</sup> it joins a broader list of characteristics which apply to state courts more generally including 'independence, impartiality, fairness and adherence to the open-court principle'.<sup>78</sup> The particular contribution of *Kirk* is the practical shape it gives to what Hayne J classed in the *Kirk* hearings as the 'irreducible minimum of supervision'.<sup>79</sup> This now unequivocally includes the issue of the prerogative writs on the ground of jurisdictional error regardless of the import of a privative clause - replicating the protection accorded to the High Court's own s 75(v) review jurisdiction in the *Constitution*.<sup>80</sup> Incidentally, this development illustrates the constitutional reality (previously acknowledged by Gummow, Hayne and Crennan JJ) that different state courts may have different constitutional personalities,<sup>81</sup> with some of the foundational attributes of superior state courts extending beyond those of the courts below them.

The new protection of the state Supreme Courts' power to intervene in cases of jurisdictional error is unlikely to be easily circumvented. Recent experience suggests that the High Court will closely scrutinise attempts to indirectly 'oust'<sup>82</sup> the supervisory jurisdiction that was underlined in *Kirk*. Attempts might include, for example, the levying of grossly high filing fees for litigants seeking prerogative relief or the imposition of inflexible time limits for the commencement of review proceedings. The latter is

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<sup>75</sup> See eg *Plaintiff S157* (2003) 211 CLR 476, [5] (Gleeson CJ). See also Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 81; Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 345, 366.

<sup>76</sup> See further the pre-*Kirk* analysis in Denise Meyerson, 'State and Federal Privative Clauses: Not So Different After All' (2005) 16 *Public Law Review* 39, where the author relies upon rights-based public law theories in arguing for a guaranteed state supervisory jurisdiction. See also Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, 2 September 2004, Brisbane) 9. Cf the comments in Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and The Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 14, 37ff.

<sup>77</sup> Note also that in *Wainohu*, French CJ and Kiefel J indicate that the giving of reasons, at least for 'final' or 'important interlocutory decisions', is also a constitutionalised aspect of state Supreme Court operation: *Wainohu* (2011) 85 ALJR 746, [44], [57].

<sup>78</sup> *Totani* (2010) 85 ALJR 19, [62] (French CJ); See also, *K-Generation* (2009) 237 CLR 501, [255]-[256] (Kirby J); *Gypsy Jokers* (2008) 234 CLR 532, [10] (Gummow, Hayne, Heydon and Kiefel JJ); *Fardon* (2004) 223 CLR 575, [41]-[42] (McHugh J); *North Australian Aboriginal Legal Service Inc v Bradley* (2004) 218 CLR 146, [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Bradley*'); *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181, [25] (Kirby J); *Totani* (2010) 85 ALJR 19, [443] (Kiefel J); *Hinch* (2011) 85 ALJR 398.

<sup>79</sup> Transcript of Proceedings, *Kirk & Anor v Industrial Relations Commission of NSW & Anor* [2009] HCATrans 239 (1 October 2009).

<sup>80</sup> Section 75(v) vests original jurisdiction in the High Court in all cases 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.

<sup>81</sup> *Forge* (2006) 228 CLR 45, [82]-[85] (Gummow, Hayne and Crennan JJ).

<sup>82</sup> *Plaintiff S157* (2003) 211 CLR 476, [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

potentially very important given the prominence of carefully prescribed time constraints in certain fields of state law. However, there seems to be little scope for attempted circumvention of the *Kirk* decision in this manner<sup>83</sup> – particularly because of the apparent ready transferability of the High Court reasoning in *Bodruddaza v Minister for Immigration and Multicultural Affairs*.<sup>84</sup> In that case, the High Court found that restrictions on the High Court's own s 75(v) review process, such as time limits, would only be constitutional where they did not (whether directly or in practical effect) 'so curtail or limit the right or ability of applicants to seek relief under s 75(v) as to be inconsistent with the place of the provision in the constitutional structure'.<sup>85</sup> This conclusion drew heavily on the Court's decision in *Plaintiff S157*<sup>86</sup> and resulted, in *Bodruddaza*, in the striking down of a provision which sought to limit the time in which a migration litigant could seek a remedy in the High Court. As has been emphasised by Chief Justice Spigelman, it seems that time bar provisions in state legislation could not validly compromise the Supreme Court supervisory jurisdiction given constitutional protection by *Kirk*.<sup>87</sup> The detail of the reasoning in *Bodruddaza* indicates that federal time limits would only be likely to avoid 'constitutional difficulties' if they took account of 'supervening events',<sup>88</sup> and situations such as where a party only learns that a decision was corrupt once the review period has expired.<sup>89</sup> It is very likely that the state Supreme Courts' newly protected jurisdiction will be approached in a similar manner.

While the constitutional protection of the Supreme Court's supervisory role is now clear,<sup>90</sup> the pivotal notion of 'jurisdictional error' itself is of course notoriously elusive – with resulting unpredictability in the specific practical content of the Supreme Courts' protected jurisdiction. *Kirk*'s somewhat neglected, unsteady contribution to the development of the notion of jurisdictional error is examined further below, in the course of a broader attempt to re-conceptualise some of the difficulty attending the notion and offer a pathway forward. Administrative law has much work to do here, and the task has clearly grown in importance.

## Where to now for Administrative Law?

### *The hapless 'Privative Clause'*

The most immediate practical impact of the *Kirk* decision on Australian public law comes from the fact that it authoritatively re-marks the boundaries of the protection afforded by state privative clauses. The joint judges emphasised that their conclusions did not spell invalidity for all state privative clauses,<sup>91</sup> however, clearly these are now necessarily of limited effect as they will be read down (or invalidated) in the face of identified jurisdictional error. To a degree this simply reinforces traditional interpretive techniques

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<sup>83</sup> See eg the discussion in Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 89-90.

<sup>84</sup> *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 ('*Bodruddaza*').

<sup>85</sup> Ibid [53] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>86</sup> (2003) 211 CLR 476.

<sup>87</sup> Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 89.

<sup>88</sup> *Bodruddaza* (2007) 228 CLR 651, [59], [57] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>89</sup> This example was given by Gleeson CJ in *Plaintiff S157* (2003) 211 CLR 476, [39].

<sup>90</sup> This was recently re-affirmed in *Totani* (2010) 85 ALJR 19, [26] (French CJ), [128] (Gummow J).

<sup>91</sup> *Kirk* (2010) 239 CLR 531, [100].

long employed across jurisdictions, whereby restrictive readings<sup>92</sup> (eg of privative clauses that only protect 'decisions') often narrowed the protective reach of such clauses to non-jurisdictional error. However, as noted above, *Kirk* is a seemingly terminal blow to the assumption in Australia that state parliaments could, if they really tried, craft a privative clause that evades the traditional textual confinement.<sup>93</sup> *Totani* confirmed<sup>94</sup> that bolder contemporary drafting techniques, such as the extension of privative clauses to 'purported decisions',<sup>95</sup> now suffer the same difficulties in the state Supreme Court context as they do in the context of original High Court review.<sup>96</sup>

The *Kirk* decision similarly brought to the state level in Australia the continued erosion of the old *Hickman* approach to privative clause interpretation. The traditional *Hickman* notion was essentially that privative clause protection could be effective provided that certain manifest errors were avoided.<sup>97</sup> A bolder reading (that such protection *would* be effective in those circumstances) had gradually become popular in government circles.<sup>98</sup> Yet this version was dealt a firm blow when the High Court in 2003 (in *Plaintiff S157*) made it clear again, just on first principles, that *Hickman* was only a construction aid for use in reconciling the specific internal contradiction arising where a statute mixed ouster of judicial review with a conferral of limited powers.<sup>99</sup> The High Court shifted the focus in this reconciliation exercise to the identification of 'inviolable' or 'essential' conditions (also implicit in *Hickman*<sup>100</sup> and further developed soon after<sup>101</sup>), but did not completely dismiss the relevance of *Hickman*'s manifest error formula.<sup>102</sup> Of course in *S157* itself, weighing heavily in the whole process was the constitutional immutability of the High Court's s 75(v) jurisdiction and the terminological infirmity of a privative clause declaring protection only for a 'decision...under this Act'.<sup>103</sup>

Following *Plaintiff S157* an aggregated approach emerged in difficult cases at the state level in Australia, obviously in the absence at that point of overriding constitutional

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<sup>92</sup> For a valuable brief history, see Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009), 1040ff. For arguments mapping the potential step up from traditional interpretative presumptions to acknowledgement of 'fundamental' and immutable rights, see Denise Meyerson, 'State and Federal Privative Clauses: Not So Different After All' (2005) 16 *Public Law Review* 39, 47.

<sup>93</sup> See eg the prominent decision in *Mitchforce* (2003) 57 NSWLR 212 (discussed below); cf also *Woolworths Ltd v Hawke* (1998) 45 NSWLR 13.

<sup>94</sup> *Totani* (2010) 85 ALJR 19, esp French CJ at [26]ff. Cf *Wainohu* (2011) 85 ALJR 746, eg [15] (French CJ and Kiefel J).

<sup>95</sup> For discussion of some of the history of the 'purported decision' privative clause, see eg Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 82. See further Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 345, 363ff.

<sup>96</sup> See *Plaintiff S157* (2003) 211 CLR 476; and particularly *Bodruddaza* (2007) 228 CLR 651.

<sup>97</sup> *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 615 ('*Hickman*') and the reference there to the basic requirements of bona fides, relation to the subject matter of the legislation, and reasonable referability to the power conferred.

<sup>98</sup> Cf Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 8.

<sup>99</sup> See *Plaintiff S157* (2003) 211 CLR 476, [60]ff per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; cf *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [29]-[30], [40]ff.

<sup>100</sup> *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 616 (Dixon J).

<sup>101</sup> *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *R v Metal Trades Employees' Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208.

<sup>102</sup> *Plaintiff S157* (2003) 211 CLR 476, [20], [91].

<sup>103</sup> *Ibid* [19], [71]ff.

considerations.<sup>104</sup> For privative clause protection to be effective, satisfaction of the *Hickman* provisos (ie the avoidance of the listed 'manifest errors') was required but not sufficient. A second step was needed (to the extent that it was distinct<sup>105</sup>), which involved a search for breach of inviolable (or 'indispensable'/'essential') conditions or limitations. In the pre-*Kirk* NSW Court of Appeal decision in *Mitchforce*,<sup>106</sup> for example, Spigelman CJ confirmed the applicability of a privative clause<sup>107</sup> to a serious error of the Industrial Relations Commission - on the basis that the error was not in breach of the *Hickman* provisos or any inviolable limit on power.<sup>108</sup> Interestingly, inviolability here was defined via a 'reconciliation' that made particular reference to the strength of the privative clause's extension to 'purported decisions'. This point is explored further below.

*Mitchforce* has been rendered somewhat redundant by the High Court's pronouncement on the state position in *Kirk*, in which the constitutional considerations came through more dominantly than in *Plaintiff S157*. *Hickman* was mentioned only incidentally in the joint judgment in *Kirk*; simply on the point that the law regarding privative clauses must begin from the proposition that they present a contradiction to be resolved.<sup>109</sup> However, their Honours then quickly declared that the matter was 'not just a conundrum of contrariety' with respect to the terms of one statute, and moved on to their 'fundamental constitutional considerations' that were examined above.<sup>110</sup> What room is left for *Hickman* and its focus on a narrow category of 'manifest error'? Early indications, post-*Kirk*, are that *Hickman* is now considered of little relevance at state level as the effectiveness of a privative clause turns essentially upon the existence (or not) of jurisdictional error.<sup>111</sup> This is supported by recent (and admittedly conventional) academic comment that the *Hickman* formula is just an indicator of more severe forms of jurisdictional error<sup>112</sup> - marking out a 'core content' of that notion that has long been subject to a strong presumption of reviewability<sup>113</sup> but whose significance is now lost with the full range of jurisdictional error remaining reviewable.

*Hickman* may conceivably retain a background presence via the slim academic possibility<sup>114</sup> that some error might yet prove to be not 'jurisdictional' (on more flexible

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<sup>104</sup> Cf in the federal context the pre-*Plaintiff S157* migration decision in *NAAV* (2002) 123 FCR 298.

<sup>105</sup> See eg the discussion in Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 9; Michael Sexton and Julia Quilter, 'Privative Clauses and State Constitutions' (2003) 5(4) *Constitutional Law & Policy Review* 69, 72.

<sup>106</sup> *Mitchforce* (2003) 57 NSWLR 212.

<sup>107</sup> This was in fact an earlier incarnation of the privative clause examined in *Kirk* (s 179 of the *Industrial Relations Act 1996* (NSW)).

<sup>108</sup> (2003) 57 NSWLR 212, [92]ff.

<sup>109</sup> *Kirk* (2010) 239 CLR 531, [94].

<sup>110</sup> *Ibid.*

<sup>111</sup> See particularly *Director General NSW Dept of Health v IRC (NSW)* [2010] NSWCA 47.

<sup>112</sup> See eg Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92, 103. Cf Chief Justice Marilyn Warren, 'The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States' (Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 15.

<sup>113</sup> See Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 82; Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 8.

<sup>114</sup> Cf the comments in Chief Justice Marilyn Warren, 'The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States' (Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 15.

understandings of the term – see below) but still fall foul of the pre-set ‘manifest error’ formula. Of greater practical significance is the fact that in this whole equation the precise position of the Federal Court, with its lesser constitutional connection, has been underexplored to date. Logic and existing discussion indicates are that there may be little joy to be had in attempting to extrapolate from *S157* and *Kirk* some reinforcement of Federal Court supervisory jurisdiction.<sup>115</sup> If the constitutional guarantee of judicial review cannot be somehow extended to the Federal Court, one implication is of course that this context could provide a final refuge for the *Hickman* methodology. The Federal Court position, and the fact that cross-court consistency may in fact be within reach, is discussed further below.

Not surprisingly in the wake of *Kirk*, some commentators have reminded us that there may in fact be good policy reasons for insulating certain decisions from review (eg the acute importance in some contexts of specialist expertise and/or finality).<sup>116</sup> And there has been some discussion of how exactly state parliaments might still successfully impede review of jurisdictional type errors.<sup>117</sup> The latter discussion is largely beyond the scope of this article, however it might be noted that thus far there is little basis for optimism amongst interested parliamentary drafters.

### ***The High Court on jurisdictional error: circularity, compromise or stalled clarification?***

Broadly speaking then, from an Australian administrative law perspective there is an appealing simplicity in the essential reasoning of *Kirk*<sup>118</sup> - chiefly in the fact that it removes a layer of administrative law complexity at state level. The question ‘what can privative clauses protect?’ has in broad terms become a much simpler one. Yet substantial questions are left behind. *Kirk* turns us back to the perennial administrative law difficulty: what is ‘jurisdictional error’? Indeed the progressive constitutionalisation of the courts’ supervisory jurisdiction over jurisdictional error, most particularly through the

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<sup>115</sup> See eg *Abebe v Commonwealth* (1999) 197 CLR 510, [14], [21], [58] (Gleeson CJ and McHugh J), [231]ff (Kirby J), [273] (Callinan J); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 281 (Gibbs CJ); *SZAJB v Minister for Immigration and Citizenship* (2008) 168 FCR 410, [32]-[36] (French J), [114] (Tracey J); *Fisher v Minister for Immigration and Citizenship* (2007) 162 FCR 299, [39] (Stone J); *SZJYV v Minister for Immigration and Citizenship* [2007] FCA 731 (16 May 2007) [5] (Downes J); *NAAV* (2002) 123 FCR 298, [504] (French J). See also Linda Kirk, ‘Privative Clauses and the Federal Parliament’ (Gilbert & Tobin Centre Constitutional Law Conference, Sydney, 21 February 2003) 14; Linda Kirk, ‘Chapter III and Legislative Interference with the Judicial Process: *Abebe v Commonwealth* and *Nicholas v The Queen*’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads – Essays in Constitutional Law* (2000) 119, 131; Chief Justice Spigelman, ‘The Centrality of Jurisdictional Error’ (Keynote Address AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010) 40.

<sup>116</sup> See particularly Nick Gouliaditis, ‘Privative Clauses: Epic Fail’ (Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010); Cf Mark Aronson, ‘Commentary on “The Entrenched Minimum Provision of Judicial Review and the Rule of Law” by Leighton McDonald’ (2010) 21 *Public Law Review* 35 (note particularly his emphasis on the relevance of the existence (or not) of other legal accountability mechanisms – and of the result in *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146).

<sup>117</sup> See eg Nick Gouliaditis, ‘Privative Clauses: Epic Fail’ (Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010); Chris Finn, ‘Constitutionalising Supervisory Review at State Level: The End of Hickman?’ (2010) 21 *Public Law Review* 92; Chief Justice Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77; Mark Aronson, ‘Commentary on “The Entrenched Minimum Provision of Judicial Review and the Rule of Law” by Leighton McDonald’ (2010) 21 *Public Law Review* 14.

<sup>118</sup> *Kirk* (2010) 239 CLR 531.

decisions in *Plaintiff S157* and *Kirk*, has placed increasing weight upon this long-troubled and awkwardly expanding concept.<sup>119</sup>

As a suitable starting point, clearly the distinction between jurisdictional and non-jurisdictional error is alive and well in Australia.<sup>120</sup> The distinction now has constitutional significance in both the state and federal spheres. Beyond this the path ahead is not much clearer post-*Kirk*, but as will be seen it is now once again an interesting one.

At a simple level *Kirk* was a state level replication of the federally-focused decision in *Plaintiff S157* – largely mirroring that decision as regards the constitutional confinement of privative clauses. However, there is a deeper synergy between the cases for present purposes, as regards the conceptual difficulties attending the notion of ‘jurisdictional error’. In the years between these cases the Australian High Court stepped over much of the difficulty, as the matters coming to it stayed close to well-worn precedent on basic procedural error, ‘jurisdictional facts’ and natural justice.<sup>121</sup> Yet *Kirk* required more deliberate attention to the concept of jurisdictional error,<sup>122</sup> and the tip of an interesting core problem resurfaced.

Two errors were identified in the Industrial Court proceedings below, in respect of the particularisation of the charges<sup>123</sup> and the prosecution’s calling of the defendant as a witness.<sup>124</sup> The Court then embarked upon a discussion of the often-neglected history of jurisdictional error, with something approaching a rare ‘frank admission’<sup>125</sup> of its context-

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<sup>119</sup> For detailed discussion of the history of ‘jurisdictional error’ in Australia (including its disappearance for a time), with particular reference to the influence of migration developments, see Stephen Gageler SC, ‘Impact of Migration Law on the Development of Australian Administrative Law’ (2010) 17 *Australian Journal of Administrative Law* 92, 95ff and 101. For valuable general accounts see also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 11ff; Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009) 1063ff; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190, [28]ff (Spigelman CJ). As to the scale and awkwardness of the expansion of jurisdictional error, see also Benjamin O’Donnell, ‘Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution’ (2007) 28 *Australian Bar Review* 291, 311ff; Caron Beaton-Wells, ‘Judicial Review of Migration Decisions: Life after *S157*’ (2005) 33 *Federal Law Review* 141, 144ff.

<sup>120</sup> Contrast developments in other important common law nations: see recently the discussion in Chief Justice Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77, 83; cf M Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 *Federal Law Review* 1.

<sup>121</sup> See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Applicants S134/2002* (2003) 211 CLR 441; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S154/2002* (2003) 77 ALJR 1909; *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *NAIS v Minister for Immigration and Indigenous Affairs* (2005) 228 CLR 470; *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627; *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489; and cf more recently *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

<sup>122</sup> A similarly opportunity presented itself in *Bodruddaza* (2007) 228 CLR 651, however the categorization of the alleged error proved unnecessary: [70] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

<sup>123</sup> It was concluded that the acts or omissions said to give rise to the contravention of the *Occupational Health and Safety Act 1983* (NSW) (ie the particular measure/s not taken) had to be identified in the statement of any offence charged. See *Kirk* (2010) 239 CLR 531, [12]ff.

<sup>124</sup> It was concluded that the prosecution’s calling of Mr Kirk as a witness (which was agreed to by both sides) was a substantial departure from evidentiary restrictions that could not be waived: *Ibid* [50]ff.

<sup>125</sup> Chris Finn, ‘Constitutionalising Supervisory Review at State Level: The End of Hickman?’ (2010) 21 *Public Law Review* 92, 94. Cf Leslie Zines, ‘Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of New South Wales & South Australia v Totani*’ (CCCS/AACL Seminar, Melbourne Law School, Melbourne, 26 November 2010).

specific, conclusory and essentially functionalistic nature.<sup>126</sup> Their Honours expressly declined to 'mark the metes and bounds' of the concept in this case, and whilst they recited the traditional *Craig v South Australia*<sup>127</sup> formulas for the identification of jurisdictional error in the inferior court context, they emphasised that the boundary line was a fine one and that *Craig* should not be read as providing a rigid taxonomy. The examples given in *Craig*, it was stressed, were just examples.<sup>128</sup> However, having acknowledged the uncertain nature of jurisdictional error and the non-rigid, purely illustrative role of the *Craig* classifications, in ultimately classifying the errors before them as jurisdictional errors<sup>129</sup> their Honours readily employed *Craig* categories without deeper analysis. The first error was seen to be one about the limits of the lower Court's functions or powers (which in fact led it to make orders it had no power to make); and the second also reflected misapprehension of a limit on powers.<sup>130</sup>

This all invites closer attention. The more technically-fraught decision of *Plaintiff S157* provides a point of access to a quiet and unresolved methodological division on the notion of jurisdictional error in Australia that may help to explain *Kirk's* awkward marriage of predictive formulas and admitted uncertainty, and indeed ultimately provide some shape to the space left open by *Kirk's* professed retreat from overly formulaic conceptualisations of jurisdictional error.

In broad terms, the Court in *Plaintiff S157* was appropriately concerned with several core matters: the textual interpretation of the privative clause in issue; the 'reconciliation' of any resulting internal contradiction in the statute by reference to *Hickman* and notions of the 'inviolable'<sup>131</sup> or 'essential';<sup>132</sup> and the identification of a jurisdictional error. Importantly however, and reflective of underlying difficulty, in places the various inquiries are conflated to some extent,<sup>133</sup> such that the decision as a whole has an air of circularity. To oversimplify the point, in such a case is an error not protected by a privative clause because it is 'jurisdictional', or is an error 'jurisdictional' because it is not protected by the reconciled privative clause?<sup>134</sup> To re-conceptualise and broaden the

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<sup>126</sup> *Kirk* (2010) 239 CLR 531, [60]ff. Cf the comments in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165, [121] (Kirby J).

<sup>127</sup> *Craig* (1995) 184 CLR 163.

<sup>128</sup> *Kirk* (2010) 239 CLR 531, [71]-[73]. Cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, [82] (McHugh, Gummow and Hayne JJ) ('*Yusuf*').

<sup>129</sup> *Kirk* (2010) 239 CLR 531, [71]ff. Contrast the conclusions in the Court of Appeal below: *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

<sup>130</sup> *Kirk* (2010) 239 CLR 531, [74]-[77]. The joint majority also noted, somewhat incidentally, that the errors appeared in the reasons for decision, and hence 'on the face of the record' as that expression must be understood in the light of ss 69(3) and (4) of the *Supreme Court Act 1970* (NSW). Most importantly in this last respect, the Court's obiter comments here indicate that it is poised to critically revisit *Craig's* restrictive interpretation of 'the record' (absent such statutory modification), and the appropriateness of its consequential constraint upon the general availability of certiorari for non-jurisdictional error.

<sup>131</sup> *Plaintiff S157* (2003) 211 CLR 476, [20]ff (Gleeson CJ).

<sup>132</sup> (2003) 211 CLR 476, [69] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>133</sup> See esp *Ibid* [76]-[78]. Upon reading down the privative clause to exclude jurisdictional error (by reference to old textual confinement principles and constitutional considerations), their Honours indicated that it may then be necessary to proceed to the 'reconciliation' process to determine whether a particular failure is or is not a jurisdictional error. See also the clear inclusion of the privative clause itself in the reconciliation and assessment process at [69]. Cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Applicants S134/2002* (2003) 211 CLR 441, [72] (Gaudron and Kirby JJ).

<sup>134</sup> For a suggestion that there may be scope within the terms of *Plaintiff S157* for a re-subdivision of jurisdictional errors (serious v less-serious) in the context of privative clause interpretation, see Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 10-11.

problem, is the notion of jurisdictional error to some extent externally-defined and dropped into a court's reasoning at the appropriate point, or does it emerge internally from the court's interpretation of the specific legislative intention on what is essential to a particular decision? If it is to be some combination of both, does the latter really leave much room for the former? Whether by reason of the particular natural justice context or its deliberate 'fuzziness',<sup>135</sup> *Plaintiff S157* did not clearly admit nor rationalise the alternation. Conceivably we could try to explain and sustain an awkward compromise, however there is now a pressing need for coherency in Australia in view of the expanding constitutional law dimension. And given the growing acknowledgment of the utilitarian history of jurisdictional error and its lack of a clear independent meaning, perhaps the time is right to further explore what the internally-focused alternative, generalised and formalised, might look like.

Read to its full potential, *Plaintiff S157* could have prompted a general drift to a more statute-specific approach to jurisdictional error (one to which the presence of a privative clause would logically be relevant). Such a reading finds support in Gleeson CJ's discussions in the case and apparent concern to confirm that a breach of natural justice, although generally assumed to be a jurisdictional error, was indeed a breach of an 'inviolable' condition in the specific (whole) statutory context.<sup>136</sup> The other possible reading, a narrower one rationalising the compromise referred to above, is that the more statute-specific approach applies only to the classification of particular less-easily categorised instances of serious error, or to the classification of breaches of express prescriptions.<sup>137</sup> This narrower reading perhaps finds support in the joint majority's quick externally-referenced categorisation of the natural justice error as 'jurisdictional' without any clear attention to specific legislative purpose.<sup>138</sup>

The difference in the alternative approaches is easily blurred<sup>139</sup> - by the inevitably complex contexts for such classifications, by the general preference for an instinctive rather than organised approach, and indeed by the obvious fact that the critical source of external assistance, the *Craig* categories, themselves lead attention to legislative terms and sometimes (if discerningly handled) to the critical matter of legislative intention on the significance of particular error. Yet the important point of principle here, the neglect of which breeds ongoing uncertainty, is occasionally brought into sharp relief in the lower Australian courts. In 2009, Hodgson JA of the New South Wales Court of Appeal commented:<sup>140</sup>

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<sup>135</sup> Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 14, 38.

<sup>136</sup> (2003) 211 CLR 476, 31ff (note the express inclusion of the privative clause in the 'reconciliation'. Cf also Callinan J at [159]. Cf the potentially broad comments (albeit in the uncontentious context of simple procedural defect – see below) in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, [72] (McHugh J). See also the breadth of the comments in *NAIS v Minister for Immigration and Indigenous Affairs* (2005) 228 CLR 470, [71]ff (Kirby J), and *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165, [123] (Kirby J).

<sup>137</sup> Cf the comments in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Applicants S134/2002* (2003) 211 CLR 441, [72] (Gaudron and Kirby JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [49]-[50] per Gummow and Hayne JJ, [92] (Kirby J).

<sup>138</sup> (2003) 211 CLR 476, [83]. Cf *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [92] (Kirby J).

<sup>139</sup> See eg *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [49]-[50] (Gummow and Hayne JJ).

<sup>140</sup> *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 352, [37]ff (Hodgson JA).

Basten JA relied on *Craig v South Australia* ...for the proposition that ... for an administrative decision-maker to approach the exercise of a statutory function on a legally erroneous basis is to commit a reviewable error. I have already given my understanding of the effect of *Craig* (as explained in *Yusuf*), which is that it indicates what may be jurisdictional errors, but does not avoid the need to consider particular statutory regimes, including any privative clause, in order to decide what would amount to jurisdictional errors in particular cases.

Irrespective of whether Basten JA's approach is correctly summarised here, the theoretical division is clear. So conceptualised, how have the alternative approaches fared? The role of the specific statutory 'reconciliation' in the interpretation of a privative clause is of course reasonably well established,<sup>141</sup> as is the broad importance of legislative intention to the notion of jurisdictional error. The extrapolated notion that specific statutory intention necessarily informs the identification of jurisdictional error, often with the logical correlative that a privative clause has a role via 'reconciliation', has been pursued sporadically in specific commentary and arguments put to courts.<sup>142</sup> However, this approach has struggled since *Plaintiff S157* – particularly with respect to the role of the privative clause. It appeared to suffer at the hands of general assumptions that such an approach would unduly narrow the concept of jurisdictional error. These concerns were no doubt in part fueled by early cavalier calls on such logic to try to save traditional 'narrow' jurisdictional errors (prompting one suggestion that reconciliation was sometimes 'impossible' rather than just unable to save the government decision).<sup>143</sup> And this nervousness was no doubt exacerbated by the powerful operation given to privative clauses in certain prominent lower court statutory reconciliations.<sup>144</sup> Moreover, the High Court clearly flagged its wish to avoid a return to the (different but related) generic argument that a privative clause and satisfaction of *Hickman* necessarily 'extended' the decision-making powers in question by reference to some minimum requirement of bona fides.<sup>145</sup> After some further misfiring of the full reconciliation argument,<sup>146</sup> of course ultimately the constitutional dimension reached the all-important state level. And the constitutional confinement of privative clauses in this

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<sup>141</sup> See particularly the discussions on point in *Plaintiff S157/2002* (2003) 211 CLR 476; cf also, for example, *Batterham v QSR* (2006) 225 CLR 237, [25] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ); *Darling Casino Limited v New South Wales Casino Control Authority* (1997) 191 CLR 602 (Gaudron and Gummow JJ). For further discussion (and critique), see eg Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 9; Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 14, 37.

<sup>142</sup> See prominent examples in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Applicants S134/2002* (2003) 211 CLR 441, [77] (Gaudron and Kirby JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [91] (Kirby J); cf *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, [41] (McHugh J).

<sup>143</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Applicants S134/2002* (2003) 211 CLR 441, [77]ff (Gaudron and Kirby JJ); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992.

<sup>144</sup> See particularly *NAAV* (2002) 123 FCR 298; *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212.

<sup>145</sup> See *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [29]-[30], [48]ff (Gummow and Hayne JJ); and see also the exchanges between counsel and court in that case and in the unsuccessful special leave applications for *Minister for Immigration and Multicultural and Indigenous Affairs v Scargill* and *Minister for Immigration and Multicultural and Indigenous Affairs v Lobo* (High Court of Australia, Gummow J, 13 February 2004) – extracted in Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life after *S157*' (2005) 33 *Federal Law Review* 141, 158.

<sup>146</sup> Importantly, a half attempt to re-apply the full logic of reconciliation faltered in the 2007 case of *Bodruddaza*: the boldly worded time limit ouster there was necessarily weakened by its person-specific operation: *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, [28]-[29] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

context appears to have brought with it a quicker disregard<sup>147</sup> of the potential role of such clauses in interpretative reconciliation (as discussed below).

All the while, in the background to these problems with an internally-focused approach, there remained the more accessible pre-mixed definitions of jurisdictional error from *Craig* (which had gained particular prominence via the migration decision of *Minister for Immigration and Multicultural Affairs v Yusuf*<sup>148</sup>). Not surprisingly then, in operational terms, the concerted intention-focused approach to jurisdictional error has not been too keenly explored,<sup>149</sup> and indeed aspects of it have been expressly abandoned or criticised in recent commentary.<sup>150</sup>

### ***The internal 'essentiality' approach assessed and applied***

What can be said at a more theoretical level? Notions of essentiality, 'inviolability' and 'imperative' duties – obviously all built on a view of specific legislative intention – have long featured in assessments of the seriousness and consequences of errors in Australia.<sup>151</sup> And these ideas have periodically been readily attached to the notion of jurisdictional error (in identifying at least a species of jurisdictional error).<sup>152</sup> It is clear that currently this conceptualisation of jurisdictional error is often bypassed (eg for natural justice), or overlain by the generic *Craig*<sup>153</sup> formulas. However, in considering the continued worth of this split methodology it is important to remember the courts *have* remained securely and effectively focused on specific legislative intention for some important classes of relevant error: for example in the identification of jurisdictional facts<sup>154</sup> or the search for an invalidating procedural error.<sup>155</sup> Particularly in the latter context, High Court judges have willingly embraced notions of statutory essentiality and equated that with 'jurisdiction'.<sup>156</sup> In one prominent decision, a no-invalidity clause (the

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<sup>147</sup> See eg *Totani* (2010) 85 ALJR 19, [26]ff (French CJ); and most recently *Wainohu* (2011) 85 ALJR 746, eg [15] (French CJ and Kiefel J).

<sup>148</sup> *Yusuf* (2001) 206 CLR 323, esp [82] (McHugh, Gummow and Hayne JJ).

<sup>149</sup> See generally the analysis of the Federal Court patterns in Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life after *S157*' (2005) 33 *Federal Law Review* 141, esp 143ff.

<sup>150</sup> See eg Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14, 17; Chris Finn, 'Constitutionalising Supervisory Review At State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92, 104ff. Cf Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life after *S157*' (2005) 33 *Federal Law Review* 141 (but note the comments at 173).

<sup>151</sup> See the emphasis for example in *R v Metal Trades Employees' Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208, 248 (Dixon J); *R v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415, 419 (Mason ACJ and Brennan J); *Darling Casino Limited v New South Wales Casino Control Authority* (1997) 191 CLR 602 (Gaudron and Gummow JJ).

<sup>152</sup> See eg *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, [72] (McHugh J); cf *NAIS v Minister for Immigration and Indigenous Affairs* (2005) 228 CLR 470, [71]ff (Kirby J). And of course see *Plaintiff S157* (2003) 211 CLR 476, [76]-[78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>153</sup> *Craig* (1995) 184 CLR 163.

<sup>154</sup> See eg *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992.

<sup>155</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627; cf *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489.

<sup>156</sup> *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 esp McHugh J (and see also Gummow J, Kirby J and Hayne J – Kirby J acknowledging the uncertainty leapt by such a connection: [173]). Cf also the comments in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212 (esp McHugh J). For a recent example of ready adoption of the language of 'jurisdictional error' in the context of a *Project Blue Sky* procedural failure analysis; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190, [39]ff. For a detailed examination and development of the connections here, with a focus on the meaning of notions of 'invalidity', see Benjamin O'Donnell,

first cousin of the traditional privative clause) featured strongly in the statutory essentiality assessment.<sup>157</sup>

The dilemma is whether jurisdictional facts and procedural failures (which generally arise from express prescriptions) should mark the limits of the clear statute-specific focus, or whether this is a methodology that should extend across express and implied prescriptions<sup>158</sup> and be acknowledged as one that inheres in, clarifies, and can extend or expel the *Craig* categories. Certainly a clear and meaningful distinction between express and implied requirements would seem to have long ago dissolved in Australian administrative law,<sup>159</sup> and the High Court has clearly acknowledged the possible existence of 'implied' jurisdictional limits in an Act.<sup>160</sup> And while it is ambitious to anticipate that a single methodology can be forged from the erratic history of jurisdictional error, at a conceptual level it is difficult to justify departures from a close focus on legislative purpose based simply on dissolving administrative law distinctions, precedents from different contexts and earlier awkward judicial attempts at predictive formulas.

Accordingly, there is some appeal in the idea that the Australian notion of jurisdictional error emerged from *Plaintiff S157* somewhat modernized. However, as noted above, sustained serious examination of this possibility has been stifled. The default thinking therefore continues - that the concept of 'jurisdictional error' is often an externally shaped one that is dropped in 'dutifully'<sup>161</sup> at the appropriate point, principally by reference to judicial instinct and the *Craig* formulas<sup>162</sup> (or under-explored assumptions about natural justice<sup>163</sup>). And the overall position therefore appears to be that the law of jurisdictional error in Australia has proceeded with one foot on each of two rafts – one built of judicial attempts at generic formulas and the other built of specific legislative intentions.<sup>164</sup> For obvious reasons this unrationalised combination makes for difficult travel.

In practical terms, it seems that a deliberate and more generally-applied focus on specific legislative intention might be a more coherent, transparent and workable organising principle than anything to be found in the opaque and very contestable

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'Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution' (2007) 28 *Australian Bar Review* 291.

<sup>157</sup> *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146, [23] (Gummow, Hayne, Heydon and Crennan JJ). Cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Palme* (2003) 216 CLR 212 (esp McHugh J).

<sup>158</sup> Cf in this regard the comments in Stephen Gageler SC, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 104-105; and Benjamin O'Donnell, 'Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution' (2007) 28 *Australian Bar Review* 291, 322ff.

<sup>159</sup> Consider for example the developments in the context of relevant and irrelevant considerations, exemplified in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

<sup>160</sup> Eg *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, [113] (Crennan and Bell JJ).

<sup>161</sup> Chief Justice Marilyn Warren, 'The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States' (Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 17.

<sup>162</sup> Cf recently in the High Court *Visscher v Giudice* (2009) 239 CLR 361, [81]; *Plaintiff M13/2011 v Minister for Immigration & Citizenship* (2011) 85 ALJR 740, [22].

<sup>163</sup> See particularly *Aala* (2000) 204 CLR 82, [40]ff, [59] (Gaudron and Gummow JJ), [142] (Kirby J), [169] (Hayne J); and see also *Plaintiff S157* (2003) 211 CLR 476, [25] (Gleeson CJ), [83] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>164</sup> Cf *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 352, [7]ff (Hodgson JA).

categories of jurisdictional error laid down in *Craig*<sup>165</sup> – which Professor Aronson has noted were ‘carefully crafted to say very little indeed’.<sup>166</sup> This broader methodology provides a truer rationalisation of the assessment of ‘authority’ being undertaken,<sup>167</sup> a means by which we can achieve flexible and sustainable clarity in common scenarios, and a tool for proceeding in a principled manner in new situations. It is also a methodology that can address criticisms of the problematic inferior court / tribunal distinction<sup>168</sup> drawn by *Craig*.<sup>169</sup> Moreover, this methodology can to some extent appease those dissatisfied with the new inability of state legislatures to immunise decision-makers from jurisdictional error review - because the presence of a strongly worded privative clause may have some role in determining what will be a jurisdictional error. This is not to return to attributing a ‘curative’ role to privative clauses as regards their interaction with jurisdictional error, but rather to fully embrace the inescapably case-specific and post hoc nature of the very concept of jurisdictional error.

At first glance, the *Kirk* decision appears to direct us back towards the more predictive and formulaic approach of *Craig*. The joint majority ultimately clung quite closely to the *Craig* formulations, in actually classifying the carefully identified errors as jurisdictional, without explicit reference to specific parliamentary intention on that point. This is perhaps in part a product of the entrenched incrementalism of rulings in this area,<sup>170</sup> and the fact that the addition of constitutional gravitas to the notion of ‘jurisdictional error’ encourages some neglect of the possibility that it has a humble source in interpretative grind and compromise. Importantly however, the marked difference between the High Court and Full Federal Court<sup>171</sup> conclusions on this *Craig* assessment again reveal the indeterminacy of the *Craig* categories. And most importantly, as noted earlier, there were various signs of broader and less-formulaic thinking in the High Court joint majority discussions. In the first place, support for a more flexible approach is found in their Honours’ reference, with apparent approval, to academic comment that the notion of jurisdictional error is context specific and essentially functional.<sup>172</sup> The judges were also, as noted earlier, at pains to emphasise that ‘*Craig* is not a rigid taxonomy’ and that the examples of jurisdictional error given there ‘are just that – examples’.<sup>173</sup> The broadening

<sup>165</sup> Chief Justice Spigelman has suggested at least that a simple application of *Craig* may now be an incomplete judicial response to a search for jurisdictional error of the type with which *Plaintiff S157* was concerned: Chief Justice Spigelman, ‘Integrity and Privative Clauses’ (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 11.

<sup>166</sup> Mark Aronson, ‘Jurisdictional Error Without the Tears’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 335.

<sup>167</sup> Note the prominent emphasis on ‘authority’ in key High Court decisions: *Aala* (2000) 204 CLR 82, [162] (per Hayne J); and more recently *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, [16] (Gummow ACJ and Kiefel J).

<sup>168</sup> Note in this context the comments in *Kirk* itself: (2010) 239 CLR 531, [68]ff (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>169</sup> An intention-based focus has already been employed by state courts in assessments of whether a particular body should be dealt with as an inferior court or a tribunal for the purposes of the *Craig* categories: see eg *Re Carey*; *Ex parte Exclude Holdings Pty Ltd* (2006) 32 WAR 501; *Re State Administrative Tribunal*; *Ex parte McCourt* (2007) 34 WAR 342. Cf *The Returned & Services League of Australia (Vict Branch) Inc v Liquor Licensing Commission* [1999] 2 VR 203, 213 (Phillips JA).

<sup>170</sup> Cf Benjamin O’Donnell, ‘Jurisdictional Error, Invalidity and the Role of Injunction in S 75(v) of the Australian Constitution’ (2007) 28 *Australian Bar Review* 291, 333.

<sup>171</sup> Contrast the conclusions below in *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

<sup>172</sup> (2010) 239 CLR 531, [63]ff.

<sup>173</sup> *Ibid* [73]. Cf *Yusuf* (2001) 206 CLR 323, [82] (McHugh, Gummow and Hayne JJ).

mindset is also evident in the Court's expression of concern over the workability of the court/tribunal distinction in *Craig* (at least in the state context).<sup>174</sup>

The best description of *Kirk*, as regards its contribution on the notion of 'jurisdictional error', is that it stops short of a full return to the formulas of *Craig* and veers some way towards the view that jurisdictional error is a conclusory or post hoc<sup>175</sup> concept rather than a predictive one. An admission that the notion of jurisdictional error is a conclusory one, and insistence that the *Craig* categories are just examples, of course leaves the elephant firmly ensconced in the room. How should Australian courts, intending parties and observers approach the classification? Some proffer a focus on 'seriousness' of error,<sup>176</sup> protection of fundamental rights,<sup>177</sup> avoidance of 'miscarriages of justice',<sup>178</sup> or notions of institutional integrity.<sup>179</sup> Some emphasise notions of 'invalidity' under related interpretive tests<sup>180</sup> or ideas of 'essentiality'<sup>181</sup> in a manner loosely consistent with the core of the arguments advanced here. And sometimes it is just conceded that there perhaps can be no single theory or logical process for the identification of jurisdictional error.<sup>182</sup> However, threading through much of this commentary is a level of satisfaction with the courts' ability to read a statute and divine parliamentary purpose – a process with which administrative law has long engaged. And the corresponding judicial confidence, evident for example in the broader thinking of Gleeson CJ in *Plaintiff S157*, has an unharnessed organisational potential that may ultimately leave *Craig* looking like something of a distraction.

The measure applicable in a deliberate and generalised parliamentary-intention based approach is found in the notions of 'essentiality',<sup>183</sup> 'inviolability'<sup>184</sup> and 'indispensability' that have been effectively employed and well-tested in the contexts of privative clause interpretation,<sup>185</sup> jurisdictional fact identification,<sup>186</sup> procedural error assessment,<sup>187</sup> and

<sup>174</sup> (2010) 239 CLR 531, [68]ff.

<sup>175</sup> Cf eg Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 333; Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92.

<sup>176</sup> See eg Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92.

<sup>177</sup> See eg Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

<sup>178</sup> See eg the discussion in *NAIS v Minister for Immigration and Indigenous Affairs* (2005) 228 CLR 470, [159] (Callinan and Heydon JJ).

<sup>179</sup> Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, 2 September 2004, Brisbane).

<sup>180</sup> Benjamin O'Donnell, 'Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution' (2007) 28 *Australian Bar Review* 291.

<sup>181</sup> Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, 2 September 2004, Brisbane); Justice J Gilmour, 'Kirk: Newton's Apple Fell' (2010 Conference of the Samuel Griffith Society, Perth, 29 August 2004) 13.

<sup>182</sup> Cf eg Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 84. As to the possibility that 'jurisdictional error' may have different meanings for different purposes (or at least a different meaning in the context of High Court review), see eg Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 333ff; Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2009) 1063ff.

<sup>183</sup> Cf the emphasis in *NAIS v Minister for Immigration and Indigenous Affairs* (2005) 228 CLR 470, [71]ff (Kirby J).

<sup>184</sup> Note in this regard *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627 (French CJ, Gummow, Hayne, Crennan and Bell JJ) – particularly the use there of the term 'inviolable' in a simple procedural error case, interchangeably it seems with the term 'imperative' (see [24], [36]).

<sup>185</sup> See *Plaintiff S157* (2003) 211 CLR 476.

indeed statutory 'no evidence' standards.<sup>188</sup> However for present purposes, the concept underlying these notions must be extracted from some extant confusion and polished a little.

The faint and underexplored assumption,<sup>189</sup> in some quarters, appears to have been that within the amorphous notion of 'jurisdictional error' there were two subsets of error defined by the 'inviolable conditions'-type formula and the *Hickman* provisos (possibly overlapping, or perhaps one subsuming the other). There is of course a broader category off screen; legal error (jurisdictional or non-jurisdictional), which is itself a subset of 'error' writ large. Administrative lawyers spend many hours immersed in exploration of the various boundaries and intersections. Under a deliberate and specific parliamentary intention-based approach to jurisdictional error, with the notion of 'essentiality' or 'inviolability' adopted as the critical measure, the internal diagrammatic abstraction is reduced to a category of jurisdictional error *coincident with* breaches of inviolable limits and a fading inner subset defined by the old *Hickman* provisos.<sup>190</sup> Of course the coalescence of 'inviolability' and jurisdiction is necessitated to some extent by the constitutional developments ushered in by *Plaintiff S157* and *Kirk*: the notion that there is a category of jurisdictional error that does not amount to a breach of an inviolable condition and hence can be protected by a privative clause is no longer sustainable.<sup>191</sup>

Within this simplified paradigm, the established *Craig* categories of jurisdictional error (to the extent that their meaning is settled) could obviously carry presumptions into the process of assessment, as would of course fraud<sup>192</sup> or a breach of natural justice<sup>193</sup> on the basis of their historical pedigree. However, on this approach the *Craig* formulas are at the very least controlled (ie clarified, extended and confined as necessary) by the more statute-specific formula. The established categories of legal error are therefore ultimately all dealt with in a similar manner, but with the assessment in each case graduated appropriately according to the specific legislative context and the identity of the decision maker. It should be pointed out at this juncture that beyond natural justice and fraud (and perhaps bad faith and unreasonableness<sup>194</sup>), it is difficult to identify other

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<sup>186</sup> See eg *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55.

<sup>187</sup> See most importantly, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>188</sup> See *Administrative Decision (Judicial Review) Act 1977* (Cth), s 5(3)(a).

<sup>189</sup> See eg *NAAV* (2002) 123 FCR 298; *Mitchforce* (2003) 57 NSWLR 212; cf *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 (Hodgson J); and cf also Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 9-10.

<sup>190</sup> The only lingering uncertainty is a largely academic one - the slim possibility that *Hickman* errors may narrowly extend beyond the composite (and now more circumstantially flexible) notion of jurisdictional error.

<sup>191</sup> Consider in the regard *Mitchforce* (2003) 57 NSWLR 212 and *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; and cf the more recent comments in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190, [27]-[32] (Spigelman CJ); *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 22, [69]ff (White JA).

<sup>192</sup> As to the strength of the presumption against parliamentary authorisation of fraud, see eg *Bodruddaza* (2007) 228 CLR 651, [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146, [54]ff (Gummow, Hayne, Heydon and Crennan JJ).

<sup>193</sup> See eg *Aala* (2000) 204 CLR 82, [27]ff (Gaudron and Gummow JJ); *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372. Note also of course *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. And cf the arguments in Benjamin O'Donnell, 'Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution' (2007) 28 *Australian Bar Review* 291, 298.

<sup>194</sup> These could of course carry similar presumptions. As regards bad faith, see of course *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. Also, the High Court has indicated a readiness to construe a

errors from the established grounds for which it would be hard to discern some statutory intention as to their essentiality. And of course the essentiality focus readily accommodates the identification of complete absences of jurisdiction and failures to exercise jurisdiction. The challenges of rationalising attacks on *non*-statutory powers remain, however the presumptions attending natural justice and fraud etc are a solid starting point for identifying jurisdictional error in that context. Finally here, it must also ultimately be acknowledged that what was traditionally termed 'narrow' or 'threshold' jurisdictional error, and indeed the traditional *Hickman* errors themselves, may well be beyond salvage by any reconciliation and finding of inessentiality owing to inherent contrariety.<sup>195</sup>

So how, precisely, does the deliberate statutory essentiality framework operate in the intractably difficult privative clause context? Such clauses are of course still to be read down where possible, as an initial<sup>196</sup> or component<sup>197</sup> step, by reference to traditional textual confinement principles and (where applicable) constitutional considerations. Any relevant remaining conflict in the statutory provisions must then be 'reconciled' (or further reconciled). Where the reading down is, as so often has been the case, to exclude 'jurisdictional error' from the privative clause's protection, the focus obviously then turns to the notion of jurisdictional error (which will be unprotected) and its identification in the relevant case. Externalists at this point may stop and reach for the *Craig* categories or established natural justice assumptions,<sup>198</sup> and these obviously may carry some weight here, however under the more organised 'essentiality' approach the focus ultimately remains on the specific legislative intention as to the significance and consequences of the error in question.<sup>199</sup>

A privative clause may of course reach beyond what can be easily read down, for example via popular contemporary drafting strategies such as extending protection to 'purported decisions'. The High Court has cast some doubt on the potential of such simply-expressed extensions (just on basic interpretative principles), suggesting that the word 'purported' may add little as privative clauses only ever operate on decisions that are infirm in some respect.<sup>200</sup> However, these (pre-*Kirk*) comments would seem to paper over well-established understandings of the term 'decision' and its interplay with jurisdictional and non-jurisdictional error.<sup>201</sup> And in any event, a legislature can of course be more explicit about its purpose in extending privative clause protection to 'purported'

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statutory power (silent on the issue of unreasonableness) so that it is an essential condition of the exercise of the power that it be exercised reasonably: *Abebe v Commonwealth* (1999) 197 CLR 510, [116]; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, [123] (Crennan and Bell JJ). Cf also *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) – and the earlier comments cited there.

<sup>195</sup> Cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Applicants S134/2002* (2003) 211 CLR 441, [77]ff (Gaudron and Kirby JJ); cf *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992.

<sup>196</sup> Cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [60], [70] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Kirk* (2010) 239 CLR 531, [101]ff (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>197</sup> Cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [19] (Gleeson CJ).

<sup>198</sup> See particularly *Aala* (2000) 204 CLR 82, [40]ff, [59] (Gaudron and Gummow JJ), [142] (Kirby J), [169] (Hayne J); and see also *Plaintiff S157* (2003) 211 CLR 476, [25] (Gleeson CJ), [83] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>199</sup> See again, for example, *Plaintiff S157* (2003) 211 CLR 476, 31ff (Gleeson CJ).

<sup>200</sup> *Batterham v QSR Ltd* (2006) 225 CLR 237, [26] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

<sup>201</sup> More recently in the State context, the High Court appears to prefer meeting such drafting techniques simply with the constitutional implications of the decision in *Kirk*: see eg *Totani* (2010) 85 ALJR 19, [26]ff (French CJ); *Wainohu* (2011) 85 ALJR 746, eg [15] (French CJ and Kiefel J).

decisions.<sup>202</sup> Yet it is not so easy to put aside the contemporary constitutional difficulty with such clauses (extended to the state level via *Kirk*): privative clauses cannot protect jurisdictional error from review by the High Court or the state Supreme Courts. However, as may by this point be obvious, the methodology identified in this article may yet return some life to such drafting techniques given its emphasis on the post hoc nature of jurisdictional error and the need for a true reconciliation of all statutory terms in its identification. It is tempting to still pre-emptively dismiss such clauses (at least in the context of High Court and Supreme Court review) on the basis of their intention at face value to subvert the constitutional guarantee of supervisory jurisdiction.<sup>203</sup> However, that would appear to miss a step if it is accepted that all legislative provisions have a role in defining relevant authority.

A suitable approach to avoid some of the contradiction and circularity here may take the following form. First, the 'purported decision' clause can be interpreted (quite naturally) as seeking to refer to any supposed decision. Then on that basis, and resisting constitutional pre-emption, the clause may play (depending on particular context) its potentially larger role in the statutory reconciliation. Errors ultimately considered to be in breach of limits still identified as essential or inviolable (thus properly identified as 'jurisdictional errors') are not protected by the clause. The 'purported decision' extension thus influences, but does not follow, the definition of jurisdictional error in the particular circumstances. Allowing it to so follow would see this drafting mechanism double-dipping in its impact – and of course often it could not follow and protect the defined jurisdictional errors for constitutional reasons. It might be added here that any quicker constitutional pre-emption of such clauses, in the context of High Court and Supreme Court review, runs the risk of again leaving the Federal Court behind to some extent.

### ***The broader implications of a clarification***

A focused statutory 'essentiality' approach to jurisdictional error would carry several important implications. First, the long suffering privative clause would be given a more legitimate and consistent role, for under this approach it is appropriate to factor in any privative clause in a reconciliation of statutory contradiction and hence in the identification of essential requirements. Correlatively, parliaments would not be so stripped of influence irrespective of potentially sound reasons for certain decisions to be final and/or exclusively handled by specialist bodies<sup>204</sup> (and in appropriate circumstances such reasons could be relevant to an assessment of relevant parliamentary intention on particular errors<sup>205</sup>). It must be noted again here that *Plaintiff S157* expressly rejected the idea<sup>206</sup> that a privative clause simply expanded executive authority out to the limits

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<sup>202</sup> See eg the provisions examined in *Bodruddaza* (2007) 228 CLR 651 – and the implication in the Court's holding the key provision to be invalid for constitutional reasons (contrast the result in the *Plaintiff S157* decision discussed above).

<sup>203</sup> See eg *Totani* (2010) 85 ALJR 19, [26]ff (French CJ); *Wainohu* (2011) 85 ALJR 746, eg [15] (French CJ and Kiefel J).

<sup>204</sup> See in this regard Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010); Mary Crock and Edward Santow, 'Privative Clauses and the Limits of the Law' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 345.

<sup>205</sup> Cf the comments in Benjamin O'Donnell, 'Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution' (2007) 28 *Australian Bar Review* 291, 322 and the reference there to debates about the treatment of 'polycentric' powers.

<sup>206</sup> Cf also the reasoning in *NAAV* (2002) 123 FCR 298 (esp Black CJ, Beaumont J and von Doussa J).

drawn in the *Hickman* provisos,<sup>207</sup> however it seems clear, given the Court's other comments in the case, that its real objection to the *Hickman* expansion argument was the automatic and unexaminable nature of its proposed result.

Secondly, a fully developed essentiality approach to jurisdictional error would allow administrative law to complete the process begun by constitutional law – particularly in the uncertain context of the Federal Court's jurisdiction. Even without the constitutional overlay, review jurisdiction over jurisdictional error would effectively be guaranteed as a consequence of the process of statutory assessment and reconciliation. The identification of essential or inviolable limits (and hence reviewable errors) by a reconciliation of the internal statutory contradiction arising from a privative clause would necessarily reveal and coincide with what would properly be classified as 'jurisdictional error' in the specific legislative context. The Federal Court is thus maneuvered into line with the constitutionally favoured High Court and state Supreme Courts. Administrative law's own 'gravitational pull' will have struck in the federal orchard.

Thirdly, under this framework the constitutional protection accorded to the supervisory jurisdiction of the High Court and the Supreme Courts is supported by a more coherent and more responsive administrative law foundation. It is difficult to point to another constitutional protection that depends upon a principle for which commentators and judges so readily concede<sup>208</sup> there is no clear test.

It might be argued that the focused 'essentiality' methodology, by aligning the definition of jurisdictional error more closely with specific legislative terms and purpose, too readily cedes the ostensible certainty that was hard-won in *Plaintiff S157* and *Kirk*. However, uncertainty has always been present in the very notion of jurisdictional error, and despite the superficial simplicity of the result in those decisions, the Court's discussions indicate that we have in fact clearly reached the point of admitting that uncertainty. If we so accept that 'jurisdictional error' is a flexible, functional and post hoc concept, what methodology could be more appropriate than a parliamentary intention focus?<sup>209</sup> If there are to be externally constructed incursions into this focus, then some rationalisation and justification of why different classes of errors are treated differently is sorely needed. This is particularly important when the disregard of clear parliamentary intention, including that expressed in privative clauses, may only press parliaments into other attempts at executive government protection in relevant situations – eg by less obvious limitations on review avenues and the conferral of artificially undefined discretions, all contrary to good government.

One final theoretical implication of the essentiality approach is that the entrenchment of jurisdictional error review is already secured to some extent by administrative law's own machinations. Administrative law, via statutory reconciliation, itself achieves the protection of jurisdictional error supervision in the face of a privative clause (including in the Federal Court). This is a potentially very useful by-product of the statute specific

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<sup>207</sup> (2003) 211 CLR 476, [61]ff (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). Cf *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992, [57] (Gummow and Hayne JJ).

<sup>208</sup> See eg Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 84; *Totani* (2010) 85 ALJR 19, [128] (Gummow J); Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, esp 340.

<sup>209</sup> Cf Alan Robertson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 40, 41-42.

focus, even beyond the Federal Court context, as we find here a blue collar shoring up of what some respected commentators see to be *Kirk's* over-reliance upon specific constitutional references.<sup>210</sup>

Irrespective of this potential administrative law backfilling, the importance of the constitutional principles at play - one step in the progressive Chapter III march - must not be understated. They may prove to be the prompt for the administrative law clarification advocated in this article. They now of course underwrite the continued existence of *avenues* of judicial review, providing structural protection where administrative law ceases. They also play a key role in the initial textual interpretation of a privative clause, contributing to the force of traditional reading down techniques. And they would seem to ensure that in relevant cases courts *will* seek jurisdictional boundaries, reinforcing administrative law's sometimes eccentric wanderings against attempts to prevent such inquiries.<sup>211</sup> Moreover, while administrative law currently provides the essential content of the critical notion of 'jurisdictional error' (by whatever means), the new constitutional dimension - which draws upon some powerfully organic 'rule of law' conceptions and a conspicuous antipathy towards untouchable 'islands of power' - may not remain silent in future refinement of the concept. Constitutional and administrative law are now keen collaborators in this field, and certainly the notion of 'essentiality' has space for some constitutional infusion.

## Conclusion

To return now from the intricacies of 'jurisdictional error', still the darkest corner of Australian administrative law, it is clear that the convergence of administrative and constitutional law principle in the *Kirk* decision brings us to an important and interesting point in Australian public law development. As Chief Justice Spigelman's gravity analogy suggests, the meeting was not by chance. The federal precedent of *Plaintiff S157*, together with the recent busyness of constitutional law in identifying the core characteristics of courts and/or chasing off threats to their 'institutional integrity', inevitably led the High Court to the critical supervisory role of the state Supreme Courts. For many legal observers this is a role that affirms the rule of law in its simplest incarnation; the notion that governments must have legal warrant for what they do.<sup>212</sup> By the same token, there was significant independent force in administrative law's aversion to attempted statutory ouster of jurisdictional error review, and it was perhaps inevitable that the appeal of a constitutional absolute would reach the state level.

Whether the convergence was a product of gravity or independent forces, the implications are highly significant. This article has endeavoured to draw together the threads of the important constitutional law developments at play here, examining the evolution of the protected constitutional personality of state courts and the organising

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<sup>210</sup> See eg, George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (Gilbert & Tobin Centre for Public Law 2011 Constitutional Law Conference, Sydney, 18 February 2011) 8-9.

<sup>211</sup> 'No invalidity' clauses, for example, are largely beyond the scope of this discussion, but see the pre-*Kirk* discussions in Benjamin O'Donnell, 'Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution' (2007) 28 *Australian Bar Review* 291, 299, 332; Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life after *S157* (2005) 33 *Federal Law Review* 141, 174. And cf Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 332.

<sup>212</sup> See Denise Meyerson, 'State and Federal Privative Clauses: Not So Different After All' (2005) 16 *Public Law Review* 39; Chief Justice Spigelman, 'Integrity and Privative Clauses' (The Third Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane, 2 September 2004) 12.

principle for this found in the integrated court structure engrained by Chapter III of the *Constitution*. This article has argued that *Kirk* represents one stop, but an important one, on the Chapter III journey that began in *Kable*. Ultimately, the integration of the judicature becomes the constitutional rationale for a progressive elucidation of ‘minimum’ curial content, which in turn brings about a de facto separation of powers at the state level to curb legislative encroachments on the role of the state judicature.

Beyond the constitutional law importance of *Kirk*, and its contribution in a slow-starting but now quickening constitutional epic, the practical administrative law implications are very significant. Practitioners and academics, having long struggled with the complexities and contradictions of privative clause interpretation, were briefly rendered quiet by the simplicity and clarity of the High Court’s critical determination that Supreme Court supervision of jurisdictional error is constitutionally entrenched. The important affirmations of *Plaintiff S157* had thus been replicated at state level, and the implications for executive decision-making and administrative law practice were profound. However, important questions remain. Most significantly, given the growing significance of the notion of ‘jurisdictional error’ in Australia, are we now any closer in the High Court precedent to a settled position on its meaning?

The *Kirk* decision’s own contribution on the notion of jurisdictional error has been somewhat neglected in the academic and public focus on the case’s constitutional significance. However, the case marks an interesting return by the High Court to the administrative law puzzle. At the very least, with its clear acknowledgement of the uncertainty of jurisdictional error and the incompleteness of the *Craig* formulas, the decision has opened space for a renewed debate. More importantly however, it provides a new point of access to a subtle methodological divide in the Australian thinking on this issue – a divide between what have been termed here the external and internal approaches. The latter, on one reading offered up by the *Plaintiff S157* decision, is somewhat out of fashion. However, it in fact provides a solution to many of the inconsistencies and uncertainties attending the jurisdictional error assessment, which has for many years often hovered somewhere between judicial instinct<sup>213</sup> and the awkward and ambiguous predictive formulas of *Craig*.<sup>214</sup> An explicit, internal statutory intention focus – largely freed from the distractions of the *Craig* formulas – would produce a more coherent and flexible approach that is more respectful of legislative purpose and more consistent with surrounding administrative law methodology. It would, in short, produce a more palatable uncertainty. A tested measure of parliamentary intention for these purposes, already effectively applied in specific administrative law contexts, is the notion of ‘essentiality’ or ‘inviolability’. As explained above, such a methodology could incidentally work some reform to the awkward judicial exile of privative clauses and the parliamentary purposes behind them. It could correct an equation that appears to have left the Federal Court, a significant contributor to Australian judicial review, outside looking in. And it could provide some much needed conceptual strength and clarity to the newest Australian constitutional guarantee.

From the elegant public law convergence in the *Kirk* decision, Australian commentators and practitioners will now return to their respective trails – perhaps buoyed somewhat by

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<sup>213</sup> Cf the comments in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165, [120] (Kirby J).

<sup>214</sup> Cf recently in the High Court the examples in *Visscher v Giudice* (2009) 239 CLR 361, [81]; *Plaintiff M13/2011 v Minister for Immigration & Citizenship* (2011) 85 ALJR 740, [22].

a renewed faith in the practical potential of constitutional guarantees, and by the emerging simplicity in privative clause operation. However, on the mysteries of jurisdictional error the promise is perhaps at best a promise of greater candour. On this issue, there are 'miles to go before [we] sleep'.<sup>215</sup>

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Robert Frost, 'Stopping By Woods on a Snowy Evening' in *Selected Poems of Robert Frost* (Holt, Rinehart and Winston, 1963) 140.