
The supervisory jurisdiction of the Supreme Courts

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In according constitutional protection to the supervisory jurisdiction of the State Supreme Courts, the High Court in Kirk's case brought Australian law into line with Canadian constitutional law, a step which had been foreshadowed over some years. The basis on which the outcome is justified has implications for approaches to constitutional interpretation more generally. The possible consequences for the interpretation of privative clauses in State legislation are also noted. The limit of legislative intervention is defined by the concept of jurisdictional error. This new-found constitutional role breathes life into a concept long since abandoned in English administrative law and lacking clear boundaries. The courts will need to develop clearer guidelines, based on a functional approach, allowing for differing levels of scrutiny, depending on the nature of the administrative or judicial decision under review. Account should also be taken of changing social, governmental and legal environments.

INTRODUCTION

Changes in legal principle may come about in surprising circumstances. In a period when the Supreme Court of New South Wales was deprived of its supervisory jurisdiction with respect to the State Industrial Court,¹ by a very strong privative clause, it was willing to intervene in a case of anticipated excess of jurisdiction before a relevant decision had been made. That practice was approved by the High Court.² It would have been easy to say, "early intervention is unnecessary, the privative clause being ineffective"; but that did not happen. In due course, the legislature was moved to reinstate in part the supervisory jurisdiction of the Supreme Court, in cases of a purported determination of the Full Bench of the Industrial Court on an issue as to its jurisdiction.

Nevertheless, the High Court took the next opportunity to do what it had not done in the earlier cases, holding that the State lacked legislative power to remove the supervisory jurisdiction of the Supreme Court with respect to the Industrial Court. Perhaps because that step was unnecessary (it being conceded that the privative clause did not preclude review for jurisdictional error and such error being found), there was limited discussion of earlier apparently inconsistent authority, or the basis and extent of the new principle.

The later decision of the High Court, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (*Kirk*), has met with unqualified approval, although the supporting reasoning has been questioned.³ The result appears to make good sense in terms of upholding the rule of law and promoting an integrated national judicial system. It provides a sound basis for avoiding the apparent effects of strong privative provisions.

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¹ Then known as the Industrial Relations Commission of New South Wales.

² *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180; *Batterham v QSR Ltd* (2006) 225 CLR 237 at [28]; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274.

³ Spigelman JJ, "The centrality of jurisdictional error" (2010) 21 PLR 77; Zines L, *Recent Developments in Ch III: Kirk v Industrial Relations Commission of New South Wales and South Australia v Totani* (Paper presented Centre for Comparative Constitutional Studies/AACL Seminar, Melbourne, 26 November 2010) p 10; McDonald L, "The entrenched minimum



However, two issues broadly identified invite further consideration. First, when, as here, there is a tectonic shift at the intersection of constitutional and administrative law, the underlying constitutional justification must be understood. Particularly is that so where the principles are articulated in relation to supervision of judicial power. Secondly, the consequences for judicial review must also be identified with some care, an exercise that will depend in part upon the principles revealed in addressing the constitutional question.

A. BACKGROUND ISSUES

(1) Procedural history

Kirk involved criminal proceedings against the corporate employer of its deceased manager and a director of the company, for failing to ensure the health, safety and welfare of the manager, in contravention of their duties under the *Occupational Health and Safety Act 1990* (NSW) (ss 15, 16) (see *Kirk* at [9]). They were originally convicted and sentenced in proceedings before Walton J in the Industrial Court. The *Industrial Relations Act 1996* (NSW) provided a right of appeal to a Full Bench of the Industrial Court.⁴ Rather than take that step, the convicted defendants brought proceedings in the Court of Appeal to challenge their convictions at trial.⁵ The fate of such an application was potentially affected by the privative clause in s 179 of the *Industrial Relations Act* (as amended in 2005), which precluded any appeal, review, or grant of relief in respect of a decision of the Commission (including in its capacity as the Industrial Court), other than a decision of the Full Bench on an issue of its jurisdiction.⁶

The Court of Appeal held that the applicants should exhaust their rights of appeal before invoking the supervisory jurisdiction, with its potential constitutional issues; the validity of the convictions was not addressed.⁷ When the appellants returned to the Industrial Court they were granted leave to appeal limited to one issue, on which they were unsuccessful. They did not seek to challenge the refusal of the Full Bench to grant unqualified leave to appeal, but an appeal was brought, unsuccessfully, from the decision of the Full Bench on the one issue on which leave was granted. That appeal was dismissed; the ground was irrelevant to the reasoning and orders in the High Court. Concurrently with the appeal, the appellants applied again to the Court of Appeal to review their convictions at trial. Their applications were rejected, not because relief was precluded by the privative clause, but because the errors relied on were held not to go to the jurisdiction of the Industrial Court.⁸

On appeal to the High Court, the grounds of challenge were recast (apparently with only limited objection from the prosecutor) to allege a failure to plead conduct amounting to a relevant offence and

provision of judicial review and the rule of law” (2010) 21 PLR 14; and commentaries on McDonald: Aronson M (2010) 21 PLR 35; Robertson A (2010) 21 PLR 40; Finn C, “Constitutionalizing supervisory review at State level: The end of Hickman?” (2010) 21 PLR 92.

⁴ In accordance with the scheme of the *Criminal Appeal Act 1912* (NSW), s 5, an appeal lay as of right with respect to questions of law only: *Industrial Relations Act 1996* (NSW), s 196, otherwise leave was required.

⁵ See *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151; they also sought, unsuccessfully and irrelevantly for present purposes, to invoke the jurisdiction of the Court of Criminal Appeal.

⁶ “179. *Finality of decisions* (1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal. (2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal. (3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law. (4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of: (a) the Full Bench of the Commission in Court Session, or (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision. (5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise. (6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.”

⁷ *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 at [46], [154].

⁸ *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465; [2008] NSWCA 156. For a valuable outline of issues raised but not resolved, see Lacey W, “*Kirk v Industrial Court of New South Wales – Breathing Life into Kable*” (2010) 34 MU:LR 641 at 661ff.



a grave procedural error in permitting Mr Kirk to be called by the prosecutor to give evidence (*Kirk* at [15], [28], [30], [52]). These jurisdictional errors, on which the appellants ultimately succeeded, invalidated the convictions at trial. The judgment of the Full Bench on appeal was set aside, but only to give effect to the orders quashing the trial judgment and convictions (at [110]-[111]).

The basic principle articulated by the High Court in *Kirk* is that a State legislature has no power to diminish an essential characteristic of its Supreme Court, by removing part of its supervisory jurisdiction over a court with limited jurisdiction. The Supreme Court's authority, on which the legislature may not intrude, is the power to review decisions of such a body for "jurisdictional error". One consequence of that conclusion is to render otiose the intellectual legerdemain revealed in earlier authorities which have struggled to impose a similar limit on privative clauses as a matter of statutory construction. In fact such a step was not necessary in *Kirk*, because s 179 of the *Industrial Relations Act* was held, on its proper construction, not to achieve any greater level of limitation on the Court's supervisory jurisdiction. Thus, consistently with the reasoning in *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, a provision which protected a "decision" of the Industrial Court from review was held not to protect an invalid decision, purportedly made but in fact beyond power.⁹ Section 179(4), which referred to "purported decisions" as to jurisdiction, was not applicable because the Industrial Court did not seek to address, in terms, the question of its own jurisdiction.¹⁰ (It is unclear whether the parties raised any issue as to the operation of the privative clause in a case where only restricted leave to appeal was granted: s 179(4)(b).)

In other circumstances, failure to raise at an earlier stage the jurisdictional issue on which the appellants succeeded in the High Court (an opportunity which had arisen on three prior occasions) might have led to refusal of relief on a discretionary basis, or a refusal to grant special leave to appeal.¹¹

This procedural history indicates why there was no need to discuss the constitutional significance of a strong privative clause in a State law which:

- (a) contains no right of appeal from a statutory decision-making process; or
- (b) contains a right of appeal, but one limited to,
 - (i) correction of jurisdictional error, or
 - (ii) correction of errors of law; or
- (c) contains rights of appeal by way of rehearing; and
- (d) in the case of either (b) or (c), requires leave.

In practice an available right of appeal from a first instance decision may render the supervisory jurisdiction irrelevant; it may also, as in *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 (*Kirk (No 1)*), constitute a discretionary ground for treating an application for review as premature. Further, where there is an appeal by way of rehearing, which, if successful, will result in a substituted judgment, the court exercising supervisory jurisdiction may well stay its hand, or require the applicant to elect between remedies. Relevantly for present purposes, a different question is raised, namely, can a State remove the supervisory jurisdiction in respect of first instance decisions, so long as there is a right of appeal, either to the Supreme Court (which must, at least, extend to jurisdictional error) or to a body which is itself amenable to the supervisory jurisdiction or to

⁹ The pre-2005 form of s 179 provided: "(1) Subject to the exercise of a right of appeal to the Full Bench of the Commission conferred by this or any other Act or law, a decision or purported decision of the Commission (however constituted): (a) is final, and (b) may not be appealed against, reviewed, quashed or called in question by any court or tribunal (whether on an issue of fact, law jurisdiction or otherwise). (2) A judgment or order that, but for this section, might be given or made in order to grant relief or remedy (whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise) may not be given or made in relation to a decision or purported decision of the Commission, however constituted. (3) To avoid doubt, this section extends to any decision or purported decision of the Commission, including an award or order of the Commission."

¹⁰ Compare *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at [69]; 84 ALJR 663, as to "necessarily implicit" decisions.

¹¹ *Mickelberg v The Queen* (1989) 167 CLR 259 at 272 (Mason CJ), 313 (Toohey and Gaudron JJ); *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [48].



an appeal on broader grounds? This is not a question relevant only to the Industrial Court: for example, the New South Wales Land and Environment Court is given powers of judicial review in respect of decisions made under environmental and planning laws, to the exclusion of the Supreme Court's jurisdiction.¹² The Land and Environment Court is, however, itself subject to review by the Court of Appeal in its appellate (and no doubt its supervisory) jurisdiction. Are such arrangements valid?

In part, the answer to this last question may depend on whether the principles established by *Kirk* in relation to the Industrial Court exercising its criminal jurisdiction, apply to review of administrative decisions and whether, if so, to all such decisions.

(2) Precursors to *Kirk*

The constitutional protection of the supervisory jurisdiction of State Supreme Courts upheld in *Kirk* was derived primarily from the provision (*Constitution*, s 73(ii)) conferring appellate authority on the High Court, in respect of decisions of such courts. The federal Parliament can make exceptions to and regulate that jurisdiction, but a State legislature cannot. Nor, the High Court held, can the latter indirectly diminish the appellate jurisdiction of the High Court by removing from its Supreme Court some essential characteristic and, in particular, its supervisory jurisdiction. The apparent novelty of this position arose from the contrast with earlier cases which appeared to allow such a power to a State legislature,¹³ being a greater power than that enjoyed by the Commonwealth, which cannot diminish the supervisory jurisdiction of the federal supreme court under s 75(v). However, this conclusion was neither entirely novel, nor without forewarning.

The Canadian Supreme Court reached a similar conclusion with respect to a constitutionally protected supervisory jurisdiction several decades ago. In Canada, the judges of the Superior (and other) Courts of the Provinces are appointed by the Governor-General.¹⁴ It followed, by implication, as the Canadian Supreme Court recently affirmed in *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at [29]-[31] (Bastarache and LeBel JJ), that a provincial legislature could not remove or reallocate to another tribunal the supervisory jurisdiction of its Superior Court.¹⁵ The constitutional implication arose not merely in respect of the existence of the court as an institution, but required maintenance of its essential or core functions.¹⁶ These functions are fixed in form, but were identified by the Supreme Court in ambulatory terms.¹⁷

In Australia, in 1995, the Victorian Court of Appeal considered the effect of legislation conferring on the Attorney-General sole power to institute proceedings for contempt of court. Hayne JA

¹² *Land and Environment Court Act 1979* (NSW), s 71.

¹³ See, eg *Batterham v QSR Ltd* (2006) 225 CLR 237 at [25]; *Darling Casino Ltd v NSW Casino Authority* (199) 191 CLR 602 at 633; cf *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 at [33], where the court spoke in terms of statutory construction, but implied an underlying constitutional limitation: "In addition, it must also be presumed that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution." That approach was consistent with older authority, including *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121 at 134-135 (Dixon J).

¹⁴ *Constitution Act 1867* (formerly known as *The British North America Act 1867* (IMP)), s 96.

¹⁵ *Crevier v Attorney-General (Que)* [1981] 2 SCR 220 at 236-237 (Laskin CJ). See also *Attorney-General (Que) v Farrah* [1978] 2 SCR 638.

¹⁶ In *Attorney-General (Que) v Farrah* [1978] 2 SCR 638 at 649-655 Pratte J recorded the historical background to the supervisory jurisdiction of the Provincial Superior Courts, quoting Fauteux CJ in, inter alia, *Three Rivers Boatman v Canadian Labour Relations Board* [1969] SCR 607.

¹⁷ The Indian Supreme Court has identified judicial review of legislation and executive action as part of the "basic structure" of the Indian Constitution, beyond the power of amendment: *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; (1973) 4 SCC 225; *Minerva Mills Ltd v Union of India* [1980] INSC 141; AIR 1980 SC 1789; *L Chandra Kumar v Union of India* AIR 1997 SC 1125; see a lively history of attempts to amend the Indian Constitution in Datar AP, "Our Constitution and its Self-Inflicted Wounds" [2007] 1 Indian J of Con Law 92. The issue has not been important in the US; for a discussion of early cases seeking constitutional protection for the exercise of judicial review, see Jaffe L, *Judicial Control of Administrative Action* (Little Brown, 1965) pp 376ff: protection is usually discussed by reference to constitutional grounds, or defence of enforcement proceedings, see, eg Mashaw, Merrill and Shane, *Administrative Law* (4th ed, West Group, 1998) pp 845ff.



(dissenting as to the outcome) stated that legislation “which would deprive a superior court of power to prevent an unauthorized assumption of jurisdiction” requires unambiguously clear terms.¹⁸ He also noted, as an issue not requiring resolution, the “serious question” whether the Victorian Parliament could “so change the Constitution of this State as to remove as one element of its governance a superior court of record with the powers and jurisdiction inherent in such a court”.¹⁹ His Honour also noted the absence of reference in argument to the Commonwealth *Constitution* generally and Ch III in particular.

The following year, in *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, McHugh J, after identifying the principle that there was a single unified common law in Australia, subject to the supervision of the High Court pursuant to s 73(ii) of the *Constitution*, continued (at 114, 115):

Moreover, although it is not necessary to decide the point in the present case, a State law that prevented a right of appeal to the Supreme Court from, or a review of, the 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.

...

In *Commonwealth v Queensland* [(1975) 134 CLR 298 at 314-315] ... Gibbs J held that it is implicit in Ch III that a State cannot legislate in a way that has the effect of violating “the principles that underlie Ch III”.

The idea of legislation “preventing a right of appeal ... from an inferior court” requires elucidation, there being no general law right of appeal, but the matter of present relevance lies in the reference to withdrawal of a right of “review” of the decision of an inferior court. References to s 73(ii) and the conferral on State Supreme Courts of a federal constitutional status, with concomitant limitations on State legislative power, may also be found in the judgments of Gaudron J and Gummow J in *Kable* (at 102, 143-144) and (as noted by Spigelman CJ in *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212), by Gummow J in *Gould v Brown* (1998) 193 CLR 346 at [194]-[196].

The usual drafting technique for limiting the supervisory jurisdiction is a privative clause of the kind addressed in *Kirk*. In *Plaintiff S157*, Gleeson CJ, after noting the direct protection afforded to the High Court’s supervisory jurisdiction by s 75(v) of the *Constitution*, stated:

[7] Privative clauses which deprive, or purport to deprive, courts of jurisdiction to review the acts of public officials or tribunals in order to enforce compliance with the law, or which limit, or purport to limit, such jurisdiction, may apply in either State or federal jurisdiction. Many of the considerations relevant to their interpretation and application are common to both.

[8] Speaking of a nation with a unitary constitution, Denning LJ said:

If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

[9] In a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, there is a further issue that may be raised by a privative clause. It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power.

In *Mitchforce* (at [124]), Spigelman CJ remarked:

If the decisions of the Industrial Commission are not liable to appeal or review, even by the High Court, there are significant implications for the rule of law in Australia. The rule of law is “part of the fabric on which the written words of the *Constitution* are superimposed” (to adapt the phrase of Isaacs J in *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 at 413; see *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193). The existence of a statutory court of limited jurisdiction, which is exempt from review for jurisdictional error, may not be consistent with the rule of law.

¹⁸ *BHP Ltd v Dagi* [1996] 2 VR 117 at 193.

¹⁹ *BHP Ltd v Dagi* [1996] 2 VR 117 at 205; comments in which Phillips JA joined, at 190.



In *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 at [146], Kirby J dissented as to the propriety of the practice of early intervention adopted in the Court of Appeal to avoid the effect of the pre-2005 form of s 179,²⁰ but noted:

I would be the first to defend the Court of Appeal in the provision of a writ in the nature of prohibition against fundamental error on the part of the Commission that led it to exceed or neglect its jurisdiction, and this notwithstanding s 179 of the [Industrial Relations] Act. The statutory inclusion of reference to a “purported decision” could not protect from supervisory orders of the highest court of the State action by the Commission that did not reach the fundamental requirements contemplated by Parliament in protecting “decisions” and also “purported decisions”. The rule of law, which is an acknowledged implication of the Australian *Constitution*, imposes ultimate limits on the power of any legislature to render governmental action, federal, State or Territory, immune from conformity to the law and scrutiny by the courts against that basal standard.

The issue of the legislative power of the State to restrict judicial review for jurisdictional error was expressly raised, but not determined, in *Kirk (No 1)*.²¹

Three things are noteworthy about these passages. First, “the rule of law” is invoked to provide a justification for the supervisory jurisdiction. In this context, the rule of law may be taken to be largely self-reflective; as relied on by Lord Denning and Kirby J, it means little more than that courts are the guarantors of compliance by other arms of government with substantive limits on their powers. But when the task is to identify the source and limits of the courts’ role, the phrase “the rule of law” provides no clear guidance.²² Secondly, the constitutional doctrine of separation of powers is invoked to the same end, namely to identify the courts as the arbiters of validity with respect to the exercise of power by another arm of government.²³ However, that doctrine is entirely consistent with some aspects of control being kept from the courts, including, for example, merit review of administrative action, as explained by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36. Thirdly, it is implied that the separation of powers doctrine operates similarly at the State level as at the federal level. In some cases it was not necessary to spell out the justification for this conclusion in relation to State jurisdiction, but it should be noted that, conventionally, the doctrine of separation of powers has been held not to operate in relation to State Constitutions, or at least not with the same rigour as under the federal *Constitution*.

More recently, in *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45 at [63], in rejecting a challenge to a decision of the NSW Supreme Court constituted by an acting judge, the High Court stated that it was beyond the legislative power of the State to so alter “the constitution or character” of its Supreme Court that it failed to satisfy the constitutional descriptor.²⁴

If the decision in *Kirk* was unexpected, perhaps it should not have been. However, it is necessary to inquire a little further into the reasoning which supports the result.

B. BASIS OF CONSTITUTIONAL PROTECTION

It being accepted that State Constitutions confer legislative power of the greatest amplitude,²⁵ a constraint on State power must be derived from one or more of four sources, namely:

- (a) the express terms of the federal *Constitution*;
- (b) by implication from the structure and language of the *Constitution*;
- (c) “assumptions” underlying the *Constitution*; or

²⁰ The version of s 179 to which Kirby J referred in this passage pre-dated the 2005 amendments and thus differed significantly from that in issue in *Kirk*: see n 9.

²¹ *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151 at [86]-[91].

²² The concept has a rich analytical history which is expertly summarised by Professor Martin Loughlin, *Foundations of Public Law* (OUP, 2010), Ch 11, “Rechtstaat, Rule of Law, l’Etat de droit”. See also Jaffe and Henderson, “Judicial review and the Rule of law; Historical Origins” (1956) 72 LQR 345; Saunders C and Le Roy K (ed), *The Rule of Law* (Federation Press, 2003).

²³ Stellios J, *The Separation of Judicial Power* (Paper presented to ACL seminar, Sydney, 20 October 2010) pp 10-12.

²⁴ That had not happened in that case and the challenge was dismissed.

²⁵ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 (set out below).



(d) unwritten constitutional principles derived from English common law.

None of these four “sources” is entirely independent of the others; there is likely to be an intermingling of all four sources in any particular analysis, though it may be important to know where the emphasis is properly placed.

(1) Textual support

In *M’Culloch v Maryland* 17 US 316 at 407 (1819),²⁶ the progenitor of judicial review of legislation, Marshall CJ, speaking of the division of powers between the Union and the States, identified an important characteristic of constitutions:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they could be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It, probably, would never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of those objects themselves.

That language undoubtedly applies as much to the Australian as to the American Constitution. In *Kirk*, the High Court anchored its reasoning in the reference in s 73(ii) to the “Supreme Courts of the States”,²⁷ but the phrase alone cannot bear the weight of the conclusion reached. The “great outline” is marked, but not its “minor ingredients”. That reference could mean the courts as they exist from time to time. Such an understanding must be partly correct; a vast increase in the size, jurisdiction and volume of cases determined has been accommodated within the character of the courts referred to in s 73(ii), despite the inevitable effects on the functions and character of the High Court.

Although an ambulatory approach to the language of the *Constitution* may properly engage the exercise of supervisory jurisdiction over a particular judicial body which did not exist in its present form in 1901,²⁸ without more, the mere use of the expression “Supreme Court” does not indicate why the failure to permit review of decisions of a specific judicial officer prevented the Supreme Court of New South Wales satisfying the constitutional descriptor of “Supreme Court” of the State. Further, there is nothing in the text to identify the boundaries of the protected jurisdiction. To say that it is delineated by the availability of relief provided by the prerogative writs involves an appeal to history, as does the recognition that the scope of certiorari with respect to errors of law on the face of the record is susceptible to legislative withdrawal.

(2) Textual implications

Professor Zines would justify the outcome in *Kirk* by reference to the integrated national judicial system, which may be implied from the language and structure of Ch III, as articulated by McHugh J in *Kable*. Zines has written:

It seems to me to be quite clear that the purpose of this jurisdiction was to ensure that the High Court is a final court of appeal in all State and federal matters. This was also the historical intention. Quick and Garran referred to the position of the High Court as a general court of appeal for Australia as “constitutionally secured” (at 742). It is of course a reasonable implication from that constitutional purpose that a State cannot impair it.

He continued:

Insofar as 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.

Zines accepted that the High Court did not adopt this reasoning, although he regarded it as a natural step towards “the goal”, which he identified as ensuring “that the High Court through the

²⁶ See also references in *Pape v Commissioner of Taxation (Cth)* (2009) 238 CLR 1 at [421] (Heydon J; dissenting).

²⁷ This is a further example of the development of constitutional principles from basic constitutional expressions: see Gummow WMC, “The Constitution: Ultimate Foundation of Australian Law?” (2005) 79 ALJ 167 at 172; Spigelman, n 3 at 78-79.

²⁸ See, eg, *Davis v Commonwealth* (1988) 166 CLR 79 at 96 (Mason CJ, Deane and Gaudron JJ).



Supreme Courts determines the principles of general law and interpretation.” That, he suggested, is consistent with the references in the joint judgment in *Kirk* to avoiding “islands of power immune from supervision and restraint”. The issue, however, is the constitutionally defined minimum requirement of “supervision and restraint”. That is identified in *Kirk* by reference to “jurisdictional error”. That expression is not to be found in the *Constitution* and is not easily derived by implication from the language and structure of the *Constitution* itself: were it otherwise, it would be surprising that it took 109 years to identify it.

(3) Underlying assumptions

Thirdly, it is possible to look to “underlying assumptions”. Zines has been dismissive of this possibility, noting the remark of Dixon J in *Australian National Airlines Pty Ltd v Commonwealth [No 1]* (1945) 71 CLR 29 at 81 that the *Constitution* is not to be interpreted according to “the unexpressed assumptions upon which the framers of the instrument supposedly proceeded”.²⁹ However, that remark was made in rejecting a proposed implied limitation on the generality of a head of Commonwealth legislative power in s 51. It does not contradict his reference in the *Communist Party Case* to the rule of law as an underlying assumption of the *Constitution*. In *Plaintiff M61/2010E v Commonwealth* (2010) 85 ALJR 133 at [54]; [2010] HCA 41, the High Court referred with implicit approval to the “well-known dictum of Dixon J in the *Australian Communist Party Case* that the *Constitution* is framed in accordance with many traditional conceptions of which some, including the rule of law, are simply assumed”. So much looks very much like common sense and may readily be accepted.³⁰ Nevertheless, an underlying assumption such as “the rule of law” operates at too high a level of abstraction to explain, when taken in isolation, the particular limit on State legislative power identified in *Kirk*.

The phrase “underlying assumptions” is itself imprecise. It could refer to assumed facts or circumstances, assumed legal principles, assumed characteristics of institutions, or assumed political principles or values. In the present case, the institutions (State Supreme Courts) are expressly identified in s 73: what is not identified is the set of characteristics and functions which comprise their essence.

Reliance on underlying assumptions, like reliance on implications, involves an appeal to history, but history provides uncertain guidance to the boundary-rider. Indeed, as not infrequently happens with judicial developments in the common law world, appeals to history are rarely what they appear to be. Our understanding of the essential character of a Supreme Court is not to be found in some hard to reconstruct views of the nineteenth century, but in current views of the role of the courts’ supervisory jurisdiction, taking that broad concept in its historical sense and investigating it at a moderate level of abstraction.

Any understanding must accommodate, for example, the explosive growth in the demands of procedural fairness and its juridical underpinnings. Both the scope and content of the requirement to accord procedural fairness have expanded, in Australia especially since 1985; yet it remains orthodox to say that the content can be controlled by legislation. Indeed, that aspect of the principle appears to have led Brennan J (and as Chief Justice) to seek juridical legitimacy in identifying adherence to procedural fairness as an implied statutory requirement.³¹ However, even if, as appears now to be the

²⁹ He noted also that that was the basis on which Brennan CJ dissented in *Kable*.

³⁰ The Canadian Supreme Court has described the rule of law as “a fundamental postulate of our constitutional structure”: *Roncarelli v Duplessis* [1959] SCR 121 at 142; see also *Reference re Secession of Quebec* [1998] 2 SCR 217 at [50], [70]-[71].

³¹ See discussion in Aronson, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, Lawbook Co, 2009), [7.65], [7.70].



accepted doctrine, the obligation is to be seen as an aspect of the common law,³² there is no suggestion that it is not variable by legislation, although in practice the task may be hard to achieve.³³

(4) Common law constitutional principles

The fourth source permits content (essential characteristics and functions) to be supplied to an institution identified in the *Constitution* by constitutional elements of the common law (including, for example, judicial independence, impartiality and aspects of a court's jurisdiction). After a period during which the major issues in constitutional law were sought to be resolved primarily by reference to the text of the written document and implications derived from the document read as a whole, fresh attention is now accorded to "the common-law heritage", including the principle of judicial independence, which French CJ stated in *South Australia v Totani* (2010) 85 ALJR 19 at [1]; [2010] HCA 39, "is antecedent to the *Constitution* and supplies principles for its interpretation and operation".

As Gleeson CJ somewhat tartly remarked in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [1]:

The Australian *Constitution* was not the product of a legal and political culture, or of historical circumstances, that created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals.

However, as *Roach* itself confirmed, there are limitations on legislative power with respect to critical institutional arrangements, deriving from common law principles operating by way of exegesis of the sparse language of the written *Constitution*.³⁴ Further, at least some expressions may acquire a different application over time.³⁵

Reference to the common law in search of constitutional principles has given rise to a fierce debate in the UK, where it is seen to contain a controversial challenge to parliamentary supremacy. The concept at the heart of that debate, identified as "common law constitutionalism", has four basic elements.³⁶ First, historically it appeals to the judge-made common law as the source of fundamental constitutional principles; secondly, it asserts that these principles are beyond the authority of the legislature to diminish; thirdly, the courts are responsible for policing the boundary and may declare invalid a law which purports to overstep, and, fourthly, the constitutional principles may be developed

³² Aronson, Dyer and Groves, n 31, [7.75].

³³ See reasoning of majority in *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [90]-[105] (Gaudron J), [125]-[147] (McHugh J), [171]-[188] (Kirby J). Other examples may be found below in the discussion of the content of jurisdictional error.

³⁴ See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125, 128, 130 (Mason CJ, Toohey and Gaudron JJ) upholding freedom of expression as "ensuring the efficacy of representative democracy"; *Cheatle v The Queen* (1993) 177 CLR 541 at 552 relying on history to demonstrate that a unanimous verdict of guilty "was an essential feature of the institution [of trial by jury]".

³⁵ In *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [45], Gummow, Kirby and Crennan JJ noted that "the extent of the franchise and the manner of its exercise affect the fundamentals of a system of representative government" and that "in providing for those fundamentals the *Constitution* makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution"; cf Hayne J (with whom Heydon J agreed) at [162], "The expression 'directly chosen by the people' may be seen as standing in sharp contrast with expressions like 'foreign power', or 'postal, telegraphic, telephonic, and other like services'. The latter expressions must be applied to various facts and circumstances can and do change over time. In particular, the political or technical facts to which they are applied may require different applications of the relevant expression over time."

³⁶ The essence of the debate may be divined from a series of papers by Sir John Laws and the response of Professor JAG Griffith: Laws J, "Judicial Remedies and the Constitution" (1994) 57 MLR 213; "Law and Democracy" [1995] PL 72; "The Constitution: Morals and Rights" [1996] PL 622; Griffith JAG, "The Brave New World of Sir John Laws" (2000) 63 MLR 159; "The Common Law and the Political Constitution" (2001) 117 LQR 42, the last commenting on views of Sedley LJ. See also, for an exposition of the fundamental nature of key values, Allan TRS, "Fairness, Equality, Rationality: Constitutional Theory and Judicial Review" in Forsyth C and Hare I (eds), *The Golden Metwand and the Crooked Cord* (Clarendon Press, 1998) pp 15-38.



by the courts in accordance with common law methods.³⁷ The concept thus involves more than an approach to interpreting legislation. Further, it is commonly raised as a possible means (it has not yet been accepted and applied in any case) of protecting fundamental human rights from legislative interference.

For present purposes the first element (the historical source), which has been trenchantly criticised by Professor Jeffrey Goldsworthy,³⁸ need not trouble us. It may well be that the source of many constitutional doctrines, including parliamentary supremacy itself and the conferral of the supervisory jurisdiction on the Courts of Kings Bench, is not to be found in the judge-made common law; on the other hand, grounds of judicial review may be so portrayed. In the UK debate, historical origins are significant because they provide a justification for on-going identification and development by the courts, in accordance with the fourth principle.

The third element is presently irrelevant; the idea that parliamentary supremacy is constrained by the written *Constitution* is not in doubt, nor is the general authority of the courts to engage in judicial review of legislation for conformity to the *Constitution*. So long as the constraints are referable at some level to the written *Constitution*, the role of the courts in reviewing legislation is uncontroversial. No doubt the need for judicial enforcement of the limits of legislative power is more readily perceived where legislative power is divided.³⁹

The fourth element raises no novel problem. Once the constitutional principle has been identified, the powers of the courts are limited to its application in changing social and legislative circumstances. That is not to say that no issue arises where the courts identify the content of a constitutional constraint in the common law, but only that the nature of the courts' function is not unexplored.

The second element has strong and weak elements. To the extent that a common law principle finds no reflection in the written Constitution (the strong element), there is a close resemblance to the UK debate. Such issues could arise in relation to State Constitutions. However, where, as in *Kirk*, the issue is firmly anchored in the language of the written document (the weak element) the consequential limit on legislative power is more readily justified. In *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [11], the High Court discussed the plenitude of State legislative power, subject to the Constitution, and continued in the following terms:

In *Union Steamship* ((1988) 166 CLR 1 at 10), the Court added:

Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... a view which Lord Reid firmly rejected in *Pickin v British Railways Board* ([1974] AC 765 at 782), is another question which we need not explore.

However, *Durham Holdings* was concerned with the alleged fundamental rights of a (corporate) person, not with structural or institutional principles derived from the common law.⁴⁰ In the institutional context of Ch III of the *Constitution*, historical conceptions have long been relied upon to inform our understanding of the essential characteristics of a "court"; see, for example, *Kotsis v*

³⁷ See generally, Goldsworthy J, *Parliamentary Sovereignty* (CUP, 2010) Ch 10. For a critique of the role of the courts in reviewing the validity of legislation, see Waldron J, *Law and Disagreement* (OUP, 1999) Ch 10 "Rights and Judicial Review".

³⁸ Goldsworthy, n 37, pp 268-280.

³⁹ Even so, it has been remarked that the judicial role of legislative review identified by Marshall CJ in *Marbury v Madison* Cranch 137; 5 US 137 (1803) was by no means a foregone conclusion at that time: see Sunstein CR and Vermeule A, "Interpretation and Institutions" (2003) 101 Mich L Rev 885 at 933-935.

⁴⁰ See also Kirby J at [73].



Kotsis,⁴¹ *Waterside Workers' Federation v Alexander*,⁴² and *Forge*,⁴³ all referred to by French CJ in *Totani*.⁴⁴ Those essential characteristics include the impartiality of the judiciary and its independence from the executive arm of government.

One effect of the English "revolution" of 1688-1689 was to subjugate the Executive (in the person of the Crown) to the Parliament, but the Bill of Rights said nothing about the role of the courts in enforcing this constitutional settlement. In England, the view that the courts could declare legislation invalid was seen to be inconsistent with the supremacy of Parliament and was expressly rejected in 1974 in *Pickin v British Railways Board* [1974] AC 765. The possibility of judicial review of the validity of legislation, by reference to unwritten constitutional constraints, was raised by three members of the House of Lords in *Jackson v Attorney-General* [2006] 1 AC 262 at [102] (Lord Steyn), [104]-[107] (Lord Hope), [176] (Lord Carswell); [2005] UKHL 56, but only tentatively and following a confrontation between the judges and the government over a proposed privative provision.⁴⁵ Those dicta have been criticised by Professor Goldsworthy in terms supported by Lord Bingham.⁴⁶

There is an apparent anomaly in identifying a common law constraint on legislative power that will operate as a qualification on the doctrine that Parliament can always vary the common law. It arrogates to the courts a self-conferred power, not necessarily to legislate, but to say that no-one has authority to legislate to particular effect. However, the anomaly is reduced if, in this context, "the common law" is understood to refer "not to a body of technical legal precedent as much as fundamental principles of public law".⁴⁷ The important distinction is drawn between the common law as principles of substantive law and the institutional elements comprising "a unique hybrid of law and political fact"⁴⁸ which "may be relied on to inform [the] text of the *Constitution*".⁴⁹

Judicial treatment of privative clauses has been recognised in the debate about common law constitutionalism as an area which may support the view that the courts have identified limits on legislative power. However, the language of the judgments cuts both ways. The constitutionalists say that the cynicism of the commentators is apt and that neither the conclusions nor the reasoning can truly be justified as a matter of statutory construction. The traditionalists, on the other hand, note that tortured reasoning, invoking principles of statutory construction, reveals a deeply rooted perception that no other approach is legitimate. Nevertheless, the approach adopted in *Hickman*⁵⁰ and later cases in Australia, and in the UK, is difficult to justify on standard principles of statutory interpretation. Although he notes the point, Professor Goldsworthy's refutation of common law constitutionalism does not satisfactorily confront the problem raised by judicial treatment of privative clauses.

(5) Application in Kirk

In *Kirk*, in addressing the effect of the privative clause, the joint judgment held that "it is necessary to take account of the requirements of Ch III of the *Constitution* that there be a body fitting the

⁴¹ *Kotsis v Kotsis* (1970) 122 CLR 69 at 91 (Windeyer J).

⁴² *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 467 (Isaacs and Rich JJ).

⁴³ *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45 at [64] (Gummow, Hayne and Crennan JJ).

⁴⁴ *South Australia v Totani* (2010) 85 ALJR 19 at [1], [59]-[65]; [2010] HCA 39.

⁴⁵ See Aronson, Dyer and Groves, n 31, [17.170]; Rawlings R, "Review, Revenge and Retreat" (2005) 68 MLR 378 esp at 400-401, describing as "remarkable naivety" the conduct of senior judges in discussing with the Executive the form of a proposed privative clause. Of course "judicial" views could also find open expression in the House of Lords debates: at 406.

⁴⁶ Goldsworthy J, *The Sovereignty of Parliament* (OUP, 1999) p 3, cited in Bingham T, *The Rule of Law* (Allen Lane, 2010) pp 167-168. For Australian critical comment, see Winterton G, "Justice Kirby's Coda in Durham" (2002) 13 PLR 165 at 167-168; Gummow, n 27 at 176.

⁴⁷ Gummow, n 27 at 170.

⁴⁸ Winterton G, "Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?" in Sampford and Preston (eds), *Interpreting Constitutions* (1996, Federation Press) p 136.

⁴⁹ See *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141 (Brennan J); Gummow, n 27 at 172.

⁵⁰ *R v Hickman; Ex parte Fox* (1945) 70 CLR 598.



description ‘the Supreme Court of a State’, and the constitutional corollary that “it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description” (*Kirk* at [96]).⁵¹ At federation, the Supreme Courts “had jurisdiction that included such jurisdiction as the Court of Queen’s Bench had in England”, including the “general power to issue a writ [of certiorari] to any inferior court in the State” (at [97]).

The court further noted that statutory privative clauses seeking to cut down the availability of certiorari were known at federation, but had been held by the Privy Council in *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442 not to be effective to protect an order made from “a manifest defect of jurisdiction in the tribunal that made it, or manifest fraud in the party procuring it”. The discussion then moved from writs of certiorari directed to inferior courts to the prerogative writs generally as “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” (*Kirk* at [98]). The supervisory role of the Supreme Courts was identified as a “defining characteristic” of those courts and as one “governed in fundamental respects by principles established as part of the common law of Australia” (at [99]). The joint judgment in *Kirk* continued (at [100]):

This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

Thus, the legislative power of a State, by a suitably worded privative clause, to limit the supervisory jurisdiction, though not remove it, appears to find its source in the pre-federation common law of the colonies as inherited from the UK. In 1900, there was little suggestion of any common law limitation on the power of the legislature to remove part of the supervisory jurisdiction of a Supreme Court; rather, the defining institutional characteristics derived from the common law were given protection by the *Constitution*. Identification of jurisdictional error as the limiting factor requires consideration of the content of that concept, and the degree to which the legislature can define its limits.

(6) A new approach to privative clauses

Aronson, Dyer and Groves have described judicial responses to attempts to limit or exclude judicial review as commonly “a mixture of incredulity, disingenuous disobedience and downright hostility”.⁵² No doubt such language can readily be justified, but it invites attention to the reason for such responses, namely, the keenly felt (if rarely articulated) tension between the fundamental principles referred to above. In the federal arena, a ban on the issue of prohibition could readily be invalidated as inconsistent with s 75(v) of the *Constitution*, although that straightforward course was not the answer supplied by the High Court.

Over the decades during which the High Court has grappled with the scope and effect of statutory privative clauses, constitutional protection for judicial review of Commonwealth administrative action has not been in doubt. Federally, a privative clause could not operate inconsistently with s 75(v). Nevertheless, while acknowledging that constraint, the court has gone to much trouble to allow a clause which in its terms withdrew the jurisdiction to issue constitutional writs, such other operation as was available. An internal conflict was perceived between a provision which conferred limited power and one which purported to deprive the courts of their common law (and constitutionalised) jurisdiction to enforce those limits. The resolution of the conflict has been expressed in different ways, but broadly speaking, three devices of statutory construction were adopted. First and most basically,

⁵¹ Referring to *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45 at [63].

⁵² Aronson, Dyer and Groves, n 31, p 953; Wade and Forsyth, *Administrative Law* (10th ed, OUP, 2009) p 616, refers to the “policy of the courts” as one of “total disobedience to Parliament”.



the solution was to distinguish conditions which were intended to be mandatory and inviolable from those, breach of which did not lead to invalidity. Secondly, and again as an exercise in statutory construction, the privative clause was seen as a device to expand the area within which the repository of the power could validly exercise it.⁵³ Thirdly, in terms which seemed to invoke fundamental principle rather than statutory construction, in *Hickman*, Dixon J focused on the exercise under review asking, was it undertaken in good faith; did it relate to the subject-matter of the legislation; was it reasonably capable of reference to the power conferred?⁵⁴ This language was (at least in relation to the second and third limbs) somewhat opaque, but it is echoed by the second of eight principles identified by Lord Bingham as “ingredients” of the rule of law:⁵⁵

Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.

However, Dixon J also spoke in terms of the need to give effect to “inviolable limitations or restraints”⁵⁶ in applying a privative clause, an exercise in reconciliation of apparently contradictory provisions which bore the hallmarks of statutory construction.⁵⁷

In a more recent case dealing with federal decision-making under the *Migration Act*, *Bodruddaza v Minister for Immigration & Multicultural Affairs* (2007) 228 CLR 651 at [45]-[46]⁵⁸ the High Court said:

Section 75(v) has the special significance identified by Dixon J in *Bank of NSW v The Commonwealth* ((1948) 76 CLR 1). His Honour said that the purpose of the inclusion of s 75(v) was ((1948) 76 CLR 1 at 363) “to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power”.

The reference to restraint of officers of the Commonwealth from exceeding federal power should not be read as limited to the observance of the constitutional limitations upon the executive and legislative power of the Commonwealth. An “essential characteristic of the judicature is that it declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers”.⁵⁹ Section 75(v) furthers that end by controlling jurisdictional error and thus introduced “into the Constitution of the Commonwealth an entrenched minimum provision of judicial review”.⁶⁰

In *Plaintiff S157*,⁶¹ the joint judgment noted a number of “general principles”, including the following:

[98] It is important to emphasise that the difference in understanding what has been decided about privative clauses is real and substantive; it is not some verbal or logical quibble. It is real and

⁵³ *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194 (Brennan J).

⁵⁴ The language also reflects equity’s approach to abuse of powers: see Spigelman JJ, “The Equitable Origins of the Improper Purpose Ground” in Pearson L, Harlow C and Taggart M, *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) Ch 6, p 147ff; *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [124] (Gummow J); *SZFDE v Minister for Immigration & Citizenship* (2007) 232 CLR 189 at [12].

⁵⁵ Bingham, n 46, pp 37, 60.

⁵⁶ *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208 at 248.

⁵⁷ Related issues arise in relation to provisions protecting the state from claims for damages. Where no action could lie for anything done “in pursuance of” a statute, clearly this did not mean validly done in execution of the statute, or no protection would be required. Nor could it be intended to condone malicious abuse of power. In *Little v Commonwealth* (1947) 75 CLR 94, Dixon J held, in terms reflecting those he had used in construing clauses limiting review, that an officer “acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purpose of the provision”.

⁵⁸ Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, Callinan J relevantly agreeing.

⁵⁹ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [43], citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (Brennan J); nor in Australia does the High Court defer to executive views as to the legal limits of the power (see *Enfield* at [39]-[44]); Hayne KM, “Deference – An Australian Perspective” [2011] PL 75.

⁶⁰ *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 at [103].

⁶¹ *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476 at [98]-[99].



substantive because it reflects two fundamental constitutional propositions, both of which the Commonwealth accepts. First, the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.

[99] To understand the three *Hickman* provisos as qualifying the powers of those who make privative clause decisions, rather than qualifying the protection which the privative clause affords, either assumes that the Act on its true construction provides no other jurisdictional limitation on the relevant decision making or other power or it assumes that the repository of the power can decide the limits of its own jurisdiction. For the reasons given earlier, the first assumption is wrong. The alternative assumption would contravene Ch III.

The purpose of the dual dichotomy in [99] is not self-explanatory. The statute may well contain jurisdictional limits going beyond good faith (as the *Migration Act* did), without negating a requirement of good faith as an implied constraint on the exercise of the power. To identify a constraint need not be to say anything about enforceability. If, to permit review, the privative clause must be qualified to permit review, the qualification may have a dual function. If some errors are beyond review, the decision-maker is to that extent immune from correction by a court.

That the Parliament cannot derogate from the *constitutional* powers of the court is, of course, trite law; it needs to be stated only because, in a long line of privative clauses, including that under consideration in *Plaintiff S157*, the Parliament adopted terminology which in terms purported to do precisely that. It has been “read down”, rather than invalidated, as a means of maximising the valid extent of such a provision.

Could not the Parliament validly identify with precision the criteria or conditions which were intended to delimit the boundaries of the power conferred? The answer to this question must be “yes”, so long as the degree of discretion conferred is not unlimited, in which case there may be doubts as to the sense in which the conferral might constitute a law. One common mechanism is to identify the satisfaction of the administrative officer as to specified matters as the criterion of valid exercise of a power. That was the effect of s 36 of the *Migration Act*, at issue in *Plaintiff S157*, the validity of which was not in doubt.

The criterion of the officer’s satisfaction as to identified criteria does not preclude judicial review, an erroneously formed state of satisfaction being open to challenge.⁶² However, the interposition of the officer’s state of satisfaction restricts the scope for judicial review, the court not being entitled to form its own view as to the qualifying criteria. (The constraint was especially stringent in times when reasons were not usual, or were in practice preemptory.)

Whether the analysis applied in federal jurisdiction operates in the same way in State jurisdiction remains to be seen. The rationale for according privative provisions such scope as is constitutionally available operates equally in each sphere.

C. SCOPE OF SUPERVISORY JURISDICTION

(1) Jurisdictional error

To say that the rule of law requires that a court exercising supervisory jurisdiction police the legal validity of judicial and administrative decision-making is to blur a number of points. Similarly, to say that the body cannot determine the scope of its own power is to assume a characteristic of the governing conditions and the effect of non-compliance. Thus, a power can be (and often is) contingent upon the satisfaction of the repository that certain circumstances exist. Generally, being so satisfied will involve identifying certain facts and characterising them in accordance with the relevant rules,

⁶² See *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; *Buck v Bavone* (1976) 135 CLR 110; for the change in approach during the 20th century, see *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 275-276 (Brennan CJ, Toohey, McHugh and Gummow JJ).



principles or standards. In the course of such an exercise, errors may arise; identification and characterisation of the error may be contestable. Further, some errors may lead to invalidity, but others not. The effect may depend on characterisation of the error and legislative indication of the intended consequence.

Errors are commonly categorised by reference to the following exercises: (a) complying with required procedures, (b) identifying applicable legal standards, (c) finding facts and (d) exercising discretionary power. Errors of law can occur in any category, but not all errors are legal errors.

To describe an error as “jurisdictional” is to identify its consequence as invalidity.

In Australia, Kirby J, amongst others, has questioned the validity of the dichotomy between jurisdictional and other errors, even describing it as “chimerical”.⁶³ However, many distinctions made by the law are based on imprecise criteria, or require the application of evaluative judgment, and may thus be both manipulable and conducive to challenge. While the social costs of imprecision are not to be ignored, the use of clearer criteria may involve a significant expansion of the powers of one arm of government (with a correlative contraction of the powers of another) and thus a change in the constitutional framework.⁶⁴

The criterion of “jurisdictional error” is inherently neither exotic nor esoteric.⁶⁵ It is concerned with the limits of power and embodies a principle of legality. Usually, the limits of any particular power will be identified as a matter of statutory construction. How one goes about such an exercise is important and needs to be examined. Whatever special features that exercise may have, deriving from the constitutional significance of the outcome (which will identify the boundary beyond which courts should not venture, the executive being subject only to non-legal controls), the exercise itself lies comfortably within conventional forms of legal analysis.

The traditional grounds of judicial review which may give rise to jurisdictional error are all ways of identifying the limits of a given power. Their use is capable of misleading, unless the purpose they serve is borne clearly in mind. Thus, in administrative law terms, an “irrelevant consideration” is something which the decision-maker is prohibited from taking into account (that is, giving weight to) in the decision-making process. Burchett J once said, that it was permissible to “pick up a red herring, turn it over and examine it, and then put it down”.⁶⁶ It may be necessary to undertake a cursory examination for purposes of identification. The important point is that the purpose of asking whether the decision-maker has taken an irrelevant consideration into account is to determine whether a step has been taken which is prohibited by the power-conferring statute, so as to render the exercise of power invalid. Usually (although not always) considerations are not expressly identified in the statute as impermissible, but such a categorisation may be inferred from the subject-matter, context and purpose of the legislation. Often they are matters upon which it would be arbitrary or capricious to rely.

⁶³ *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [212]; he also noted that it had not been adopted in a judgment of the High Court until 1983 in *R v Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415 at 423 (Murphy J), referred to in *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [133]; although the concept is much older (at [5]).

⁶⁴ In Canada, the Supreme Court’s tripartite approach to standards of review adopted in *Canada v Southam Inc* [1997] 1 SCR 748 and elucidated in *City of Toronto v Canadian Union of Public Employees, Local 79* [2003] 3 SCR 77 was said in *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at [44] to have given rise to undue complexity and disputation and was abandoned in favour of a dual system of correctness or reasonableness. As Endicott has remarked, the balancing exercise required to determine which applies has been retained, with its own invitation to litigation: Endicott T, *Administrative Law* (OUP, 2009) p 322.

⁶⁵ Similar language was used to identify the basis of the constitutionally protected jurisdiction by Laskin CJ in *Crevier v Attorney-General (Que)* [1981] 2 SCR 220 at 236-237; see generally Aronson M, “Jurisdictional Error without the Tears” in Groves M and Lee HP (eds), *Administrative Law in Australia: Fundamentals, Principles and Doctrines* (2005, CUP), Ch 21.

⁶⁶ *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127 at 135; 79 ALR 685 at 693; but cf *Kioa v West* (1985) 159 CLR 550 at 628-629 (Brennan J) referring to “the real risk of prejudice, albeit subconscious”.



(a) Procedural fairness

The conception that procedural fairness is an implied statutory requirement of valid decision-making has a degree of artificiality. At best, the conception depends upon a common law principle of statutory construction; more realistically, it is a principle derived from the common law, having a variable content depending on circumstances and not being beyond statutory variation. Whether there is some basic level of procedural fairness below which legislative reduction is not possible, has yet to be explored, no doubt for the pragmatic reason that a parliament is unlikely to legislate expressly to remove basic elements of fairness.⁶⁷ Courts tend to impose their own (ideal) model of fair judicial procedures on administrative decision-making; how legislation may effectively resist such a tendency is unclear.

Further, there has been a conceptual expansion of the scope of procedural fairness to cover a failure to consider a significant aspect of a claim, where there are facts, either not in dispute or having been found, which could support the relief sought.⁶⁸ Arguably, the preferable approach is to treat such a case as involving a failure to take into account a statutorily mandated consideration, namely the essential elements of the applicant's claim.⁶⁹

So far, there is no support in Australia for the assertion that an "unfair outcome" as such (sometimes called substantive unfairness by way of distinction from procedural unfairness⁷⁰) will permit judicial intervention,⁷¹ although the boundary between procedure and outcome is not a bright line.

Failure to accord procedural fairness is a jurisdictional error; there are no gradations in severity.⁷²

(b) Errors of law

Using a refugee claim as an example, the process of decision-making is likely to involve the following steps:

- (a) findings of primary fact, based on the available material (eg, refusal to accept the claimant's account of the cause of his injuries);
- (b) inferences drawn from, or characterisation of, those facts (eg, that one incident of mistreatment did not constitute persecution);
- (c) identification of the legal standards to be applied (eg, that to be well-founded a fear must be of that which is probable), and
- (d) application of those standards (one instance of torture did not give rise to a well-founded fear of future persecution).

Conventionally, an error of the kind described at (c) will constitute an error of law; errors at (a), (b), and (d) usually will not. Further, an error at (c) has been treated as jurisdictional error in considering an application for a protection visa, which draws on the criteria specified in the Refugees Convention.⁷³ However, to categorise a particular error may be difficult (and frequently impossible,

⁶⁷ The argument that there was a constitutional minimum standard of procedural fairness implicit in s 75(v), which federal legislation could not diminish, was raised but not addressed in *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [8]. In the past it has been accepted that Parliament may extinguish the obligation, although in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [41], Gaudron and Gummow JJ referred to a statute that has not "relevantly (and validly) limited or extinguished any obligation to accord procedural fairness" (emphasis added).

⁶⁸ *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 77 ALJR 1088 at [24]-[25] (Gummow and Callinan JJ).

⁶⁹ *SZIAI v Minister for Immigration & Citizenship* (2009) 83 ALJR 1123 at [25]; [2009] HCA 39; *Minister for Immigration & Citizenship v SZGUR* (2011) 85 ALJR 327 at [23]; [2011] HCA 1 (French CJ and Kiefel J), [74] (Gummow J), Crennan and Heydon JJ agreeing with both judgments.

⁷⁰ For a discussion of UK law, see Endicott, n 64, Ch 8.

⁷¹ *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [35]-[41].

⁷² *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [58]-[59] (Gaudron and Gummow JJ).

⁷³ See *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379.



absent a written statement of reasons). Even with reasons, the decision-maker may state the law correctly, but the outcome of its application may suggest a different standard has actually been applied. Whether a reviewing court should draw such an inference may depend on the degree of scepticism, or the intensity of scrutiny, to which the reasons are subjected.

The distinction between jurisdictional and non-jurisdictional errors of law was supposedly abandoned by the House of Lords in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. However, as Professor Endicott has explained,⁷⁴ the language used by Lord Reid in *Anisminic* (at 174) was conventional.⁷⁵ It was quite similar to that used by Jordan CJ in *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420 and that adopted in *Craig v South Australia* (1995) 184 CLR 163 at 176, which maintained the distinction as part of Australian law. The change in the UK occurred later; in *O'Reilly v Mackman* [1983] 2 AC 237, Lord Diplock recast reference to a tribunal making an error of law “and thereby asking the wrong question”, being a restriction on the class of relevant error, so as to refer to a tribunal mistaking the applicable law as one which “must have asked itself the wrong question, ie one into which it was not empowered to inquire and so had no jurisdiction to determine”,⁷⁶ thus turning the words of restriction into words encompassing the whole of the class.⁷⁷ It has been suggested that more recent cases reveal further weakening in the UK of the distinction between judicial review and an appeal by way of rehearing.⁷⁸

Furthermore, to say that all questions of law must be reviewable by a supervising court neither helps in defining the jurisdiction of a lower court (which can surely be given power to answer questions of law) nor assists in relation to State administrative bodies without creating an element of the doctrine of the separation of powers not yet imposed on the States.

(c) Fact-finding

Generally, fact-finding by an administrative decision-maker is beyond review: it is not the function of a court exercising supervisory jurisdiction to reassess either the primary facts found, or the inferences drawn, by the decision-maker. There are exceptions. If the “objective” existence of the fact (rather than the repository’s belief as to its existence) is a prerequisite to the exercise of the power, it is described as a “jurisdictional fact”.⁷⁹ Statutes are not usually construed as creating factual boundaries to the exercise of power,⁸⁰ unless one describes a state of satisfaction as itself a jurisdictional fact. It has been so described, but is a jurisdictional fact of a special kind; the reviewing court does not itself form the state of satisfaction, nor merely record whether or not the decision-maker formed a view, but rather treats the state of satisfaction as an outcome which must itself be free from reviewable error.

Nor is there necessarily a bright line boundary between findings of fact and law. It has long been understood that the distinction may be manipulable, by characterising issues in different ways.⁸¹ Moreover, a total lack of material to support an inference is an error of law and may be jurisdictional error. Review on that ground is thought to avoid the court weighing the evidence, a function conferred by legislation exclusively on the tribunal. However, even identifying a total absence of supporting material involves an assessment of the inferences which can reasonably be drawn from the whole of the material before the decision-maker.

⁷⁴ Endicott, n 64, pp 301-306; cf Craig P, *Administrative Law* (6th ed, 2008) pp 454-457.

⁷⁵ See also Lord Pearce at 194-195, and Lord Wilberforce at 207.

⁷⁶ Emphasis added. See also *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 696, 702 (Lord Diplock).

⁷⁷ More recent cases in the UK have tended to focus on the requirements of the *Human Rights Act 1998* (UK) and the European Convention on Human Rights, which may affect the scope of judicial review in particular circumstances: see, eg *Manchester City Council v Pinnock* [2010] UKSC 45, esp at [69]-[74] (opinion of the court delivered by Lord Neuberger).

⁷⁸ Groves M, “The Surrogacy Principle and Motherhood Statements” in Pearson et al, n 54, pp 78-79.

⁷⁹ As Jaffe, n 17, p 635, noted, the term “objective” is strictly inapt; the exercise of legal power never depends on objective reality, but on the finding of the administrator or the reviewing court – either can be wrong; the question is whose finding is legally determinative.

⁸⁰ But see Aronson M, “The Resurgence of Jurisdictional Facts” (2001) 12 PLR 17.

⁸¹ Wade HWR, “Anglo-American Administrative Law: More Reflections” (1966) 82 LQR 226 at 246.



Further, to adapt Jordan CJ in *Ex parte Hebburn*, there are facts and facts: some can be determined by reference to precise criteria, others will require evaluative judgment by reference to vague standards. In the latter case, fact-finding is likely to bear comparison with the exercise of a discretionary power,⁸² discussed below.

For the tribunal simply to disbelieve an uncorroborated account of a claimant is usually beyond review, but a different outcome may be possible where a tribunal appears to have ignored unchallenged and credible corroboration, or has manifestly mistaken a critical part of the evidence.⁸³ To intervene in such circumstances may involve a review of the merits of the decision, unless the error is so serious as to be characterised as a failure to perform the statutory function.⁸⁴ Ritualistic invocation of the prohibition on “merit review”, or review of errors in fact-finding, gives limited guidance, unless informed by the purpose underlying the exercise, namely identifying limits on power.

(d) Exercise of discretionary power

An exercise of discretionary power may be reviewed if “manifestly unreasonable”, a stringent test permitting only a low level of scrutiny. There is no flaw in identifying levels of reasonableness; references to “gross”, “manifest”, or “*Wednesbury*” unreasonableness indicate the degree of departure from an outcome expected by application of a given criterion to identified circumstances or conduct.

On occasion, gross or manifest unreasonableness is equated, somewhat inaccurately, with irrationality.⁸⁵ Some people view harsh treatment of asylum-seekers as grossly unreasonable; but if the purpose is to discourage others from coming, such treatment is not irrational. “Irrational” has the same flavour as arbitrary or capricious – something which defies logical explanation by reference to relevant standards. Absent explanation, it suggests a decision has been reached without reference to the legally relevant standards and, by implication, a serious legal error has occurred.⁸⁶ Where reasons are given, the nature of the error may be revealed.

Importantly for judicial review, it is necessary to identify what is being described as “unreasonable”. It may be used to characterise a finding of fact, or an outcome. Professor Jaffe argued that the “reasonableness” of the outcome (and thus the implicit reflection on the character of the decision-maker) is an inappropriate test and that it is preferable to inquire as to the process of reasoning from the available material (or evidence).⁸⁷ That need not (and should not) be a demanding test; an “intuitive leap involving ‘speculation and inference’” may suffice.⁸⁸ Nor, as with review of jury decisions, is a statement of reasons necessary to undertake such an objective assessment of the outcome, for which purpose good faith is to be presumed.

Despite the cogency of Jaffe’s suggestion, it has been said that “[t]o establish some faulty (eg illogical) inference of fact would not disclose an error of law”.⁸⁹ Nevertheless, a decision (as distinct from its supporting reasons) which appears to be truly irrational is unlikely to survive review, if only because it is likely to “indicate that a wrong legal standard was being applied”.⁹⁰

(2) Recent expressions of disquiet

The traditional formulation of grounds for review results in overlapping categories and unclear distinctions. When the Commonwealth attempted to limit the scope of judicial review of immigration

⁸² Compare *Goodman v Windeyer* (1980) 144 CLR 490 at 502 (Gibbs J).

⁸³ *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [53]-[55] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁸⁴ To characterise such an error as procedural unfairness seems unnecessary: cf *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 77 ALJR 1088 at [24]-[25]; see also text above accompanying n 69.

⁸⁵ The majority in *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at [41]-[42], either reasoned erroneously in this respect, or equated “irrational” with “patently unreasonable”.

⁸⁶ *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353 at 360 (Dixon J).

⁸⁷ Jaffe, n 17, p 596.

⁸⁸ Jaffe, n 17, p 599.

⁸⁹ *R v District Court; Ex parte White* (1966) 116 CLR 644 at 654 (Menzies J).

⁹⁰ *R v District Court; Ex parte White* (1966) 116 CLR 644 at 654.



decisions in the Federal Court, by selecting some and excluding other grounds as tabulated in the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the exercise failed.⁹¹ Indeed, two members of the High Court held that the attempt to limit the grounds was constitutionally misconceived, because, in effect, it misunderstood the nature of the supervisory jurisdiction.⁹² Comments in *Kirk* as to the incompleteness of the list of grounds which may constitute jurisdictional error, as articulated in *Craig*, suggests that the present somewhat mechanical exercise may soon be refined.

Professor Zines has inferred from the court's approval in *Kirk* of passages from Jaffe, a move towards reliance on any kind of error of sufficient gravity.⁹³ The gravity of the error may well be a significant factor, as reflected in differing levels of scrutiny. However, to generalise such a criterion would be to replace a reasonably well-understood, if imprecise, test with one of greater imprecision and uncertain scope. That the court was not supporting such a view is apparent from the judgment of the whole court in *Minister for Immigration & Citizenship v SZJSS* (2010) 85 ALJR 306 at [23]-[35]; [2010] HCA 48, where conventional language was explored. The seriousness or gravity of the error may better be understood as a superimposed constraint on intervention, rather than a mechanism for identifying the nature of the error.

Jaffe suggested that intervention tended to turn on what the court perceived as “an exceptional need for control and no statutory mode of review”. He also suggested that jurisdictional facts were likely to be those fixing relationships identified by Parliament in more precise terms than those fixing the “standards for exercise of power”, the expression of which “are apt to be vague and general”.⁹⁴ In referring to cases which seemed to turn on the gravity of the error, he accepted the factual elements as jurisdictional because that could be seen to be the inferred intention of the legislature.⁹⁵

There will be situations in which the apparent or stated intention of the legislature is to limit review to certain gross errors, and in which the notion of jurisdiction, familiar as it is to judges and lawyers, will be as good as any to express the scope of review. There are other situations, too – organizational or procedural mistakes – in which the lapse is so serious that judges will want a concept which enables them to declare the order “void”. If it is understood that the word “jurisdiction” is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified.⁹⁶

It should be noted, however, that this discussion was not directed to a distinction between jurisdictional and non-jurisdictional errors of law. Jaffe, in discussing early English authorities, focused, in the pages cited in *Kirk*,⁹⁷ on a case reviewing a decision of justices of the peace, authorising a road authority to take gravel from enclosed lands, not being a private park: *R v Bradford* [1908] 1 KB 365. The reviewing court had held that the characterisation of the land was a jurisdictional fact. His persuasive commentary must be understood in its context.

Two cases from other jurisdictions exemplify current levels of disquiet as to the established categories of reviewable error.

The first, *Canada (Citizenship & Immigration) v Khosa* [2009] 1 SCR 339 is a recent decision of the Canadian Supreme Court. Mr Khosa, an Indian citizen resident in Canada, was convicted of causing death by criminal negligence, while street racing in a motor vehicle. An order was made for his removal to India. An immigration tribunal had power to revoke the order if satisfied that “sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances

⁹¹ See *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [76]-[85] (McHugh, Gummow and Hayne JJ).

⁹² See *Abebe v Minister for Immigration & Multicultural Affairs* (1999) 197 CLR 510 at [139]-[143] (Gummow and Hayne JJ, dissenting).

⁹³ Zines, n 3, p 3; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [64]. See also Jaffe and Henderson, n 22.

⁹⁴ Jaffe L, “Judicial Review: Constitutional and Jurisdictional Fact” (1957) 70 Harv L Rev 953 at 962.

⁹⁵ Jaffe, n 94 at 963.

⁹⁶ See also Jaffe, n 17, p 631.

⁹⁷ Jaffe, n 94 at 962-963.



of the case”.⁹⁸ It declined to exercise that power, but its decision was reversed by a majority judgment in the Federal Court of Appeal. The Supreme Court allowed the further appeal and restored the decision of the tribunal. As explained in the joint judgment,⁹⁹ “the Federal Court of Appeal majority felt empowered to retry the case in important respects, even though the issues to be resolved had to do with immigration policy, not law” (at [17]). The judgment continued: “Clearly, the majority felt that the [tribunal’s] disposition was unjust to Khosa. However, Parliament saw fit to confide that particular decision to the [tribunal], not to the judges.”

The joint judgment held that the review was to be conducted according to a “reasonableness standard”, taking into account the presence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal in dealing with immigration policy (at [54]-[58]). In applying that standard, Binnie J continued (at [59]):

Reasonableness is a single standard that takes its colour from the context. ... Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law”.... There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

There are a number of respects in which this reasoning would not apply in Australia. Indeed, in part it is controversial in Canada. For example, in *Khosa* itself, Rothstein J¹⁰⁰ held that the common law “standards of review” approach was inconsistent with a statutory provision prescribing the available grounds of review.¹⁰¹ He also disagreed with the way in which a privative clause was “treated simply as one of several factors in the calibration of deference (standard of review)” (at [92]). After noting that the decision of the tribunal turned upon the weighing of a number of factors, Rothstein J concluded (at [137]):

The actual application of [these] factors to the case before it and its exercise of discretion is fact-based. I do not find that the factual findings of the [tribunal] were perverse or capricious or were made without regard to the evidence.

This approach is closer to that which might be expected in Australia. By contrast, the majority appeared to envisage that the tribunal decision would be reviewed in all relevant respects by reference to a reasonableness standard, which, in effect, provided a low level of scrutiny. Although the distinction between errors with respect to law and errors with respect to factual assessment is not abandoned, it clearly has a diminished role as part of a wider process of review, based on abstract principles. Such an approach is likely to invite judicial review in circumstances where it might not be contemplated in Australia. Further, the use of abstract principles as the basis of review is likely both to lower the restraint which operates against intervention and to increase the uncertainty as to the proper outcome.

In the UK, there has also been unease as to the value of a rigid fact/law distinction. In *E v Secretary of State for the Home Department* [2004] QB 1044,¹⁰² the Court of Appeal sought to identify circumstances when review for factual error would be appropriate on an appeal in point of law only. The case involved a refugee claim, but the principles were stated without reference to the circumstances of the applicant (or of the applicant in a companion case decided at the same time). After referring to remarks of Lord Slynn in *R v Criminal Injuries Compensation Board; Ex parte A* [1999] 2 AC 330 (*CICB*), the court said (at [63], [66]):

⁹⁸ *Immigration and Refugee Protection Act*, SC 2001, c 27, s 67(1)(c).

⁹⁹ Judgment delivered by Binnie J (McLachlin CJ, LeBel, Abella and Charron JJ concurring).

¹⁰⁰ With whom Deschamps J agreed, separately concurring in the outcome.

¹⁰¹ Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, which is similar to *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5.

¹⁰² Judgment of the court (Lord Phillips MR, Mantell and Carnwath LJ), delivered by Carnwath LJ.



In our view, the [CICB] case ... points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between “ignorance of fact” and “unfairness” as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that “objectively” there was unfairness ...

In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the [CICB] case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been “established”, in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal’s reasoning.

The principles identified in *CICB* were noted by the majority in the High Court in *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [35]-[41], but their application in Australia did not need to be determined. Nevertheless, an approach very similar to that approved in *E* was adopted by Gummow and Callinan JJ in *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 77 ALJR 1088 at [24]-[25], in terms accepted by the whole court in *SZJSS*.¹⁰³ Their Honours said that a failure to address a clearly articulated claim based on accepted or uncontested facts could amount to a breach of procedural fairness. However, as that language might be thought to encapsulate the primary statutory function of the tribunal,¹⁰⁴ a failure to exercise jurisdiction could be found to arise without resort to procedural unfairness.¹⁰⁵

In the UK, cases where *E* might avail an applicant have proved rare. There has been a tendency to weaken the conditions and expand the potential for intervention. Thus, the Court of Appeal has intervened in those troubling cases where claimants have failed to attend a hearing through the incompetence of their lawyers.¹⁰⁶

In the present context, the issue for the future is not the tightly constrained intrusion upon factual findings, in the name of procedural fairness, but the willingness of courts to expand the grounds of review under the now constitutionally protected supervisory jurisdiction.

(3) Developing a functional approach

(a) Underlying principles

The foregoing suggests a number of concerns as to the current scope and operation of particular grounds of judicial review. Their resolution requires consideration of the functions of judicial review in their constitutional context. Judicial review is a mechanism for rendering accountable decision-making of other bodies with limited powers. It is not the sole mechanism; nor are its values the sole set of relevant values. Recognising that the purpose of judicial review is not to provide a panacea for individual injustice,¹⁰⁷ nor to ensure that best, or even efficient, administrative practices are followed,¹⁰⁸ it is necessary also to accept that judicial review may actually undermine other forms of accountability and control. As Professor Mashaw has demonstrated, judicial values, with their focus

¹⁰³ *Minister for Immigration and Citizenship v SZJSS* (2010) 85 ALJR 306 at [35]; [2010] HCA 48.

¹⁰⁴ *Migration Act 1958* (Cth), s 414.

¹⁰⁵ See n 69.

¹⁰⁶ *FP (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 13 at [32] (Sedley LJ); in Australia, the High Court has upheld intervention in a case of fraud on the part of an agent of the claimants, but suggested a different statutory analysis might apply in a case of mere carelessness: *SZFDE v Minister for Immigration & Citizenship* (2007) 232 CLR 189 at [53].

¹⁰⁷ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 (Brennan J).

¹⁰⁸ *NAIS v Minister for Immigration & Multicultural Affairs* (2005) 228 CLR 470 at [14] (Gummow J), [137] (Hayne J) (both in dissent).



on individual claimants and judicial procedures, may be inconsistent with good administrative practice.¹⁰⁹ That is not to reject the role of the courts in their supervisory jurisdiction, but rather to argue in favour of a restrained approach to pressures for an expanded role. If that is true in relation to judicial review generally, it must weigh in favour of a similar approach in identifying the constitutionally protected jurisdiction.

These aspects of the constitutional context entail a view of judicial review which precludes the identification of conceptually definitive boundaries and precise tests of the limits of its functions. Identification of boundaries must allow for tensions between judicial and other values; resolution of such tensions requires courts to be alert to their existence. Judicial myopia could lead to undue expansion of judicial review. In any event, the search for definitive and semantically precise tests is doomed to fail.

The limits of a protected supervisory jurisdiction, beyond the powers of the legislature to affect, require careful attention in order to maintain the political legitimacy of the concept. Any limitation on legislative power not clearly located in a written constitution adopted by the people tends to trench upon the process of democratic self-government. To the extent that the courts can identify applicable principles beyond variation by the legislature, the function of the courts is inconsistent with a representative democracy, in which the ultimate source of power is the citizenry. Moreover, the greater the extent to which non-judicial values are relevant, the less the practical justification for vesting such power in the courts.

That concern will be exacerbated if the limits identified by the courts are not variable by an amendment to the *Constitution* by a referendum, in accordance with s 128.¹¹⁰ On the other hand, John Hart Ely, no supporter of judicially identified fundamental constitutional values, suggested that there is no equivalent affront to democracy in judicial development of the rules and institutions required to police “the mechanisms of decision”.¹¹¹ On that approach, the supervisory jurisdiction should seek to avoid protection of substantive rights.

Identifying the limits of the protected jurisdiction must also take into account a number of legal factors, including the following.

First, a jurisdiction defined by reference to relief encompassed by the old prerogative writs extends to most powers conferred on the many arms of the executive; it also extends to all independent tribunals and all other courts not themselves enjoying “unlimited” jurisdiction.¹¹² Its constitutional justification will vary with its functions. For example, judicial control of administrative decision-making can be justified by reference to the separation of powers doctrine, in a way which cannot apply to the supervision of inferior courts. Moreover, to require that State Supreme Courts must always have the final say as to the interpretation of the law may be to impose on the State constitutional structures an aspect of the separation of powers not yet identified as one binding the States.

Secondly, it becomes necessary to identify the circumstances in which the legislature can divide the Supreme Court’s jurisdiction and hive off part to another body. As noted above, in New South Wales judicial review of decisions made under a wide range of environmental and planning laws is

¹⁰⁹ Mashaw JL, “Judicial review of administrative action: Reflections on balancing political managerial and legal accountability” (2005) 1 *Revista Direito GV Especial* 1 at 153-170.

¹¹⁰ In casting doubt on the search for fundamental common law rights, Gummow J has asked whether they are also beyond constitutional amendment: Gummow, n 27 at 176 (third point). The power to amend the Indian Constitution has been held not to extend to changes destructive of its basic structure: see n 17.

¹¹¹ Ely JH, *Democracy and Distrust: A Theory of Judicial Review* (Camb, Harvard UP, 1980) p 181. Prof Jeremy Waldron is critical of the distinction in Waldron J, “A Right-Based Critique of Constitutional Rights” (1993) 13 *Oxford J Leg Studies* 18 at 39.

¹¹² It has become a curiosity that the writs and, it appears, their modern statutory replacements, do not extend to a single judge of the Royal Courts of Justice in the UK or the State Supreme Courts: see *In re Racial Communications Ltd* [1981] AC 374. The assumption that a single judge of the Supreme Court (or indeed the Court of Appeal) enjoys unlimited jurisdiction is clearly fallacious.



vested in the Land and Environment Court to the exclusion of the Supreme Court.¹¹³ Such a provision may be valid because there is a full right of appeal from the Land and Environment Court to the Court of Appeal,¹¹⁴ but the existence of a right of appeal from a single judge of the Industrial Court in *Kirk* did not affect the conclusion reached in the High Court. Because the supervisory jurisdiction does not extend to review of findings of non-jurisdictional facts by the original decision-maker, the interposition of a merit review tribunal between the original decision-maker and the court should not invite constitutional doubt so long as the tribunal's decision is reviewable for jurisdictional error on its part. In any event, review of first instance administrative decisions is quite a different matter from controlling the exercise by a superior court of its statutory criminal jurisdiction. On the other hand, it is reasonably clear that provisions such as s 69 of the *Supreme Court Act 1970* (NSW), which repeal the writs but maintain the same powers and relief in the Supreme Court, do not offend the constitutional limitation.¹¹⁵ (Differing views have been expressed as to whether such provisions may expand the scope of the supervisory jurisdiction.¹¹⁶)

Thirdly, privatising governmental functions will take on a new constitutional significance in so far as it removes decision-making from the protected supervisory jurisdiction.

Fourthly, variation in function also denies the availability of simple over-arching tests. The absence of any common law right of appeal may be the result of institutional factors, but where the legislature declines to confer a right of appeal, or insists on a highly qualified right, there is no constitutional imperative to subvert that result by expanding the scope of the supervisory jurisdiction. Further, there will usually be little reason to presume that a conferral of judicial power does not carry with it the authority (or jurisdiction) to determine both facts and legal principles to be applied by that tribunal, especially where there is only a limited (or no) right of appeal and a privative clause.

Fifthly and critically, it is necessary to determine the approach the courts should now take to unresolved issues as to the scope of jurisdictional error, bearing in mind that an expansive approach will not merely expand the role of the courts at the expense of the executive, but will do so in a manner which will be beyond correction by the legislature.

Bearing this context in mind, the underlying principles of judicial review may be broadly identified as involving the legal limits of authority, rationality, reasonableness and fairness. These in combination may be seen to identify a principle of legality, breach of which will be presumed to result in a form of ultra vires, or jurisdictional error. In this context, the limit of legal authority (sometimes referred to as narrow ultra vires) refers to the boundary of the power as identified by statute: it requires no further elaboration.

Some other principles are not in need of reconsideration. Thus, where Parliament confers executive power on an officer or tribunal, it is understood to intend that the repository is to determine the facts and take into account relevant and permissible considerations. Absent an appeal by way of rehearing, it intends the repository's decision on matters of fact, and weighing the applicable considerations, to be final. This reflects an element of the separation of powers doctrine, which operates in both federal and State jurisdictions. That may mean that no-one else (and particularly not the court exercising supervisory jurisdiction) can validly determine those matters. But it need not mean that there can be no review for factual error, nor that the weighing exercise is beyond review. Those elements derive from the common law principles governing judicial review, the boundaries of which are, however, open to realignment by the courts.

(b) Distinguishing forms of decision-making

In *Craig v South Australia* (1995) 184 CLR 163 at 176, the High Court said:

¹¹³ *Land and Environment Court Act 1979* (NSW), s 71.

¹¹⁴ Spigelman, n 3 at 91; *Land and Environment Court Act 1979* (NSW), s 58.

¹¹⁵ See, eg *Supreme Court Rules 1987* (SA), r 98, discussed below in *Craig v South Australia* (1995) 184 CLR 163.

¹¹⁶ See Handley JA (Mason P agreeing), Spigelman CJ contra, in *Solution 6 Holdings Ltd v Industrial Relations Commission* (NSW) (2004) 60 NSWLR 558 at [134]-[135] (Spigelman CJ), [160] (Mason P), [184] (Handley JA).

In considering what constitutes “jurisdictional error”, it is necessary to distinguish between, on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ.

The reason for the distinction was not fully explained; it appears to have turned on the power to determine issues of law. The court stated (at 179):

At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law ... The position is, of course, a fortiori in this country where constitutional limitations arising from the doctrine of the separation of judicial and executive powers may preclude legislative competence to confer judicial power upon an administrative tribunal ...

In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine.

The first sentence in this passage suggests that an administrative tribunal may have power conferred upon it to determine questions of law; the qualification in the second sentence must relate to federal tribunals, not State bodies. It is uncertain whether it was being suggested that authoritative determination of the law was necessarily an exercise of judicial power. The judgment also displayed some reticence as to what administrative bodies might be subject to certiorari (at 174-175).

Similar comments were made in *Kirk* (at [67]-[69]). Further, commenting on the language used in *Craig*, the reasoning in *Kirk* continued:

To observe that inferior courts generally have authority to decide questions of law “authoritatively” is not to conclude that the determination of any particular question is not open to review by a superior court ... The “authoritative” decisions of inferior courts are those decisions which are not attended by jurisdictional error. That directs attention to what is meant in this context by “jurisdiction” and “jurisdictional”. It suggests that the observation that inferior courts have authority to decide questions of law “authoritatively” is at least unhelpful.

The present relevance of the distinction between jurisdictional and non-jurisdictional errors of law is that only the former cannot be immunised from judicial review. The further point made in *Craig* was that one would be more likely to infer a statutory intention to allow a court to determine questions of law as part of its jurisdiction (ie, “authoritatively”), whereas with a tribunal, which may not be composed of lawyers, the final determination of all legal issues is more likely to be intended to rest with a reviewing court. The scope for jurisdictional error is thus likely to be greater in the case of an administrative decision-maker, as a matter of statutory construction. Whether this reasoning has now been discarded is unclear; it is not self-evidently wrong. What is practically important is willingness (or reluctance) to identify particular legal issues as “jurisdictional”.

To speak of “jurisdiction” in relation to administrative functions may be inapt, but need not be abandoned for that reason alone. What the expression should not be allowed to do, however, is to obscure the differences between supervision of administrative action and supervision of courts and independent tribunals exercising judicial (or quasi-judicial) power.

(c) Functions, powers and levels of scrutiny

The fact that judicial review adopts distinctions that are imprecise and hard to apply with certainty in novel cases, or are hard to justify in terms of just outcomes, does not compel a rethinking of its basic elements. However, it invites attention to underlying principles in order to see if a level of refinement is possible to accommodate new and changing social, governmental and legal environments.

As noted above, administrative decision-making covers a wide range of activities by bodies with differing constitutions, expertise and powers. Some administrative agencies are responsible for highly rule-bound exercises, such as the determination of individual entitlement to social welfare benefits, drivers’ licences or visas (other than protection visas); others undertake subjective evaluations involving application of matters of “opinion or policy or taste”,¹¹⁷ such as the grant of planning

¹¹⁷ *Buck v Bavone* (1976) 135 CLR 110 at 118-119 (Gibbs J).



permission subject to conditions; others again may affect the interests of groups rather than individuals directly, such as in the allocation of government funds. There are specialist tribunals which determine disputes entirely between private parties; others only handle disputes between or between government agencies and individuals.

It is unhelpful to seek to state the bases for judicial review in terms which do not take account of the function being exercised by the initial decision-maker. Function is also relevant to identifying the appropriate degree or level of scrutiny to be exercised by the reviewing court.¹¹⁸

Powers can also be categorised in a range of different ways; what follows is not an attempt to catalogue the range, but to illustrate the need to recognise the value of a functional approach in respect of powers.

One obvious distinction is between discretionary and obligatory powers, the latter being powers which must be exercised if the prescribed preconditions are met. As Gummow J noted in *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [124], *Wednesbury* unreasonableness is a test of improper exercise of a discretionary power.¹¹⁹ However, that distinction may in practice be less important than where on a scale of evaluative judgment the criterion of operation lies. Thus an obligatory power subject to an imprecise condition of engagement may attract a similarly low level of scrutiny on review as a truly discretionary power. The criterion of operation is, however, likely to be of great importance. Thus, an obligation to pay a benefit to an unmarried parent may attract intense scrutiny as to whether an applicant was correctly found not to be qualified, by contrast with the exercise of a power to approve a development application with respect to land, depending on its consequences for the visual amenity of the neighbourhood.

In Canada, significant weight is given to characteristics of the initial decision-maker, and in particular, whether it is likely to have acquired significant expertise in its area of operation, especially if that expertise is not likely to be shared by the reviewing court. Thus a low level of scrutiny may be appropriate in relation to a body undertaking industrial arbitration, where the tribunal is comprised of people with expertise in an industry or in industrial dispute resolution.

Even in a country without a bill of rights, heightened scrutiny is appropriate where the power is capable of affecting the fundamental human rights or freedoms of the individual, whether by interfering with an existing freedom, or by denying a benefit that would otherwise be available, as compared with the exercise of routine regulatory powers. Such an approach would reflect the reluctance to adopt an interpretation of a statute which would diminish fundamental human rights, if an alternative reading is open.

The value of a functional approach is that it allows for varying levels of scrutiny to be adopted with greater transparency. Identifying functions and characterising powers are tools to allow consideration of the correct approach in particular cases and to determine the degree of scrutiny which should be applied to the decision-making process and the outcome. Although Australian judgments rarely refer expressly to degrees or levels of scrutiny, the concept, unlike the related concept of deference, is not alien jurisprudence. Thus, in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, the High Court approved an approach to the reasons of an administrative tribunal which imposed a non-intrusive standard of scrutiny, rather than one whereby reasons for decision are “construed minutely and finely with an eye keenly attuned to the perception of error”.¹²⁰ Similarly, a test of “manifest unreasonableness” invokes a low level of scrutiny, thus according a greater range of permissible outcome to the decision-maker. In *Buck v Bavone* (1976) 135 CLR 110, Gibbs J explained the greater difficulty involved in challenging a decision based on policy, taste or other open-ended criteria.

¹¹⁸ See Aronson, n 65, p 342.

¹¹⁹ Discretion is defined in this context as the freedom “to make a choice among possible courses of action or inaction”: Davis KC, *Discretionary Justice: A Preliminary Inquiry* (U of Ill Press, 1969) p 4.

¹²⁰ Quoting the Full Court of the Federal Court (Neaves, French and Cooper JJ) in *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.



What is required is not a rigid, formulaic approach, but one which allows broad categories of functions and powers to be addressed with particular levels of scrutiny, on a scale from low to moderate to intense.

D. CONCLUSIONS

Recognition that a State legislature cannot validly remove the supervisory jurisdiction of its Supreme Court with respect to “jurisdictional error” committed by a court of limited jurisdiction invites consideration of a number of further issues.

First, it is not expressly stated whether the scope of that concept is the same in its constitutional guise, as when performing its traditional function as a ground of judicial review. (The possibility of variable standards has been noted.¹²¹)

Secondly, if Parliament confers on a State tribunal power to construe the law, legal error within jurisdiction can be removed from review by a privative clause. In principle, in conferring power, Parliament can identify the legal limits, either broadly or narrowly. The broader the terms of the conferral, the more limited the opportunity for judicial review. That proposition may be subject to limits derived from the unwritten constitutional framework within which judicial review operates. This framework may influence how the courts construe attempts to expand the boundaries of validly exercised power, or limit review, as may be seen in the case-law with respect to privative clauses. The constitutional framework may also contain absolute limitations, regardless of legislative intent. The nature of any absolute limits has not yet been fully explored: it will probably be contingent in a number of respects. However, there may be a point at which an attempt to confer power without enforceable limitations will cease to be a valid law. There may also be a point beyond which procedural protections cannot be reduced. One of the most important imponderables is the extent to which and the manner in which a State Parliament can validly expand the scope of decision-making power and restrict judicial intervention. This is not itself a new question, but more useful answers may only be forthcoming when legislative drafters abandon reliance on traditional attempts to oust the supervisory jurisdiction by expansive privative clauses and turn their attention to identifying the essential conditions for the valid exercise of statutory powers, having regard to function and context.

Thirdly, it may be possible that part of the supervisory jurisdiction can be transferred to a court of limited jurisdiction, so long as the Supreme Court retains (by appeal or review) control over that court’s decisions. The limits of that structural issue remain to be explored in the light of *Kirk* and *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

In some respects, *Kirk* was an unfortunate vehicle for determining the scope of the principles which it articulated. Judicial review for “jurisdictional error” can appear to be an odd concept in such a case. Both the trial judge and the Full Bench had jurisdiction to determine their own jurisdiction; thus their errors should be classified as errors within jurisdiction. However, as the Canadians would express it, such decisions must be reviewed according to a “correctness” standard: in other words, a court exercising supervisory jurisdiction may intervene unless the court below reached the correct result, as determined by the reviewing court.

However, there is a separate question as to what principle required review of the trial decision, where an appeal lay to the Full Bench. That question was not addressed in *Kirk*. If it had been, it might have been necessary to decide whether the Full Bench committed a jurisdictional error in refusing leave to appeal (assuming the error was one which required leave). It might also have raised an issue as to whether the Full Bench decision should have been invalidated on the basis of an issue not raised for its consideration (or that of the Court of Appeal).

The question of defining jurisdictional error may be seen to have two limbs. One requires reference to the power-conferring statute to identify the subject matter, scope and purpose of the power. The second is to identify the essential common law features which impose legal constraints on the exercise of the power in specific circumstances. The first approach is conventional; the second is

¹²¹ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [20]-[24] (Gaudron and Gummow JJ); see also *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [146] (Gummow J).



routine, but rarely recognised expressly as an application of the principles derived from the unwritten part of the constitution. To recognise the nature of the exercise may assist to reduce the mystery and uncertainty attending the identification of jurisdictional error.

It should, however, be recognised that not all principles of good decision-making, even apparently basic principles expressed in anodyne terms, are conditions of legal validity of administrative decisions. When the Canadian Supreme Court spoke in *Khosa* of “principles of justification, transparency and intelligibility” it implied an obligation to provide reasons. In Australia, the common law imposes such an obligation on judges,¹²² but not on administrative officers.¹²³ It therefore requires a distinction to be drawn between exercises of administrative and judicial power in State jurisdiction.¹²⁴ It should not be assumed that the same values apply to each arm of government, nor that invalidity follows in the same way in respect of breaches of similar obligations. For example, breach of a duty to give reasons for a decision may attract an order in the nature of mandamus, but not one quashing the decision.¹²⁵

There are risks in expanding the (now constitutionally entrenched) scope of judicial review without fully considering the countervailing considerations which do not rely upon judicial decision-making as the ideal model in all circumstances. Further, no sufficient reason is provided for expansion merely by decrying the criteria by which distinctions are currently made, such as judicial/administrative, fact/law, power/merit, error of law/jurisdictional error. The search for precise, defensible criteria is likely to see logic triumph over experience, where experience is based upon imprecise values and abstract principles.

Greater intellectual consistency and coherence may be achieved by maintaining the conventional grounds of review, while recognising that decisions can legitimately be subjected to varying intensity of scrutiny, depending on the nature of the decision-maker, the function engaged and the power being exercised. The current grounds of review enjoy statutory recognition in many jurisdictions, but should be applied according to underlying principles and not in a formalistic way. Much judicial review is carried out by courts, tribunals and judicial officers who do not specialise in such work, who cannot be expected to apply broadly stated principles instinctively and who work under pressures which preclude the luxury of deriving rules afresh on each occasion.

Judicial unease about the performance of important courts and tribunals, which has allowed trust to be impaired, should not lead to a level of judicial intervention which may itself give rise to concerns about the unaccountability of judicial power.

¹²² *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257-258 (Kirby P), 268-271 (Mahoney JA), 277-281 (McHugh JA).

¹²³ *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656.

¹²⁴ *Carlson v The King* (1947) 64 WN (NSW) 65 at 66 (Jordan CJ); *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at [20]-[23] (Handley JA), [103]-[109].

¹²⁵ *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at [41] (Gleeson CJ, Gummow and Heydon JJ).

