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*JUDICIAL REVIEW IN STATE JURISDICTION*

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**Introduction**

One day someone will study the history of the publication of textbooks dealing with Australian law. I suspect that there will be interesting inferences to be drawn from such a history: the publication of a first text on a particular area of law is likely to reflect a growing level of practical importance, which may, in some areas, actually be encouraged and directed by the new publication. When I studied administrative law at Adelaide University we had no Australian textbook.<sup>1</sup>

That position has long since changed, but when I moved to the Court in 2005 I think it not unfair to say that there was a relatively small group of practitioners who were comfortable with seeking judicial review in state jurisdiction. That was not because there was anything particularly distinctive about state judicial review, but was rather a reflection of the fact that most judicial review was undertaken in federal courts and, largely as a result of subject-matter specialisation, practitioners who were at home in federal courts rarely appeared in state courts. One consequence was that much of the development of administrative law which occurred from about 1990 was unfamiliar territory both for those appearing and those dealing with cases in the State Supreme Court.

Interestingly, an important exception to that proposition, was to be found in an earlier generation who knew their judicial review principles, not from cases involving the *Migration Act* or social security, but from cases involving industrial relations and, to an extent, tax. Former Judge of Appeal Ken Handley was an example of a judge

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<sup>1</sup> There was such a text, but I do not recall it being prescribed. Professor W Friedmann, then at the University of Melbourne, had published a modest 112 page text in 1950, *Principles of Australian Administrative Law* (Melb UP). The second edition, co-authored with Professor David Benjafield and published in 1962, was more than double in size. The third edition, co-authored by Professor Benjafield and Professor Harry Whitmore, published in 1966, was over 350 pages.

who brought to the State jurisdiction a deep knowledge of administrative law principles established in industrial and tax cases.

In any event, that lesson has largely been appreciated and absorbed. For example, there is now a far greater appreciation of the extent to which principles of administrative law have been developed in cases involving refugee applications under the *Migration Act 1958* (Cth) and the need to stay abreast of that jurisprudence.<sup>2</sup>

Underlying this history is an institutional element of some importance. As we know, an important trigger for the development of Australian administrative law was the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). New South Wales did not follow the Commonwealth example and still does not have equivalent legislation. However, the existence of that seminal legislation provided another development of administrative law which was seen to be irrelevant in the State jurisdiction.

Since Federation, there has, of course, been the constitutionally entrenched jurisdiction providing judicial review of actions of Commonwealth officers, sourced in s 75(v) of the Constitution. Case law dealing with the constitutionally entrenched jurisdiction has always been relevant in state courts, subject to its particular significance as a constitutional provision which is, perhaps, diminished by the constitutional protection now accorded to the State supervisory jurisdiction.<sup>3</sup> Section 75(v) was a bare conferral of jurisdiction, without a statement of procedural elements, grounds of review or any of the other trappings of a statute like the ADJR Act. The content of the constitutional review had to be derived from the general law. The same is true in the State jurisdiction.

Against that background, I propose to address two issues, both topical but both of which have, to a degree, slipped under the radar. They are, first, the exercise of the supervisory jurisdiction with respect to criminal proceedings and, secondly, problems in characterising grounds of review. The term “supervisory jurisdiction” is preferable

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<sup>2</sup> Curiously, tax cases appear still to be a genre set apart: see G Kennett and D Thomas, “Constitutional and Administrative Law Aspects of Tax” in N Williams, *Key Issues in Judicial Review* (2014, Federation Press), Ch 12.

<sup>3</sup> *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1.

to “judicial review jurisdiction” because the latter is often thought of as referring to judicial review of administrative action. By contrast, the supervisory jurisdiction extends to the control of excess or want of jurisdiction on the part of any court or tribunal, judicial or administrative or something in between.

### **Criminal proceedings and the *Supreme Court Act*, s 69**

Let me turn, then, to what is widely treated as the source of the Supreme Court’s supervisory jurisdiction, namely s 69 of the *Supreme Court Act 1970* (NSW).<sup>4</sup>

#### **69 Proceedings in lieu of writs**

- (1) Where formerly:
  - (a) the Court had jurisdiction to grant any relief or remedy or do any other thing by way of writ, whether of prohibition, mandamus, certiorari or of any other description, or
  - ...then, after the commencement of this Act:
  - (c) the Court shall continue to have jurisdiction to grant that relief or remedy or to do that thing; but
  - (d) shall not issue any such writ, and
  - (e) shall grant that relief or remedy or do that thing by way of judgment or order under this Act and the rules, and
  - (f) proceedings for that relief or remedy or for the doing of that thing shall be in accordance with this Act and the rules.
- (2) Subject to the rules, this section does not apply to:
  - (a) the writ of habeas corpus ad subjiciendum,
  - ....
- (3) It is declared that the jurisdiction of the Court to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error

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<sup>4</sup> The less used power to make an order that a person fulfil a duty, a form of statutory mandamus identified in s 65, may be put to one side.

of law that appears on the face of the record of the proceedings.

- (4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination.
- (5) Subsections (3) and (4) do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those subsections, effective to prevent the Court from exercising its powers to quash or otherwise review a decision.

While it is commonplace and not, I hope, inaccurate to refer to proceedings “brought under s 69”, s 69 neither confers jurisdiction on the Supreme Court, nor constitutes a statement of pre-existing jurisdiction. It is, in truth, no more than a procedural liberalisation, not unimportant in that regard, but importantly not the source of jurisdiction. That appears explicitly from paragraphs (c)-(f) of s 69(1). If we wish to find a statutory source of the Court’s supervisory jurisdiction, we will find it in s 22 and s 23 of the *Supreme Court Act*.

## **Part 2 The Court**

### **Division 1 Continuance and jurisdiction**

#### **22 Continuance**

The Supreme Court of New South Wales as formerly established as the superior court of record in New South Wales is hereby continued.

#### **23 Jurisdiction generally**

The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

Section 23 is a quasi-constitutional provision: it reflects the institutional arrangements for the exercise of judicial power in the State and the original conferral of jurisdiction by the Charter of Justice of 1823. However, the jurisdiction is not at large, or at the whim of the individual judge. It is to be exercised in accordance with statute and established general law principles.

This background has practical significance in 2016, more than 40 years after the commencement of the *Supreme Court Act*, when considering the operation of s 17 of the *Supreme Court Act*. As enacted in 1970 that section relevantly provided:

**Part 1 Preliminary**

...

**Division 4 Savings****17 Criminal proceedings**

- (1) Except as provided in this section this Act and the rules do not apply to any of the proceedings in the Court which are specified in the Third Schedule to this Act.

...

- (3) Subsection one of this section does not affect the operation of sections one, two, five, six, seven and seventy two of this Act.

- (4) This Act and the rules apply to and with respect to—

- (a) proceedings in the Court under the *Supreme Court (Summary Jurisdiction) Act, 1967*, in respect of which the jurisdiction of the Court under that Act may be exercised by the Court of Appeal; and
- (b) any judgment or order of the Court of Appeal given or made in the exercise of that jurisdiction.

Critical to the operation of this provision is the Third Schedule which, as enacted provided:

**THIRD SCHEDULE****EXCLUDED CRIMINAL PROCEEDINGS**

- (a) Proceedings in the Court for the prosecution of offenders on indictment ("indictment" including any information presented or filed as provided by law for the prosecution of offenders) including the sentencing or otherwise dealing with persons convicted;

...

- (d) proceedings in the Court under the *Criminal Appeal Act of 1912*;

...

- (i) proceedings in the Court for the grant of a certificate under the *Costs in Criminal Cases Act, 1967*;

....

Of these, par (a) is the basic element for present purposes; pars (d) and (i) are relevant to particular cases discussed below. It is important to note a particular feature of s 17 and a related feature of the Third Schedule, as originally enacted. Section 17 disapplied the *Supreme Court Act* and the Supreme Court Rules, with certain exceptions specified in s 17(3) which are presently relevant only in a negative sense: they did not exclude ss 22, 23, 69 or s 101 (the source of the right to appeal from a judgment or order made in a Division of the Court). The critical element in par (a) of the Third Schedule was the reference to proceedings in the Court, “Court” being by definition the Supreme Court.

Thus, in 1986, in *Shepherd v Bowen*,<sup>5</sup> Mahoney JA said that “the *Supreme Court Act*, as originally enacted, was intended to have application generally to the civil jurisdiction of the Supreme Court. However, limitations were imposed upon the generality of its application in respect of its criminal jurisdiction.”

In 1989 both s 17 and the Third Schedule were amended to extend in particular ways to criminal proceedings on indictment in the District Court. Before noting the effect of those changes it is convenient to refer to two cases decided under the original provisions.

The first was *Richards v Smyth*.<sup>6</sup> The case involved a challenge to the decision of a District Court judge to refuse to allow the accused to withdraw a plea of guilty with respect to certain drug offences. The relief sought appears to have been limited to a declaration that the exercise of discretion miscarried. The Court was satisfied that the claim to relief was made good, but noted two objections raised by the Attorney General to its exercise of jurisdiction. The narrow ground attempted to invoke s 17; a broader ground was also relied upon, which merely invoked the “structure” of the *Supreme Court Act*, when read with the *Criminal Appeal Act*. The Court had little difficulty in rejecting the submission based on s 17, for the reason already identified, namely that the reference to the “Court”, was a reference to proceedings in the Supreme Court. So far as the broader ground was concerned, the Court rejected the

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<sup>5</sup> (1986) 4 NSWLR 475 at 478 (Glass and Priestley JJA agreeing).

<sup>6</sup> Unrep, NSWCA, 24 December 1985 (Kirby P, Hope and Priestley JJA).

proposition that the statutory scheme for dealing with criminal appeals precluded any jurisdiction of the Supreme Court to deal with such matters.<sup>7</sup>

More detailed consideration was given to the scope and effect of s 17 in the case already referred to, namely *Shepherd v Bowen*.

*Shepherd v Bowen* concerned an indictment laid in the Criminal Division of the Supreme Court, which resulted in an application for a stay until the accused had had the benefit of a committal proceeding. Lusher J had rejected the application and the applicant sought leave to appeal to the Court of Appeal pursuant to s 101 of the *Supreme Court Act*. Section 101 provides a right of appeal from any judgment or order of the Court in a Division. The exclusion in s 17, covering “proceedings in the Court for the prosecution of offenders” was held to encompass all aspects of such proceedings, with the result that there was no appeal pursuant to s 101 from an interlocutory order. There was no reliance on the supervisory jurisdiction, probably because of the generally held view that it was not possible to obtain an order by way of certiorari directed to the decision of a judge of a superior court of record and, perhaps more pragmatically, that orders in the nature of prohibition would not be made in circumstances where a judge in the Division had refused a stay, from which there was no right of appeal.

The result of the case was an inevitable consequence of the fact that appeals are a function of statute and that the *Criminal Appeal Act*, which was the intended source of rights of appeal with respect to criminal proceedings, did not then include a right of appeal with respect to interlocutory judgments and orders.

There was passing reference in the reasons to ss 22 and 23, but as the source of the Court’s criminal, rather than supervisory, jurisdiction. Thus, Mahoney JA noted that the general jurisdiction of the Court to deal with both civil and criminal proceedings was conferred by the Charter of Justice of 1823. He continued:<sup>8</sup>

“As the result of the relevant legislation the Supreme Court, having all the jurisdiction of the King’s Bench Common Pleas and Exchequer Courts in England, had jurisdiction in the trial of relevant indictable

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<sup>7</sup> Typescript judgment, pp 14-16.

<sup>8</sup> *Shepherd* at 478D-E.

offences. That jurisdiction was preserved by the *Supreme Court Act*. see, eg, ss 22 and 23.”

The possibility that s 17 might, if broadly construed, disapply s 23, in relation to criminal proceedings on indictment, was not considered.

In 1988 s 17 was amended and two additional paragraphs were inserted in the Third Schedule to deal with appeals from criminal proceedings brought in the District Court.<sup>9</sup> The effect of these amendments placed those provisions in the following form.

### 17 Criminal proceedings

- (1) Except as provided in this section this Act and the rules do not apply to any of the proceedings in the Court which are specified in the Third Schedule, and no claim for relief lies to the Court against an interlocutory judgment or order given or made in proceedings referred to in paragraph (a1) or (a2) of that Schedule.

#### Third Schedule Criminal proceedings

- (a) Proceedings in the Court for the prosecution of offenders on indictment (***indictment*** including any information presented or filed as provided by law for the prosecution of offenders) including the sentencing or otherwise dealing with persons convicted,
- (a1) proceedings (including committal proceedings) for the prosecution of offenders on indictment (***indictment*** including any information presented or filed as provided by law for the prosecution of offenders) in the Court or in the District Court,
- (a2) proceedings (whether in the Court or the District Court) under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* ....<sup>10</sup>

The new second limb of s 17(1) is a true privative clause: it prohibits any claim for relief being brought in the Court against an interlocutory judgment or order given or made in serious criminal proceedings. The term “claim for relief” is defined in s 19(1) in terms broad enough to cover any claim “justiciable in the Court”.<sup>11</sup> In *El-Zayet v The Queen*,<sup>12</sup> to which further reference will be made shortly, the joint reasons of the

<sup>9</sup> *Statute Law (Miscellaneous Provisions) Act 1988* (NSW), Sch 18(1) and (4).

<sup>10</sup> Par (a2) is given in its present form, referring to the current provisions dealing with proceedings on a plea of guilty.

<sup>11</sup> *Supreme Court Act*, s 19(1)(d).

<sup>12</sup> (2014) 88 NSWLR 556; [2014] NSWCCA 298.



President and Justice Emmett referred to s 17 as effecting “two preclusions.”<sup>13</sup> I prefer to avoid a label which suggests that the two limbs have a similar effect. The first limb of s 17(1) is not so much a preclusion as a limitation on the operation of the Act and rules made under it; the second limb is a privative clause. The difference in structure is important: the “proceedings” referred to in the first limb are the criminal proceedings; the claims for relief in the second limb are not the criminal proceedings, but the appeal or judicial review proceedings in the Court of Appeal.

The drafting of the amendments is curious in a number of respects. First, the references to the Supreme Court in new pars (a1) and (a2) of the Third Schedule add nothing to the scope of par (a) and therefore do not affect the scope of the first limb of s 17(1), which itself remained unamended. The first limb did not disapply the Act with respect to criminal proceedings in the District Court. Because it only applied to proceedings in the Supreme Court, the extensions to the Third Schedule were only relevant to the second limb.

Secondly, although pars (a1) and (a2) applied to serious criminal proceedings generally, the second limb of s 17(1) was limited to interlocutory judgments and orders.

The question then raised was whether s 17(1) immunised criminal proceedings from judicial review in the supervisory jurisdiction of the Court, a question which raises issues of statutory interpretation and constitutionality. The question of statutory construction which must, of course, be informed by the answer to the constitutional question, is how to reconcile s 17, on the one hand, and ss 23 and 69 on the other. The constitutional question is, if s 17 is effective to limit the supervisory jurisdiction of the Court, how does it sit with the constitutionally protected jurisdiction of the Supreme Court identified in *Kirk*?<sup>14</sup>

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<sup>13</sup> *El-Zayat* at [51].

<sup>14</sup> See fn (3) above.

## The effect of amended s 17

### (a) the statutory construction issue

Let me put the constitutional question to one side, if only because the principle accepted in *Kirk* had not been identified when the amendments were passed. The question of statutory construction may start from the point that the procedural reforms in s 69 are in fact excluded from operation in the criminal jurisdiction by s 17. Because s 69 does not confer jurisdiction the result is that we may be thrown back on the old forms of prerogative writs and we may lose the ability to search for error of law in the reasons of the court or tribunal, except in the very limited circumstances where, under the general law, reasons formed part of the record.<sup>15</sup> That would be unfortunate, but it would not raise a constitutional issue.

On that approach, the true conflict is between s 17 and s 23.<sup>16</sup> Here, it is helpful to have regard to a matter often downplayed in exercises in statutory construction, namely the structure of the statute. First, s 17 is a provision to be found in Pt 1 of the *Supreme Court Act*, headed “Preliminary” and, Division 4, in which s 17 appears, is headed “Savings”. In other words, its primary purpose appears to be to maintain the scheme for criminal appeals to be found in the *Criminal Appeal Act 1912* (NSW) together with the institutional structure created by that Act, namely the creation of, and conferral of appellate jurisdiction on, the Court of Criminal Appeal.

By contrast, s 23 appears in Part 2 headed “The Court” and Division 1 headed “Continuance and jurisdiction”. Section 22 provides that the Supreme Court “is hereby continued.” Section 23 provides that the Court shall have “all jurisdiction which may be necessary for the administration of justice in New South Wales.” Clearly these provisions are of fundamental importance, without them the Act and rules would have no institutional operation.

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<sup>15</sup> See *Craig v South Australia* (1995) 184 CLR 163 at 181-183; [1995] HCA 58. This effect of a privative clause is recognised in s 69(5).

<sup>16</sup> The issue was addressed by Beech-Jones J in *Bimson, Roads & Maritime Services v Damorange Pty Ltd (No 2)* [2014] NSWSC 827; and see authorities discussed there.

The way in which the Court has addressed its judicial review function in relation to criminal proceedings is revealed in three cases *Adler v District Court*,<sup>17</sup> in 1990, *Chow v Director of Public Prosecutions*,<sup>18</sup> in 1992 and *El-Zayet*,<sup>19</sup> in 2014.

*Adler* was decided shortly after the amendments commenced.<sup>20</sup> The prosecution of Mr Adler was brought in the District Court. Of the three members of the Court, Kirby ACJ concluded first that the summons should be dismissed without dealing with the question of jurisdiction.<sup>21</sup> However, noting that an order refusing relief involved an assertion of jurisdiction, he considered it appropriate to deal with the issue. Mahoney JA dealt with the issue in his separate reasons. Priestley JA agreed on this issue with both the other members of the Court.<sup>22</sup>

Justice Kirby noted that the origins of the supervisory jurisdiction of the Court were derived through the Charter of Justice and the common law. He said that it would “require very clear legislative language to oust the jurisdiction of the Court of Appeal from exercising such a beneficial and important function.” He then said that no such intention was revealed by s 17(1), without further seeking to construe the section. He also identified, without deciding, a “subsidiary argument” which was that the proceedings referred to in the Third Schedule dealt with the prosecution of offenders on indictment filed “as provided by law”. The submission was that this language did not prevent a challenge on the basis that the indictment was a nullity, a submission which anticipated the approach of the High Court in *Plaintiff S157*.<sup>23</sup>

Justice Mahoney also commenced with the proposition that the *Supreme Court Act* “does not create or provide the basis of the jurisdiction of the Supreme Court ... to grant prerogative relief.”<sup>24</sup> As the first limb of s 17(1), disapplying the Act, had no effect on proceedings in the District Court, the relevance of this proposition was unclear.

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<sup>17</sup> (1990) 19 NSWLR 317.

<sup>18</sup> (1992) 28 NSWLR 593.

<sup>19</sup> See fn (12) above; *El-Zayet v Director of Public Prosecutions* [2014] NSWCA 422.

<sup>20</sup> Although the Act was not assented to until 28 June 1988, the amendments to Sch 18(1) and (4) were taken to have commenced on 18 December 1987 (s 2(3)), being the date of commencement of s 5F of the *Criminal Appeal Act*, allowing appeals from interlocutory judgments.

<sup>21</sup> *Adler* at 332G.

<sup>22</sup> *Adler* at 345B.

<sup>23</sup> *Adler* at 335G; *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; 211 CLR 476.

<sup>24</sup> *Adler* at 338G.

However, Mahoney JA then asked, explicitly referring to the first limb, whether a proceeding seeking prerogative relief was within the words “any of the proceedings in the Court which are specified in the Third Schedule”. This seems to ask the wrong question: the Third Schedule specifies criminal proceedings and relevantly for the first limb, criminal proceedings in the Supreme Court, not proceedings in the District Court. The form of the amendments, adding a functionally different second limb to s 17(1) was confusing. The proceedings specified in the Third Schedule now extend beyond proceedings in the Supreme Court to include proceedings in the District Court. However, to say that provisions in the *Supreme Court Act* do not apply to “proceedings in the Court [that is, the Supreme Court] specified in the Third Schedule” is only meaningful in circumstances where the Third Schedule is (as it was) limited to proceedings in the Supreme Court. The amendments introducing reference to proceedings in the District Court have led to confusion.

The second limb of s 17 is also problematic, but for quite different reasons. To say that “no claim for relief” lies to the Court against an interlocutory judgment in the Court or in the District Court was intended to limit relief to the process available for interlocutory appeals, which was introduced by the contemporaneous inclusion of s 5F in the *Criminal Appeal Act*. In *Adler*, Kirby ACJ acknowledged that the common purpose of s 17 and the amendments to the Third Schedule, read with s 5F of the *Criminal Appeal Act*, “was to direct the flow of ordinary proceedings of that character from the Court of Appeal to the Court of Criminal Appeal.” In rejecting the proposition that s 17(1) had that effect, he drew no explicit distinction between the two limbs of s 17(1), but the focus must have been on the second limb. The underlying justification relied on the absence of any express prohibition on a challenge to the *jurisdiction* of the District Court. That justification relied on the limitation in the privative effect of s 17(1) (second limb) to claims for relief against “interlocutory judgments and orders”; and the fact that it did not in terms extend to the proceedings in the District Court generally, as did the amendments to the Third Schedule. In fact, and understandably, Mr Adler did first seek interlocutory relief in the District Court. However, Kirby ACJ held that the prohibition in the second limb could have been avoided if the applicant had come straight to the Court of Appeal, rather than first seeking a permanent stay from the District Court judge, with the result that s 5F could provide an avenue for appeal. The fact that the Court of

Appeal had jurisdiction made the question one of discretion as to whether to grant relief, which it did. The beneficial effect of that construction, which allows (and indeed may encourage) accused persons to bypass the appellate process, is not self-evident.

The applicant in *Chow* had reached a plea bargain with the Director, pursuant to which he entered a plea of guilty in the District Court to a lesser offence. He later sought, unsuccessfully, to withdraw his plea when it appeared that the sentencing judge was firmly of the view that the facts supported the more serious offence with which he was originally charged. A majority of the Court (Kirby P and Sheller JA) thought the judge was disqualified for a reasonable apprehension of bias from proceeding with the sentencing. In dealing with the Director's submission that s 17(1) precluded a grant of relief, Kirby P applied the analysis he had noted but not adopted in *Adler*.<sup>25</sup>

"The proceedings brought against the claimant are for his prosecution as an 'offender on indictment in the District Court'. However, it is well-established that the purpose of this exclusion is to protect orders which are made within jurisdiction. It is not to exclude the supervisory jurisdiction of this Court, as the final appellate court of the State, to ensure against the making of orders which are outside jurisdiction. ...

... The 'interlocutory judgment or order' referred to by Parliament is thus an interlocutory judgment or order made within jurisdiction. It is not to be supposed that Parliament would intend to give the cloak of immunity from judicial review to an interlocutory judgment or order made outside jurisdiction of the District Court judge making such order. This Court has jurisdiction to prevent such excesses and will do so, where necessary, by declaration."

Sheller JA, having also found prejudgment, stated:<sup>26</sup>

"For reasons which are set out in *Adler* ..., there is, in my opinion, nothing in s 17 of the *Supreme Court Act* which inhibits the exercise by this Court of its supervisory jurisdiction in this case. This is not a claim for relief against a judgment or order given by the District Court in the sentencing proceedings but a claim directed to preventing a particular judge sitting or continuing to sit to hear a particular matter. In terms of the power of this Court it matters not whether his Honour had made an interlocutory order. The sort of remedy here invoked is not addressed by s 17."

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<sup>25</sup> *Chow* at 610D, F.

<sup>26</sup> *Chow* at 618E.

Cripps JA dissented as to the finding of prejudgment, but observed, with respect to jurisdiction:<sup>27</sup>

“My present inclination is that s 5F of the *Criminal Appeal Act* would allow the claimant to appeal to the Court of Criminal Appeal (with leave) because the decision, if it were made, not to allow the claimant to change his plea would be relevantly an interlocutory order. It would also seem to me that such an order, at least in the absence of any denial of natural justice, would be an order within the prohibition of s 17 of the *Supreme Court Act*. But these are matters for another day.”

The remark with respect to s 17(1) is ambiguous: prejudgment would not be understood to be a denial of natural justice.

Applications continued to be made to the Court of Appeal with respect to proceedings in the District Court: the complications in the construction of the privative provision have largely been sidestepped.<sup>28</sup>

The issue arose in a slightly different form in *El-Zayet*. The case involved a purported appeal from a decision of Price J, sitting in the Supreme Court, dealing with an interlocutory application in proceedings for a certificate under the *Costs in Criminal Cases Act*, which was a form of proceeding covered by the Third Schedule.<sup>29</sup> Although an appeal at least would have been excluded by the first limb of s 17(1), the Court dealt with both limbs. It accepted that the right of appeal under s 101 was excluded and that the exclusion included purported appeals from interlocutory orders.<sup>30</sup> Perhaps unfortunately, in a joint judgment the President and Emmett JA reiterated the confusion in *Adler*, saying that “the reference in s 17 to ‘proceedings in the Court which are specified in the Third Schedule’ does not include a proceeding for prerogative relief”.<sup>31</sup> In the end, the scope of the second limb was not resolved and there was no discussion as to whether prerogative relief could lie against a judge of the Supreme Court.

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<sup>27</sup> *Chow* at 623.

<sup>28</sup> See, eg, *Gargan v Director of Public Prosecutions (NSW)* [2004] NSWSC 10; 144 A Crim R 296 at [70]; *BUSB v Director-General of Security* [2011] NSWCA 49 at [2] (Spigelman CJ, Allsop P and Hodgson JA, McClellan CJ at CL and Johnson J agreeing); *WO v Director of Public Prosecutions (NSW)* [2009] NSWCA 370; *Jenkins v Director of Public Prosecutions* [2013] NSWCA 406 at [18]-[23] (Gleeson JA, Hoeben JA agreeing); *JW v District Court of New South Wales* [2016] NSWCA 22 (Simpson JA).

<sup>29</sup> See also *Palfrey v South Penrith Sand and Soil Pty Ltd* [2013] NSWCA 99 (Barrett JA).

<sup>30</sup> *El-Zayet* at [54]-[57].

<sup>31</sup> *El-Zayet* at [52], [60] and [61].

The current state of the law is thus that the second limb of s 17(1) does not preclude review of the District Court for jurisdictional error, such as a reasonable apprehension of bias, whether or not the District Court has ruled on the issue. Where the second limb of s 17(1) operates, that is in relation to interlocutory judgments of the District Court, it may be accepted on ordinary principles that it is effective to prevent review for error of law not constituting jurisdictional error.<sup>32</sup> Whether the supervisory jurisdiction could extend to orders made in the District Court to which s 5F of the *Criminal Appeal Act* does not apply has not been addressed. Nor has the separate question as to whether there is any scope for the operation of the supervisory jurisdiction with respect to decisions of Supreme Court judges when exercising judicial power.<sup>33</sup>

As a practical matter, it is likely that the Court of Appeal will insist on the dissatisfied accused in the District Court exhausting his or her appeal rights under the *Criminal Appeal Act* before contemplating a grant of relief in the supervisory jurisdiction. All of this means that the constitutional issues will largely fall away.

#### **(b) the Constitutional issue**

Let me turn briefly to the constitutional issue. As we know, *Kirk* provides that no legislation enacted by the State Parliament can curtail the “essential” jurisdiction of the Supreme Court as the superior court of record in the State. That jurisdiction includes the Court’s “supervisory jurisdiction”. Clearly s 17 should be construed in a manner which does not derogate from the traditional functions of the Supreme Court as reflected in ss 22 and 23.

As a practical matter, this raises two specific questions. The first is that although *Kirk* is expressed at a level of generality which appears to demand that any administrative or judicial decision can be reviewed by the Supreme Court, it is necessary to insert the word “ultimately”. *Kirk* provides no basis for limiting the power of the Parliament to specify exclusive mechanisms for review of decisions of inferior courts, tribunals and administrative officers, so long as the question of power

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<sup>32</sup> See, by analogy, the case law on s 176 of the *District Court Act*, applying to appeals from the Local Court in summary criminal jurisdiction.

<sup>33</sup> Compare, in respect of non-judicial power, *Sinkovich v Attorney General of New South Wales* (2013) 85 NSWLR 783; [2013] NSWCA 383 at [66]-[72].

can ultimately be resolved, if necessary, by the Supreme Court. If that is right, it follows that a strong privative clause can prevent one party going directly to the Supreme Court, so long as the decision of another court or tribunal can ultimately be reviewed by the Supreme Court for jurisdictional error. For this purpose, the Supreme Court includes the Court of Criminal Appeal as the institution having equivalent functions to deal with criminal matters dealt with by way of indictment.

There is another practical issue which needs to be borne in mind in seeking to review the decisions of lower tribunals or courts. That is the effect of a statutory appeal. Again there is no prohibition in *Kirk* upon the supervisory jurisdiction being exercised by way of a statutory appeal, which will often provide a broader basis for review than at least the unreformed supervisory jurisdiction. That means that the traditional step of refusing judicial review until rights of statutory appeal have been exhausted remains an available course for the Supreme Court to take, regardless of *Kirk*. However, it is important to recall that the decision of an intermediate court may supersede that of the lower court. In relation to appeals from the Local Court to the District Court (then Quarter Sessions) this principle was articulated in *Wishart v Fraser*.<sup>34</sup>

### **Characterising grounds**

Let me now move to my second topic and descend to a level of procedural practicality.

There is nothing in *Kirk* which prevents the establishment of uniform rules to allow for the expeditious and orderly conduct of judicial review proceedings. Nor is there any constitutional difficulty with the imposition of time limits so long as there is a residual discretion in the court to extend time where necessary.<sup>35</sup>

Regulation has now been given effect in Part 59 of the Uniform Civil Procedure Rules 2005 (NSW) (“UCPR”), together with particular rules to be found in Part 51 dealing with proceedings in the supervisory jurisdiction of the Court of Appeal.<sup>36</sup>

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<sup>34</sup> (1941) 64 CLR 470; [1941] HCA 8.

<sup>35</sup> See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [2007] HCA 14.

<sup>36</sup> UCPR, r 51.45.



Rather, I will confine my comments to the concept of grounds; identified with “specificity” referred to in r 59.4(c), which causes some difficulty in practice and is by no means a self-evidently useful concept, at the level of principle.

In one sense, the general law knew only two grounds, namely jurisdictional error and error of law on the face of the record. Neither of those phrases is helpful: jurisdictional error is sometimes referred to (especially in the UK) as a form of *ultra vires*, meaning no more and no less than that, in some respect, the decision was beyond power. Error of law on the face of the record was a singularly narrow concept until the record was extended by s 69 to include the reasons for the decision. That reform went a considerable distance towards equating judicial review for error of law with a statutory appeal on a question of law. Especially is that so in an environment where the obligation to give reasons has expanded rapidly to cover most forms of important decision-making.

These broad concepts were first broken down in Australia by the list of grounds provided by s 5 of the ADJR Act. This proved of considerable assistance to those seeking to articulate a basis for review of a particular decision. Nevertheless, as a form of pleading, to complain that the decision-maker took into account irrelevant considerations was often of little assistance. What was necessary was to articulate those considerations and provide a basis for contending that they lay beyond the statutory remit of the decision-maker.

In the modern context, it is likely that, with the possible exclusion of procedural fairness and unreasonableness, the limits of power will be defined by statute. That is not to say that they will be defined with precision. The broad nature of the power may be defined with some degree of precision, in terms of the powers or orders available to the decision-maker, but the factors which may properly be taken into account are likely to be implied from the subject matter, scope and purpose of the legislation. This is often a tricky exercise.

Let me give two examples, both relating to relevant and irrelevant considerations. We can start with a tripartite characterisation: thus factors may be mandatory,

permissible or prohibited.<sup>37</sup> There is value in the tripartite characterisation, because immediately one is within the broad range of permissible considerations, which one usually is, it is necessary to find some other ground, such as manifest unreasonableness, to identify an error of law. But if the limits of power are not clearly defined by statute, the distinction between the permissible and impermissible simply involves reliance upon a concept of rationality. This may be illustrated by a pre-ADJR case, *Murphyores Inc Pty Ltd v The Commonwealth*.<sup>38</sup> Thus, Stephen J posed for himself the question, “has the maker of the decision duly exercised his decision-making power or, on the contrary, is his decision vitiated by the nature of the considerations, extraneous to the power conferred, to which he has had regard in arriving at that decision?”

The answer, he continued, will depend primarily upon the legislation which confers the power. Stephen J continued:<sup>39</sup>

“It will be seldom, if ever, that the extent of the power cannot be seen to exclude from consideration by a decision-maker all corrupt or entirely personal and whimsical considerations, considerations which are unconnected with proper governmental administration; his decision will not be a bona fide one since these considerations will, on their face, not be such as the legislation permits him to have regard to.”

One can find in that statement references to good faith, improper purpose, manifest unreasonableness and irrelevant considerations. The outcome of a case is unlikely to turn on the precise characterisation of the ground. It is the focus on the limits of the statutory power which will be critical.

My second example focuses upon the use being made of a consideration. In *Duffy v Da Rin*, I sought to illustrate this point in the following terms:<sup>40</sup>

“The significance of these omissions is that ‘considerations’ have different qualities which are not recognised by a simple classification as permissible, mandatory or prohibited. To identify a lion and a deer as wild animals and place them together in a zoo is unlikely to provide a satisfactory outcome (at least for the deer). Two considerations may each be relevant, but may pull in opposite directions. A particular

<sup>37</sup> See generally, R Lancaster and S Free, “The Relevancy Grounds in Environmental and Administrative Law” in N Williams, *Key Issues in Judicial Review*, Ch 13.

<sup>38</sup> (1975-76) 136 CLR 1 at 12.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Duffy v Da Rin* [2014] NSWCA 270 at [53].

consideration may be relevant to one aspect of the reasoning process, but not to other aspects. For example, in sentencing an offender a prior criminal record is relevant, but may only be used to diminish a plea for leniency, not to increase an otherwise appropriate sentence for the particular offence. Thus a consideration which is relevant for a specific purpose or in respect of a particular issue only may be impermissibly used for a different purpose or with respect to another issue. Such misuse could constitute an error of law.”

## **Conclusion**

Much of the discussion of judicial review in Australia focuses upon federal jurisdiction. That may have led to a misapprehension that there are no particular issues arising specifically within state jurisdiction. The role of the Court of Appeal in reviewing decisions in criminal jurisdiction is, I think, one which is worthy of careful attention.

On the other hand, absent the shackles (perhaps imposed only by ourselves) flowing from s 5 of the ADJR Act, we have the opportunity to do better in State jurisdiction with respect to the grounds of judicial review, because we are free to focus on where precisely the limits of power were exceeded, without apparently pre-empting the discussion by overly taxonomic characterisation.

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