# FEDERAL CONSTITUTIONAL INFLUENCES ON STATE JUDICIAL REVIEW

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## I INTRODUCTION

Since the late 1990s it has become increasingly clear that the *Commonwealth Constitution* is the dominant influence upon judicial review of administrative action in Australia. The *Constitution* provides for a minimum entrenched provision of judicial review by recognising and protecting the supervisory jurisdiction of the High Court. This protection comes at a price because the separation of powers doctrine and the division and allocation of functions it fosters impose many limits upon the reach and content of judicial review of administrative action. This protective and restrictive effect of the separation of powers upon judicial review of administrative action arguably reflects a wider tension in the separation of powers, in which the powers and limits of each arm of government are balanced in a wider sense.

The extent to which these competing principles apply to judicial review at the State level has long been unclear. There seemed good reason why judicial review at the State level should not be subject to the restrictions that have arisen at the federal level. After all, the various State constitutions did not adopt an entrenched separation of powers like that of the *Commonwealth Constitution*.[1] The lack of any entrenched separation of

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1 This point was long acknowledged in different ways. Sometimes it was an acceptance that the overall structure or particular provisions of a State constitution did not provide a basis to hold or imply a principle of separation of powers. See, eg, *Clyne v East* (1967) 68 SR (NSW) 385, 400 (discussing the *Constitution Act 1902* (NSW)). In other instances the point was acknowledged as a general principle that State legislatures could blur judicial and other functions in a manner not permissible at the federal level. See, eg, *Kotsis v Kotsis* (1970) 122 CLR 69, 76 (Barwick CJ). See also *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652, 662-4. In that case the Full Court of the Supreme Court of Victoria accepted that ss 18 and 85 of the *Constitution Act 1975* (Vic) entrenched the Supreme Court of Victoria by protecting it against legislative impairment unless this was done with an absolute majority of both houses of parliament. But the Full Court also rejected any suggestion that the *Constitution Act 1975* (Vic) adopted the separation of powers doctrine, expressly or by necessary implication. See also John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 278 where it is stated that 'conventionally, the

powers was consistent with wider constitutional doctrine. It was also widely accepted that Ch III of the *Constitution* did not entrench the position or function of State Supreme Courts in the same way that it did for the High Court and other federal courts.[2] At the same time, there was no marked distinction between Australian judicial review doctrine at the Commonwealth or State level. Judicial review at the State level did not witness a blurring of the merits/legality divide, or develop novel principles of review that might have been impermissible at the federal level. This seemed a paradox. State Supreme Courts were neither protected nor constrained by the separation of powers doctrine in a rigid sense, yet they did not seem to step outside the broad doctrinal limits established at the federal level. It seemed that State judicial review adopted many of the doctrinal limits developed at the federal level but none of its benefits.

That has certainly changed with the confirmation in *Kirk v Industrial Relations Commission of NSW*[3] of the existence of a constitutionally entrenched minimum level of review at the State level. *Kirk* made clear that State legislatures cannot enact legislation to remove the supervisory jurisdiction of State Supreme Courts over the actions of State officials for jurisdictional error.[4] *Kirk* has received a warm reception for the protection it provides judicial review at the State level.[5] At the same time, however, the obvious benefits that arise from the constitutional entrenchment of judicial review at the State level should not distract attention from the restrictions that inevitably arise from the *Constitution*.

At the federal level the *Constitution* not only protects a minimum level of judicial review, it also limits judicial review in several important ways. Just as the *Constitution* simultaneously defines and confines judicial review at the federal level, it now surely does so at the State level. Those institutional features in turn impose limits on specific grounds of judicial review such as substantive unfairness or proportionality which, in light of *Kirk*, surely face the same constitutional restrictions at the State level. This article examines the nature of those limits and how *Kirk* reinforces constitutional limitations upon State legislatures and courts. First, however, it is useful to briefly examine the recent evolution of the constitutionally entrenched jurisdiction of the High Court against which the jurisdiction recognised in *Kirk* must be understood.

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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*.'

2 An obvious exception is the incompatibility principle of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 which was relied upon in *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 and *South Australia v Totani* (2010) 242 CLR 1. The principle is explained in James Stellios, *The Federal Judicature* (LexisNexis, 2010) 408-49.

3 (2010) 239 CLR 531 ('*Kirk*').

4 The crucial passages acknowledging this jurisdiction are at (2010) 239 CLR 531, 580–1.

5 Basten, above n 1, 273. Many commentators have examined *Kirk* and its consequences in great detail but have not explicitly endorsed or rejected, though appear to impliedly welcome the greater alignment the case has achieved between State and Commonwealth courts. See, eg, JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77; Chris Finn, 'Constitutionalising Supervisory Review at the State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92. Finn discusses *Kirk* and its consequences in detail but refrains from explicitly endorsing or rejecting the case.

## II THE MODERN CONSTITUTIONAL STARTING POINT

*Kirk* may have secured judicial review at the State level but its foundations were laid in earlier State cases which in turn shaped federal constitutional doctrine. Much of the analysis of *Kirk* has overlooked the point that the recent starting point for the now orthodox and central principles of federal constitutional doctrine governing judicial review, which *Kirk* transmitted to the State level, began life at the State level. A brief history of these cases demonstrates that the constitutional principles confirmed in *Kirk* were not strictly federal in character but were instead ones which proceeded on the assumption that the core principles governing judicial review did not differ between the Commonwealth and the States. *Kirk* therefore marked a later step in a process that had begun much earlier.

*Attorney-General (NSW) v Quin*[6] was an unlikely vehicle for the development of these principles because it seemed a purely State case involving questions at the very heart of the State judicial system. Mr Quin was one of several long serving judges whose position was rescinded by statute as part of the replacement of the court of which he was a member. The Attorney-General of the day undertook to consider applicants for positions on the new court from a pool of judicial officers drawn only from the old court. Quin and several other former judicial officers were not selected and successfully claimed a denial of natural justice.[7] The Attorney then changed the selection policy so that future appointments would be considered on a competitive basis and drawn from an open field. A majority of the High Court rejected Quin's claim to a legitimate expectation that his application would be treated according to the advantageous earlier policy.[8] The case could have rested there but for the wider remarks Brennan J made on the purpose and scope of judicial review.

Brennan J drew an explicit connection between judicial review and the *Constitution* which made no apparent distinction between the Commonwealth and the States. Brennan J began with the proposition that the 'essential warrant' of the judicial arm of government was to declare and enforce the law which he noted included judicial supervision of executive action that might exceed the *Constitution*. His Honour reasoned a similar duty extended to judicial review of administrative action that might exceed the authority by which officials acted.[9] Brennan J drew support for this proposition from the emphatic declaration of Marshall CJ in *Marbury v Madison* that it was 'the province and duty of the judicial department to say what the law is.'[10] In his fusion of this principle delineating the constitutional role of the courts to judicial review of administrative action, Brennan J reasoned that the constitutional basis of this function both defined and confined the character of judicial review. According to this view:

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6 (1990) 170 CLR 1 ('*Quin*').
7 *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.
8 *Quin* (1990) 170 CLR 1, 23–4 (Mason CJ), 41 (Brennan J), 60 (Dawson J). Their Honours were influenced in this conclusion by the fettering principle: 17 (Mason CJ), 33 (Brennan J), 60 (Dawson J).
9 Ibid 35.
10 5 US (1 Cranch) 137, 177 (1803).

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.[11]

Brennan J made clear that this approach was accompanied by several important limitations on the scope of judicial review. One was that the focus of judicial review was inevitably directed towards the behaviour of administrative officials rather than the effect this might have upon people aggrieved by that behaviour. If the proper focus of judicial review was the legality of any exercise of power rather than the factual consequences of its exercise, it followed that the merits of any exercise of power were beyond judicial reach.[12] Brennan J made clear that this division of power had a functional as well as constitutional basis when he conceded that the courts were 'not equipped to evaluate the policy considerations which properly bear' on many decisions made within the executive.[13]

There are several striking features about this reasoning. The many pages over which it runs are permeated with constitutional principles but do not expressly mention the *Constitution* or a single provision of it. Not once.[14] This aspect of Brennan J's reasoning usually goes unremarked, but it surely makes clear that his Honour saw no significant difference in the judicial function at the Commonwealth or State level. Brennan J offered a conception of the judicial role as part of a wider understanding of government in which the function of each arm was clearly defined. The task of deciding the meaning and extent of the law is claimed by the courts but the exercise of discretionary powers as defined by the courts is left to the executive government and its agencies.

Sir Anthony Mason appeared sceptical of this approach when he argued that Australian public law has long been influenced by a limited conception of judicial power that can be traced to Sir Owen Dixon and his view that 'the courts should be insulated from controversial issues which involve policy and would bring the courts into controversy.'[15] The implication is that the restrictive judicial role favoured by Dixon and then Brennan J reflected a particular view of the judicial role. Mason did, however concede the *Australian Constitution* created ideal conditions for this approach because its structure provides 'a delineation of government powers rather than ... a

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11 *Quin* (1990) 170 CLR 1, 35-6. The extended reasoning from which this passage is taken was approved in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

12 Ibid 36. Basten has usefully noted that this and other references to the separation of powers are 'entirely consistent with some aspects of control being kept from the courts': above n 1, 278.

13 *Quin* (1990) 170 CLR 1, 37.

14 Ibid 35–9. There is a single reference to a constitutional case at 35.

15 Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of the Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 109. A similar view is adopted by Gageler, who argues that the political structures established by the *Constitution* provide a good reason for courts to adopt a more deferential or restrained approach when strong avenues of political accountability operate: Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 152.

charter of citizen's right.'[16] If the *Constitution* is structurally predisposed to the development of principles settling arrangements between different branches of government, the approach of Brennan J may simply illustrate and extend Dixon's restrictive approach to the reach of judicial power. Gageler offered a different interpretation, suggesting that the approach of Brennan J contained the benefits of order, harmony and peace.[17] They foster a constitutional settlement in which the key functions of each arm of government is clarified and protected from substantial interference by the others.

The next key step in the process, *Craig v South Australia*,[18] was important for the distinction it drew between tribunals and inferior courts and the consequences that flowed from the location of each in different arms of government. The essential warrant for this distinction was that tribunals, as creatures of the executive government, necessarily lacked the power to 'authoritatively determine questions of law'.[19] The High Court strongly affirmed this basic constitutional distinction but, as in *Quin*, did so based upon the unspoken assumption that fundamental principles embodied in the *Constitution* provided a guiding light for State institutions. The other important feature of *Craig* was its emphatic endorsement of jurisdictional error as the device to determine the line marking the point beyond which tribunals and inferior courts could not step and where superior courts were obliged to act.[20] That concept has assumed a central place in federal law but, like the principles expounded by Brennan J in *Quin*, began its new life at the State level before assuming its full influence in *Plaintiff S157/2002 v Commonwealth*.[21]

The key propositions offered by Brennan J in *Quin* and central elements of *Craig* were adopted and fused in *Enfield*.[22] That case is chiefly known for its rejection of the American *Chevron* doctrine, which grants great deference to administrators to determine possible interpretations of the law.[23] The High Court concluded that this doctrine was incompatible with the limited role granted to executive agencies in our constitutional arrangements.[24] According to this scheme, administrative officials or tribunals cannot make authoritative determinations on legal issues or non-authoritative decisions subject to significant deference from the courts because the *Constitution* clearly allocates such functions to the judicial arm of government. At the same time, the High Court drew upon the central propositions of *Quin* and affirmed that equivalent restrictions applied to the power of the courts in judicial review of administrative action. Just as tribunals and bureaucrats could not determine the law,

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16 Mason, above n 15, 109.

17 Stephen Gageler, 'Some Themes in Judicial Review' in Robin Creyke and Patrick Keyser (eds), *The Brennan Legacy – Blowing in the Winds of Legal Orthodoxy* (Federation Press, 2002) 67.

18 (1995) 184 CLR 163.

19 Ibid 179.

20 Ibid 178–80.

21 (2003) 211 CLR 476 ('*Plaintiff S157/2002*').

22 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

23 Allars has argued that the apparent rejection of *Chevron* by the High Court is not as complete or straightforward as first appears: Margaret Allars, 'Chevron in Australia: A Duplicitous Rejection?' (2002) 54 *Administrative Law Review* 569.

24 From *Chevron USA Inc v Natural Resources Defense Council Inc*, 467 US 837 (1984).

courts and judges could not trespass on those issues forming part of the merits of a decision.[25] This apparently neat arrangement arguably concealed a contradiction. The High Court had affirmed a division of power and allocation of functions that was strongly influenced by the early American constitutional landmark of *Marbury v Madison* but pointedly rejected the constitutional compromise later reached in *Chevron*.[26] The use of outside influences by the High Court is therefore extremely selective and reflects a particular judicial preference about the strictness with which judicial and executive power should be separated.

Any doubt that these understandings of the judicial function and the consequential allocation of other functions to different arms of government were largely matters of limitation was comprehensively debunked by *Plaintiff S157/2002*.[27] That case confirmed that the roles Brennan J had envisaged for each arm of government in *Quin* limited and protected supervisory review in equal measure, though it provided a spectacular example of the latter. The High Court confirmed the existence of a constitutionally entrenched minimum standard of judicial review,[28] and did so by reference to a conception of the allocation of power that can be traced to *Marbury v Madison*. The High Court added an Australian gloss with its acceptance that jurisdictional error operated as a central organising concept to its entrenched judicial review jurisdiction.[29] Jurisdictional error marked the point beyond which administrative officials and the federal legislature could not pass.

While *Plaintiff S157/2002* was greeted with acclaim in Australia,[30] and bemusement by some outside observers,[31] it was fair to say that the case was accepted to provide an authoritative statement of arrangements at the federal level but little of direct relevance to the States. State judicial review was thought to be different. That reading of the case was consistent with existing High Court doctrine, which held that 'a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman*

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25 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152–4 [43]–[44] (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

26 There is a vast literature on *Chevron*, some of which acknowledges that the case provides a useful exception to *Marbury v Madison* to grease to the wheels of government. See, eg, Cass Sunstein, 'Beyond *Marbury*: The Executive's Power to Say What the Law Is' (2006) 115 *Yale Law Journal* 2850.

27 (2003) 211 CLR 476.

28 Ibid 513 [103] (Gaudron, McHugh, Gummow, Kirby, Hayne JJ, Callinan J agreeing on this point).

29 Ibid 506 [76]–[77], 508 [83] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), 512 [98] (Callinan J).

30 See, eg, Caron Beaton Wells, 'Restoring the Rule of Law: *Plaintiff S157/2002 v Commonwealth of Australia*' (2003) 10 *Australian Journal of Administrative Law* 125; Duncan Kerr and George Williams, 'Review of Executive Action and the Rule of Law Under the Australian Constitution' (2003) 14 *Public Law Review* 219.

31 David Dyzenhaus, *The Constitution of Law – Legality in a Time of Emergency* (Cambridge University Press, 2006) 112–4. Before the privative clause was ruled upon by the High Court Dyzenhaus described it as 'a fascinating legislative derogation from the rule of law': 'The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law' in Cheryl Saunders and Kathleen Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 21, 44.

principle.'[32] Such reasoning proceeded on the assumption that the supervisory jurisdiction of State Supreme Courts was not constitutionally entrenched.[33] It also presumed that the quite different position of State courts required that federal constitutional authorities and principles 'must be treated with care' when considered in State proceedings.[34] Two articles queried whether the core reasoning of *Plaintiff S157/2002* might apply at the State level but neither gained much attention.[35] The first such piece suggested that '[t]here is no reason to suppose that the considerations which have underpinned federal cases like that of *Plaintiff S157/2002*, such as the separation of powers and the maintenance of the rule of law, are no less pressing under State constitutional arrangements.'[36] *Kirk* emphatically vindicated that possibility.

## III THE LANDMARK OF *KIRK*

*Kirk* arose from a lengthy prosecution in the New South Wales Industrial Relations Court. Appeals against the conviction of Mr Kirk and his company were rejected by the New South Wales Court of Appeal, which held any errors of the Industrial Relations Court were factual rather than jurisdictional.[37] The High Court held that the Industrial Relations Court had misapprehended its jurisdiction, which led it to make orders that were beyond its power.[38] These errors were jurisdictional and therefore not within the scope of the privative clause applicable to proceedings in the Industrial Relations Court.[39] An earlier version of this legislation came before the High Court just

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32 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ).

33 See, eg, the various judicial statements prior to *Kirk* suggesting that State legislation removing or limiting supervisory review should either be expressed in very clear terms or would be interpreted narrowly. See, eg, *BHP Ltd v Dagi* [1996] 2 VR 117, 193 (Hayne JA); *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180, 194 [33] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ). Such statements implicitly accept the existence of a power of State parliaments to enact such legislation.

34 A phrase used by Spigelman CJ in *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW* (2004) 60 NSWLR 558, 589 [129].

35 Enid Campbell and Matthew Groves, 'Privative Clauses and the Australian Constitution' (2004) 4 *Oxford University Commonwealth Law Journal* 51, 73–5; Duncan Kerr, 'Privative Clauses and the Courts: Why and How Australian Courts have resisted Attempts to Remove Citizen's Rights of Judicial Review of Executive Action' (2005) 5 *Queensland University of Technology Law and Justice Journal* 195, 212–5.

36 Campbell and Groves, above n 35, 75. Spigelman CJ adopted a similar view in *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, 238 [124] when he suggested that 'a statutory court of limited jurisdiction, which is exempt from review for jurisdictional error, may not be consistent with the rule of law.'

37 *Kirk v Industrial Relations Commission of NSW* (2008) 173 IR 465. An appeal against the conviction and sentence was dismissed in *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151.

38 The key finding on these issues were that the Industrial Relations Commission had received from Mr Kirk as a witness for the prosecution, which was not possible in the circumstances: *Kirk* (2010) 239 CLR 531, 565–6 [51]–[53], 574–5 [74]–[76].

39 *Industrial Relations Act 1996* (NSW) s 179.

a few years earlier,[40] but it was able to avoid any detailed consideration of the privative clause in those cases.[41] The Court could have done so again in *Kirk*, by finding that the clause, which did not purport to extend to jurisdictional errors, did not extend to the errors found in that case.[42] The High Court instead painted with a much broader brush.

*Kirk* endorsed the key role played by jurisdictional error in Australian law as a device to delineate legal error and the point at which judicial intervention to correct such errors was constitutionally mandated.[43] The Court affirmed the central connection between jurisdictional error and the constitutionally entrenched right of judicial review that arose from s 75(v) but identified a different focus to bring the States within this constitutional fold. The Court reasoned that s 73 of the Constitution presumed the continued existence of State Supreme Courts and built upon earlier decisions which had confirmed that the States could not enact legislation 'so to alter the constitution or character of its Supreme Court so that it ceases to meet the constitutional description.'[44] The inevitable destination of this reasoning was the conclusion that it was beyond the legislative power of the States to enact legislation which would 'deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power'.[45]

The role of the State Supreme Courts was thus equated in broad terms to those of federal courts. They exist to define and declare the law. They keep the executive agencies within their province and do so from a defined and protected judicial province. The key difference is that this function is largely secured at the federal level in s 75(v) but through ss 71 and 73 at the State level.[46] It is also secured more generally by the unified judicial system that s 73 creates and the single common law which operates within that system.[47] The High Court also drew the position of State and federal courts more closely together by its acceptance that the protected supervisory role it identified for the State Supreme Courts is anchored to the doctrine of jurisdictional error.[48] The wider theme of this reasoning was one of unity – both

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40 *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180; *Batterham v QSR Ltd* (2006) 225 CLR 237; and *Old UGC Inc v Industrial Relations Commission of NSW* (2006) 225 CLR 274.

41 The reasons are explained in *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180, 196 [44].

42 The reasons why the critical provision did not operate to exclude supervisory review for jurisdictional error are explained in detail in Basten, above n 1, 275; Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne University Law Review* 870, 875–7.

43 *Kirk* (2010) 239 CLR 531, 571–4 [66]–[73].

44 Ibid 580 [96].

45 Ibid 581 [99].

46 It is appropriate to say s 75(v) 'largely' secures the judicial review jurisdiction of the High Court at the federal level because s 75(iii) is also relevant: *Plaintiff S157/2002* (2003) 211 CLR 476, 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139 [156] where Hayne J suggested that jurisdiction to grant the writs mentioned in s 75(v) could have been drawn from the position of primacy granted to the High Court in s 71.

47 *Kirk* (2010) 239 CLR 531, 580 [96], citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63].

48 *Kirk* (2010) 239 CLR 531, 581 [100].

conceptual and legal – which was confirmed when the High Court decried the possibility of 'distorted positions' within this unified system.[49]

At the same time, however, the Court did not exclude the possibility that differences might remain between the States and the Commonwealth. The Court explained that its general call for doctrinal unity was 'not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts.'[50] That possibility was consistent with the suggestion much earlier in the court's reasoning that a lesser level of separation of powers was required at the State level. Those remarks were made in a passage that accepted the distinction between courts and tribunals might be more difficult at the State level.[51] The implication is that *Kirk* signals a fairly strict approach to legislation that seeks to remove the core supervisory jurisdiction of State courts, but not to legislation that blurs the court/tribunal distinction at the State level and which has proliferated in recent times.[52]

The Commonwealth Solicitor-General, Stephen Gageler SC, recently explained that his vision of the structure and function of the *Constitution* emphasised the perceived political design of the *Constitution* and naturally proceeded on the assumption that constitutional text was not determinative.[53] The various threads of *Kirk* also suggest a particular constitutional vision extending beyond constitutional text, namely symmetry of judicial function and power within our federal structure. Within this structure the basic character of the judicial function does not differ between the State Supreme Courts and the High Court. Nor does its purpose. *Kirk* recognises and extends the 'protective purpose' of the entrenched supervisory jurisdiction of the High Court recognised in *Plaintiff S157/2002*[54] to the State level.

One might accept this level of symmetry, but the precedent upon which it was based does not appear strong. The only case cited by the Court to support its belief that the State Supreme Courts had a protected jurisdiction to issue certiorari to correct jurisdictional error at the time of federation was *Colonial Bank of Australasia v Willan*.[55] A close inspection of that case suggests it does not support so broad a proposition as the High Court sought to attach to it. The privative clause in *Willan* was found by the Privy Council to control and limit the use of certiorari rather than completely prevent its issue, so that it was interpreted to preclude use of the writ except for 'manifest

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49 Ibid 581 [99], citing Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

50 *Kirk* (2010) 239 CLR 531, 581 [100].

51 Ibid 573 [69].

52 The implications of this point are beyond the scope of this article. For present purposes it is useful to note that some State tribunals are invested with powers that cannot be granted to federal tribunals. For example, the decisions of the general tribunals of Victoria and Western Australia may be registered in courts and enforced without further judicial order. See *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 122; *State Administrative Tribunal Act 2004* (WA), s 86. Such provisions are plainly unconstitutional at the federal level: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. *Kirk* seems to permit the continuation of such differences.

53 Gageler, above n 15, 140, 156.

54 (2003) 211 CLR 476, 514 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

55 (1874) LR 5 PC 417, 442, cited in *Kirk* (2010) 230 CLR 531, 582 [97].

defect of jurisdiction' or manifest fraud.'[56] *Willan* certainly confirms that provisions restricting the use of certiorari are read narrowly. Whether it also confirms that such provisions were regarded as ineffective prior to federation is doubtful.[57]

The High Court's references to one of the series of articles by Jaffe also deserve comment. Jaffe argued that a right of judicial review should be presumptively available.[58] He did so largely by reference to an analysis of the common law origins of judicial review which drew no apparent distinction between State and federal law. Jaffe was, however, mindful of the different constitutional position of judicial review in those levels of government and did not identify the broad symmetry adopted in *Kirk*.[59] The High Court instead drew support for this proposition from Jaffe's warning about the development of 'distorted positions'.[60] This caution was made during Jaffe's historical analysis of why English courts invoked jurisdictional notions in judicial review. Jaffe reasoned that the concept would typically surface for functional reasons when 'review is felt to be necessary.'[61] The High Court side stepped this cynical explanation of judicial reliance on jurisdictional concepts by asserting:

> It is not useful to examine whether Jaffe's explanation of why distorted positions may develop is right. What is important is that the development of distorted positions is to be avoided.[62]

This passage offers an incomplete but revealing insight into what lies behind *Kirk*. Jaffe's focus was on the distorted positions that could arise between courts and tribunals if tribunals were able to determine conclusively questions about their jurisdiction or powers. His wider concern was alignment between the judicial and executive arms of government. The High Court was instead concerned about the alignment of underlying principles between the different courts within our federal system. We cannot predict how far this concern may reach. It is possible that the High Court may come to accept that 'distortion positions' should not arise between State and federal tribunals. If so, the apparent licence given in *Kirk* to the differences in State tribunals may just prove a short respite before the tension it creates with *Kirk*'s disapproval of distorted positions is tested. The alignment of guiding principles between State and federal courts may inevitably press upon State tribunals.

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56 *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 442.

57 Part of the problem is because *Willan* largely fell into obscurity after *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. My disagreement with the interpretation given to the *Willan* case in *Kirk* does not mean I accept the view of *Willan* argued for by Gouliaditis, above n 42, 877–8. Gouliaditis concludes that *Willan* supports the proposition that, prior to federation, legislation could validly preclude supervisory review by a State court 'on the grounds of jurisdictional error, subject only to limits equivalent to the *Hickman* provisos.' *Willan* does not clearly support such a far-reaching principle.

58 This argument was made in Louis L Jaffe, 'The Right to Judicial Review I' (1958) 71 *Harvard Law Review* 401 and 'The Right to Judicial Review II' (1958) 71 *Harvard Law Review* 769.

59 He suggested that the constitutional basis of review in the United States was probably stronger at the State level: Louis L Jaffe, 'The Right to Judicial Review II' (1958) 71 *Harvard Law Review* 769, 795.

60 *Kirk* (2010) 239 CLR 531, 581 [99], citing Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

61 Jaffe, ibid.

62 *Kirk* (2010) 239 CLR 531, 570 [64].

*Kirk* also offered an incomplete explanation of the 'defining characteristics' of State Supreme Courts, to which the constitutional protection it recognised extended. The High Court made clear that the issue of prohibition, certiorari, mandamus and habeas corpus during supervisory review was a defining characteristic.[63] The Court concluded that supervisory review by a State Supreme Court was '*one* of its defining characteristics',[64] but remained silent on others. Finn has argued that one defining characteristic of State Supreme Courts could be independence.[65] Any such requirement would only be meaningful if it is extended beyond the incompatibility doctrine and existing requirements that State Supreme Court judges be impartial and be perceived as such.[66] Finn also argued that the 'core functions' of State Supreme Courts in a constitutional sense include 'at least, the protection of individual rights and freedoms'.[67] He offered no authority for this proposition but reasoned that:

> It is well understood that the superior courts, staffed by judges independent of government policy, play an essential role in our constitutional arrangements in protecting individual rights and liberties.[68]

While the courts often proclaim that judicial review serves to protect rights, they rarely move beyond general statements to this effect.[69] The correctness of any argument that the protection of rights and liberties is a defining characteristic of supervisory review, and therefore constitutionally protected, depends heavily on the nature and source of the rights and liberties in question. The jurisdiction recognised by *Kirk* would surely encompass the vindication of rights arising from the *Constitution*, so far as they are in issue in proceedings in State courts, because one core function of State Supreme Courts must be to protect the wider polity and principles of the *Constitution* within which they are now recognised and protected. This duty does not necessarily extend to rights and liberties arising from other sources. More importantly, it does not

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63 Ibid 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

64 Ibid 581 [99] (emphasis added).

65 Finn, above n 5, 107.

66 This is the assessment of Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 271, citing *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Baker v The Queen* (2004) 223 CLR 513.

67 Finn, above n 5, 107. A more subtle approach is adopted by Basten. He has suggested that heightened judicial scrutiny may be appropriate in cases involving an exercise of power that might affect a fundamental right or freedom. Basten concludes '[s]uch 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': Basten, above n 1, 297. This reasoning achieves much of the result Finn appears to advocate, but does not require that the protection of rights is a defining feature of the courts in a constitutional sense.

68 Finn, above n 5, 107.

69 See, eg, *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 where Brennan J stated that 'judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected'.accordingly'.

provide a clear basis to imply a restriction on legislative power to narrow or remove State supervisory jurisdiction over common law rights and liberties.[70]

The problem with any suggestion that the protection of rights is a defining feature of a court in the constitutional sense is that it appears to be at odds with the historical basis that the High Court recognised in *Kirk* (however imperfectly). But one may question whether a tension truly exists between the High Court's recourse to constitutional history and more modern conceptions of the appropriate role for the courts. Basten alluded to this when he conceded that 'appeals to history are rarely what they appear to be.' He continued:

> 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.[71]

The strength of this approach is its concession that any conception of the proper role of superior courts lies in a blend of historical and contemporary explanations. The problem with *Kirk* may therefore be the failure of the High Court to adequately explain the latter, though in this omission it is not alone. The Supreme Court of Canada has essentially recognised a similar protected supervisory jurisdiction in Canadian courts.[72] Canada's *Constitution* does not contain express provisions confirming that jurisdiction but the Supreme Court eventually reached the view that supervisory review was 'so important that it is given constitutional protection.'[73] One Canadian scholar recently complained that 'one might cavil at the use of the passive voice and point out that the Supreme Court of Canada gave itself constitutional protection.'[74] *Kirk* arguably suffers from a similar flaw in that it purports to uncover a principle within the *Constitution* without acknowledging the role of the High Court in its construction.[75]

Despite these shortcomings, *Kirk* has been lauded for the new protection that it offers judicial review at the State level. The institutional protection arising from *Kable*,[76] which prohibits legislation investing State courts with functions deemed incompatible with what are regarded as their core functions is now matched by a

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70 This conclusion conforms to the federal position, in which the High Court has not adopted a general theory to imply restraints upon Commonwealth legislative powers by reference to the common law: WMC Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167, 177.

71 Basten, above n 1, 280.

72 The first crucial case was *Crevier v Attorney-General of Quebec* [1981] 2 SCR 220. *Crevier* held that a privative clause could not preclude supervisory review on the question of the appropriate standard of review (a vital issue in Canadian administrative law). The case has long been accepted as precluding legislation which purports to exclude supervisory review on this and other constitutional issues.

73 *U.E.S., Local 298 v Bibeault* [1998] 2 SCR 1048, [126].

74 Audrey Macklin, 'Standard or Review: The Pragmatic and Functional Test' in Colleen Flood and Lorne Sossin, *Administrative Law in Context* (2008) 208.

75 A different view is taken by Basten, above n 1, 284. Basten concludes that there is some support for the jurisdiction recognised in *Kirk* in the common law prior to federation and that this was fortified by the *Constitution*.

76 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

protection cast over the supervisory jurisdiction of those courts.[77] The prohibitions upon legislation affecting States courts now apply as much to derogations from their jurisdictions as it does to inappropriate legislative additions. But this protection comes with an inevitable price, namely the limitations upon the judicial function which originated in *Quin*. There may be dispute as to whether that case offers a limited conception of the judicial function as Sir Anthony Mason implies or, perhaps more benignly, a better defined judicial role, but there is no doubt about its end result. It defines and confines the judicial function in equal measure.[78] What it defines as judicial in character is placed behind a constitutional firewall. What is accepted to be outside the judicial function is left relatively unprotected. That is the price of the constitutional settlement that underpins *Quin* and it is now one to be paid at the State level. The next sections of this article consider some of that lost territory.

## IV THE APPELLATE FUNCTION OF THE HIGH COURT AS LIMIT UPON STATE JUDICIAL REVIEW

*Kirk* confirmed the axiomatic points that the High Court lies at the apex of the Australian judicial system and that, while this system may be federal in character, it is integrated. This much necessarily flows from several sections of the *Constitution*, most notably s 73, and the now well settled principle that there is only one common law of Australia.[79] The premier position occupied by the High Court over both constitutional and common law issues is necessary and desirable if there is to be uniformity between the *Constitution* and the common law and also between the different jurisdictions within our federal system.[80] But unity can sometimes come at the expense of innovation and change.

A good example is *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[81] where the High Court overturned a decision of the New South Wales Court of Appeal which had revised a long established principle of equity. The remarkable feature of the High Court decision was not that it overturned a decision of an intermediate court but the blunt and critical terms in which it did so.[82] The High Court made clear that the adoption by the Court of Appeal of a different principle than the one it had previously accepted was 'not a step which an intermediate court of appeal should take in the face of long-established authority and seriously considered dicta of a majority of this

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77 Zines has suggested that *Kirk* is a logical and desirable extension of the integration of State courts into a unified Australian judicature that commenced with *Kable*: Leslie Zines, 'Recent Developments in Ch III: Kirk v IRC & South Australia v Totani' (paper presented to the AGM of the Australian Association of Constitutional Lawyers, Australian National University, Canberra, 26 November 2010).

78 Spigelman has described this facet of constitutional doctrine as 'a two-way street': JJ Spigelman, 'Public Law and the Executive' (2010) 34 *Australian Bar Review* 10, 18. A similar view seems implicit in Basten, above n 1, 294.

79 The unitary nature of the common law was confirmed in *Kirk* (2010) 239 CLR 531, 581 [99] citing *Lipohar v The Queen* (1999) 200 CLR 485, 505 [43] (Gaudron, Gummow and Hayne JJ). On close inspection the more decisive passage in *Lipohar* seems to be at 505–6 [45]–[46].

80 The latter issue seemed to weigh upon the High Court in *Lipohar v The Queen* (1999) 200 CLR 485, 505–10 [43]–[57] (Gaudron, Gummow and Hayne JJ).

81 (2007) 230 CLR 89 ('*Farah*').

82 Ibid 155 [148].

Court.'[83] The President of the Court of Appeal returned fire upon his retirement at what he perceived to be the 'haughty declaration' of supremacy by the High Court.[84] Mason P complained of the 'blinkered' approach of the High Court as evidenced by its refusal to consider competing judicial and scholarly views that might have supported the decision under appeal. The effect, his Honour suggested, was 'shutting off the oxygen of fresh ideas that would otherwise compete for acceptance in the free market of Australian jurisprudence' which had been 'read throughout the country as the assertion of a High Court monopoly in the essential developmental aspect of the common law'.[85]

Whether the *Farah* decision will have that effect is a matter of speculation only time can determine, particularly in light of the many and mixed messages the High Court sends in administrative law.[86] There are many instances in which it has overturned an expansive use of existing grounds of review by lower courts,[87] or sent varying signals on novel approaches to the migration legislation which might have provided a basis

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83 Ibid 151 [134].

84 Keith Mason, 'President Mason's Farewell Speech' (2008) 82 *Australian Law Journal* 768, 769. Mason P did not mention the *Farah* case but it was clearly the target of his remarks.

85 Ibid.

86 The effect of *Farah* more generally is also yet to be fully explored. Differing views on the issue were expressed in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, when question arose about the so-called 'objective theory of contract'. Allsop P appeared to adopt a fairly literal approach of the effect of *Farah* upon the ability of intermediate courts to undertake any significant revision of settled law: 613 [3]–[4]. By contrast, Campbell JA, suggested that *Farah* could be interpreted several ways. He suggested that one reading of *Farah* 'is to treat it as saying that it is wrong for an intermediate Court of Appeal to depart from "seriously considered dicta" of a majority of the High Court (simpliciter). Another is to treat it as saying that it is wrong for an intermediate Court of Appeal to depart from seriously considered dicta of a majority of the High Court concerning a topic on which there is a long-established line of authority. Another is that the clear finding that this Court had been wrong to depart from views about the first limb of *Barnes v Addy* (1874) … is based on particular facts of the case': 679–80 [311]. The view of Allsop P appears more aligned with that of the High Court. See, eg, *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45, [3] (Gummow, Heydon and Bell JJ).

87 See, eg, *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 323 where the High Court overturned a wider approach to actual bias taken by the Full Court of the Federal Court in two separate decisions.

for new common law grounds of review.[88] In other instances the High Court has simply held its cards close to its chest.[89]

There are various signs of the reluctance of lower courts to foster innovation in judicial review. In rare instances this can take the form of a single judge of a superior court openly expressing reluctance to adopt a novel principle, such as proportionality, on the ground that such a step should be made further up the chain of judicial command.[90] That reluctance is more likely to be expressed by way of silence. It may arguably also be discerned by the apparent absence of recent decisions of single judges of the Federal or State Supreme Courts, or their appellate courts, which consider new or radically revised principles of review either at common law or under the open ended grounds of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)[91] that might accommodate such principles.[92]

English law, by contrast, is replete with decisions from lower and intermediate courts which have challenged existing doctrine or adopted radical new principles. Many such cases have openly mused about new normative concepts that might

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88 See, eg, *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, where the High Court appeared fairly tolerant towards decisions of the Refugee Review Tribunal containing serious deficiencies or omissions in their reasoning. That approach suggested that the detail of the migration legislation would not provide a basis for tentative steps towards either implying a jurisdictional error in the form of failing to make findings on material questions of fact or adoption of the equivalent and more general English ground of that nature. The High Court appeared to back track in *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 197 ALR 389, 394 [24] when it held that the failure to 'respond to a substantial, clearly articulated argument relying on established facts' could constitute jurisdictional error. The precise reason for this apparently different approach to findings of fact and arguments based upon established facts is unclear.

89 A striking recent example was *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, 435 where a majority of the High Court noted, but found it unnecessary to decide upon, the expansive approach to unreasonableness adopted in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 where Wilcox J accepted unreasonableness could encompass the breach of a limited duty to inquire. The High Court suggested that any such duty would arise as a species of jurisdictional error. This possibility also remains unsettled: *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594, 603 [23] (French CJ and Kiefel J), 620 [78] (Gummow J). Heydon and Crennan JJ each agreed with both judgments: 623 [91]–[92].

90 See, eg, *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 424 [57] where Hollingworth J declined to decide whether proportionality was a ground of review in Victoria or Australia. Her Honour suggested the issue should be decided by a higher court such as an intermediate one.

91 ('*ADJR Act*')

92 These grounds are ss 5(1)(j), 6(1)(j) (otherwise contrary to law) and ss 5(2)(j), 6(2)(j) (abuse of power) in the *ADJR Act*. Similar grounds are included in the *ADJR Act*: *Administrative Decisions (Judicial Review) Act 1989* (ACT) ss 5(1)(i), 6(1)(i) (otherwise contrary to law), ss 5(1)(e), 5(2)(i), 6(2)(e), 6(2)(i) (abuse of power); *Judicial Review Act 1991* (Qld) ss 20(2)(j) 21(2)(j) (otherwise contrary to law), ss 29(2)(e), 21(2)(e), 23(i) (abuse of power); *Judicial Review Act 2000* (Tas) ss 17(2)(i), 18(2)(i) (otherwise contrary to law), ss 17(2)(e), 18(2)(e), 20(i) (abuse of power). Those grounds have been described as 'dead letters': Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 518.

underpin grounds of review.[93] The new principle of substantive unfairness was established by the Court of Appeal rather than the now abolished House of Lords.[94] In the key case where this principle crystallised the Court of Appeal appeared untroubled that the novel principle it adopted was 'still developing'.[95] What is the likelihood that an intermediate Australian court would adopt such a radical principle? If it did, what then would be the likelihood the decision would be accepted by the parties rather than immediately challenged in the High Court?

No-one can seriously doubt that lower and intermediate courts make and modify the law. What is in doubt is their willingness to undertake more radical steps in light of *Farah* and perhaps also their very power to do so. *Kirk* may reinforce those problems because the entrenched supervisory jurisdiction it recognised emanated from the constitutional position of the High Court and the supremacy its constitutionally entrenched appellate function necessarily grants the Court over the State Supreme Courts. The High Court pointedly affirmed this aspect of its power in *Kirk* when it remarked that 'the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by *this* court.'[96] Against this background of simultaneous protection and dominance of the State Supreme Courts by the High Court, one must strongly doubt whether significant doctrinal innovation is possible in judicial review at the State level.

## V JURISDICTIONAL ERROR

*Kirk* and other recent High Court cases confirmed the central importance of jurisdictional error but have done little to clarify its meaning or invocation. *Kirk* did at least confirm some key points surrounding the doctrine. Jurisdictional error is now a central organising principle in State judicial review in much the same way it is at the federal level.[97] *Kirk* also confirmed the obvious point that the various errors which may be labelled as jurisdictional in character are exactly that – particular instances of a wider principle.[98] The implication is that the list of errors accepted as jurisdictional

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93 Examples are collected and criticised in Thomas Poole, 'Between the Devil and The Deep Blue Sea: Administrative Law in an Age of Rights' 39–40 and Matthew Groves, 'The Surrogacy Principle and Mother Statements in Administrative Law' 77–82. Both papers are in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State* (Hart Publishing, 2008).

94 The decisive English case was *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 242 [55]–[59].

95 Ibid 242 [59]. The Court of Appeal is equally adventurous when considering statutory appeals of administrative decisions. See, eg, *E v Secretary of State for the Home Department* [2004] QB 1044, 1077 [66] where it held that a mistake of law giving rise to unfairness could constitute a ground of appeal on a point of law. This vastly expanded the scope of rights of appeal on a question of law.

96 *Kirk* (2010) 239 CLR 531, 581 [99] (emphasis added).

97 A point made clear by the High Court's emphasis on the role of the State Supreme Courts to grant certiorari for jurisdictional error: ibid 580 [97] and the inability of the States to legislate to restrict this power: 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

98 Ibid 573–4 [71]–[73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). On this issue it is useful to note the citation with apparent approval by the High Court of the

may expand and this expansion will apply equally to the Commonwealth and the States.

*Kirk* did more than simply fuse jurisdictional error and its constitutionally sacred character to State Supreme Courts. It also melded the many problems of that doctrine to the States. One is the imprecision of existing examples of jurisdictional error, such as failing to discharge an imperative duty or observe an inviolable limitation or restraint upon a statutory power,[99] or misapprehending or disregarding the nature or limits by decision-makers of their functions or powers.[100] These examples of the conduct that may support a finding of jurisdictional error have common qualities. They are obscure, malleable and also conclusory in that they do little more than confirm the self evident point that an error has been detected rather than explain how or why that finding was reached. This problem is longstanding,[101] though *Kirk* was notable for its simultaneous acceptance of jurisdictional error and acknowledgment of the result oriented nature of the doctrine. To that end, the High Court cited with apparent approval a passage by Jaffe explaining that the characterisation of questions as jurisdictional:

> is almost entirely functional; it is used to validate review when review is felt necessary...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.[102]

The idea that the level of error may affect the extent to which a decision may be subject to supervisory review is not new,[103] but it does little to explain whether and why an error may be characterised as jurisdictional.[104] Judicial findings of jurisdictional error also have little precedent value because the vague and context dependent process by which limitations and duties are implied rarely provide useful guidance from one legislative context to another. The problem is amplified by the fact that many of the limitations or imperative duties which the courts have declared may

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catalogue Mark Aronson has drawn of eight forms of error so far accepted as jurisdictional: ibid 573 [71], citing Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law; Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 335–6.

99 *Plaintiff S157/2002* (2003) 211 CLR 476, 506 [76]–[77] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

100 *Craig v South Australia* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

101 See, eg, *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 43, 49 [27] (Hill, Branson, and Stone JJ). The 'somewhat circular' nature of jurisdictional error was also acknowledged in: *WAJZ v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 84 ALD 655, 672 [70] (French J). A contrary view is taken by Basten who acknowledged that the description of an error as jurisdictional 'is to identify its consequence as invalidity', though he also suggests that the 'criterion of "jurisdictional error" is inherently neither exotic nor esoteric': Basten, above n 1, 287.

102 *Kirk* (2010) 239 CLR 531, 570–1 [64], citing Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.

103 See, eg, *Plaintiff S157/2002* (2003) 211 CLR 476, 485 [13] (Gleeson CJ).

104 The problem is not unique to jurisdictional error. Similar criticisms have been made of the invocation of fundamental values in common law constitutionalism. See, eg, Thomas Poole, 'Constitutional Exceptionalism and the Common Law' (2009) 7 *International Journal of Constitutional Law* 247, 264–6.

give rise to jurisdictional error are implied by judicial interpretation rather than express legislative statement. That interpretive process is not easy and judges frequently concede it is one upon which reasonable judicial minds may differ by reason of 'the significant range of elements that must be taken into account'.[105] Such differences mark out a fault line where jurisdictional error inevitably becomes contestable. [106]

Gageler has acknowledged that the uncertainty of jurisdictional error makes the concept a protean one, though he does not see it as necessarily empty. He suggested the courts could simply make more explicit reference to the values which must surely underpin jurisdictional error and its invocation in particular cases.[107] Gageler considered that a good starting point was the factors that Gleeson CJ marshalled in *Plaintiff S157/2002* as principles for statutory construction to guide the process of 'reconciliation' that privative clauses often require.[108] Although these various principles have proved useful in the interpretation of privative clauses, they provide little concrete guidance beyond that. They are tailored to maintaining the right of access to the courts in the face of legislation to the contrary, so that people aggrieved by administrative behaviour can seek judicial remedies, but they say very little about what people can expect in the administrative process. Gleeson CJ's principles are in effect designed by a judge for the benefit of other judges.

At this point I should raise my cloven hoof.[109] I am sceptical of jurisdictional error and see many parallels with the legalism that guided Sir Owen Dixon.[110] Legalism had its naysayers even during the peak of its influence,[111] but the doctrine is now generally discredited as an obscure mantra that 'conceals rather than reveals judicial reasoning.'[112] Legalism and formalism are often now used interchangeably,[113] and subject to equal disdain. Both are said to provide a flimsy veil for the values of the

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105 Spigelman, above n 5, 85.

106 Stephen Gageler, 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92, 104–5.

107 This suggestion echoes an empirical study of the *Chevron* case, which found that decisions to strike down or uphold agency interpretations of statutes and rules were underpinned by unspoken judicial ideology: Thomas Miles and Cass Sunstein, 'Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*' (2006) 73 *University of Chicago Law Review* 823.

108 (2003) 211 CLR 476, 491–3 [27]–[32].

109 A phrase taken from Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1, 16.

110 See the speech reproduced at (1952) 85 CLR xiv.

111 Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221. Zines made a cogent argument that Dixon held a clear theory of federalism, despite the implicit contrary claim in Dixon's adherence to the purported neutrality of legalism.

112 Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5 *Constitutional Law and Policy Review* 41, 45. The doctrine has its admirers. See, eg, Kenneth Hayne, 'Concerning Judicial Method – Fifty Years On' (2006) 32 *Melbourne University Law Review* 223; Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110. A useful overview of more recent directions is given in Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21.

113 Taggart, above n 109, 7.

judges who adhere to such doctrines. One could easily update such criticisms by simply replacing references to 'legalism' with 'jurisdictional error'. Both are obscure, typically invoked without coherent explanation of their underlying basis and those who doubt the doctrine are labelled unbelievers. Only legalism has so far been accepted as a false idol.

Some judges acknowledge the uncertainty of jurisdictional error. Chief Justice Spigelman recently conceded that the doctrine was 'a general concept of undefined and probably undefinable, content.'[114] His solution was a call for judicial restraint because '[t]he very fact that it is the judiciary which decides what is an appropriate exercise of judicial power imposes a significant burden of circumspection on judges.'[115] Justice Basten similarly acknowledged that 'an expansive approach [to jurisdictional error] 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.'[116] Such honesty should not obscure the serious contradictions at the foundations of jurisdictional error. The claim of the courts to their constitutional function of declaring and defining the law and the associated entrenchment of supervisory review is maintained by reference to a legal concept the courts cannot fully articulate. How can the courts derive secure authority from a doctrine they have invented but cannot clearly explain?

In my view, the doctrine ought to be discarded because it is uncertain and open ended and, most importantly, adds little of substance to constitutional doctrine.[117] It is not clear how the constitutional role of the courts identified by Brennan J in *Quin* necessarily requires the incorporation of jurisdictional error.[118] If the province of the courts is to declare and apply the law, why must it be pronounced by reference to jurisdictional error? Why not simply accept that the province of the courts is to detect and prevent legal error, rather than error identified as jurisdictional in nature? This turn would follow the suggestion of Sir John Laws, that a concept used as 'a builder's scaffold'[119] in the construction of modern judicial review might be discarded now that the building itself is relatively complete. The difficulty that *Kirk* presents to such doctrinal spring cleaning is not simply to confirm that this English solution has not

114 Spigelman, above n 78, 17.

115 Spigelman, above n 78, 18.

116 Basten, above n 1, 295.

117 Though discarding jurisdictional error would not necessarily solve all the ills of judicial review. Subsuming jurisdictional error within a notion of error of law might simply relabel some of the problems of jurisdictional error. Discarding jurisdictional error might also leave serious factual errors in uncertain terrain. Jurisdictional principle does not draw the sharp distinction between errors of law and fact as the error of law concept does: Jack Beatson, The Scope of Judicial Review for Error of Law' (1984) 4 *Oxford Journal of Legal Studies* 22, 25.

118 This approach has obvious parallels to that of Kirby J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 122–3 [211]–[212]; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 439–440 [173]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1185 [122].

119 John Laws, 'An Extract from: Illegality: The Problem of Jurisdiction' in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000) 81. These remarks were directed to ultra vires and the function Laws perceived it served to secure judicial review in England. The same logic can apply to Australia's use of jurisdictional error.

been adopted in Australia,[120] but also that its entrenchment of jurisdictional error at the State level means that the task of its inevitable removal will be more protracted, painful and can only happen in the High Court.

## VI PRIVATIVE CLAUSES AT THE STATE LEVEL

Although *Kirk* made clear that State parliaments cannot exclude supervisory review for jurisdictional error, the High Court left open the possibility that the States could still enact valid privative clauses.[121] The Court gave no clear indication of what State parliaments could include within an effective privative clause or how they might be interpreted but recent federal cases suggest this possibility is a polite fiction. The strict and technical interpretive approach adopted for privative clauses in *Plaintiff S157/2002* creates a sufficient level of uncertainty on their meaning, at least until it is resolved by the courts, that the federal parliament would surely pause to wonder if they are worth the trouble. State parliaments now have similar reason to pause.

*Plaintiff S157/2002* confirmed that there can be 'no general rule of the meaning or effect of privative clauses.'[122] Provisions granting power to administrative officials are necessarily limited for constitutional reasons,[123] which will stand in tension with provisions seeking to limit the role of the courts to police those inherently limited powers.[124] The nature of this tension depends greatly on the terms of a privative clause and the wider statutory framework in which it is located.[125] The exact meaning of privative clauses can in theory be as varied as the statutes within which they are placed. The only certainties are the constitutional principles against which privative clauses are interpreted. An obvious one is that the operation of the Constitution cannot be excluded and its requirements will prevail over all else.[126] The separate but related point is that privative clauses are construed strictly, due to the judicial presumption that parliaments do not intend to remove or restrict the jurisdiction of the courts.[127]

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120 *Kirk* noted that England's rejection jurisdictional error had not been followed in Australia: (2010) 239 CLR 531, 571 [65].

121 Ibid 581 [100].

122 (2003) 211 CLR 476, 501 [60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

123 Ibid 505 [73], 512 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

124 Aronson has questioned whether such provisions *necessarily* create a tension within a statute. He argues that many of the apparent contradictions identified between legislative provisions are not necessarily contradictions within the statute in question but may instead reveal a wider contradiction between a provision and assumptions arising for the rule of law: Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law' (2010) 21 *Public Law Review* 35, 37. The implication is that the task of interpretive reconciliation proceeds on the fictitious assumption that the difficulty which requires reconciliation arises within the terms of a statute, when it is actually a broader conflict between the aim of one of more provisions affecting the availability of judicial review and contrary assumptions of principle which exist outside the statute.

125 (2003) 211 CLR 476, 501 [60], 503 [65] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

126 Ibid 504 [71] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

127 Ibid 505 [72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

*Plaintiff S157/2002* illustrated the devastating potential of these principles. The clause in that case passed constitutional muster but was eviscerated.[128] It was interpreted as being able to encompass only decisions not infected by jurisdictional error. The expansive approach taken to jurisdictional error meant that the effective scope left to the privative clause was extremely narrow. *Kirk* leaves no reason to believe that State privative clauses will receive different treatment. Where they clearly conflict with established constitutional doctrine, which now includes the entrenched supervisory jurisdiction recognised in *Kirk*, they are simply invalid to the extent of any conflict. The courts will also interpret privative clauses where possible to avoid direct conflict with constitutional prohibitions.

*Bodruddaza's Case*[129] confirms that constitutional obstacles also lie in the path of procedural restrictions on judicial review. In that case the High Court struck down a rigid legislative time limit to commence judicial review proceedings because it did not allow consideration of the 'range of vitiating circumstances that may affect administrative decision making.'[130] The Court reasoned that the inflexible nature of the limit 'subverts the constitutional purpose of the remedy provided by s 75(v).'[131] Such observations confirm that rigid time limits will be constitutionally invalid because they prevent the issue of remedies based on grounds that can, and often do, only become known after the limitation period has expired.[132]

More generally, they also suggest that procedural restrictions must preserve a judicial discretion sufficiently wide to manage unforeseen problems of the administrative process. The issue is necessarily uncertain because the High Court gave no clear guidance on when or why a restriction would become substantive rather than procedural in character.[133] That uncertainty means the judicial response to such clauses could be as wide and varied as the errors that the High Court envisaged could arise from the administrative process. If so, the legislative ability to narrow access to judicial review by procedural restrictions has an unsteady foundation.

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128 A description adopted by David Dyzenhaus, *The Constitution of Law: Legality in a time of emergency* (Cambridge University Press, 2006) 113. He suggests (at 106–7) this approach can be traced at least back to *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

129 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671 [54] Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ held that the validity of such clauses was to be determined by their 'substance or practical effect' rather than their form but their Honours gave little general guidance on that distinction.

130 Ibid 671–2 [55] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). The focus of the majority upon this issue made it unnecessary to consider the length of the specified limit in detail.

131 Ibid 672 [58] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

132 While time limits without the possibility of extensions for exceptional circumstances are rare in judicial review, they do exist. See, eg, *Administrative Law Act 1978* (Vic) s 4 (1). That provision has been interpreted as not allowing any extension: *Keller v Bayside City Council* [1996] 1 VR 357, 362, 375 (Batt J); *Quality Packaging Service Pty Ltd v City of Brunswick* [1996] VR 829. It is unclear whether the existence of a more flexible time limit for judicial review at common law may save the inflexible statutory one from constitutional failure.

133 In *Plaintiff S157/2002* (2003) 211 CLR 476, 538 [176] Callinan J suggested that procedural restrictions 'must be truly regulatory in nature' to pass constitutional muster.

The decision of the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[134] indicates that *Kirk* may not affect many provisions which limit the rights of parties because they are not truly privative in character. *Chase Oyster* involved a building contract dispute which had been subject to adjudication in accordance with the *Building And Construction Industry Security of Payment Act 1999* (NSW). The Act allowed for the registration and enforcement of adjudications as a judgment debt, but limited the rights of a party who sought to have any such judgment set aside. The New South Wales Court of Appeal held that these restrictions did not offend *Kirk* because they were extended only to proceedings to set aside a judgment debt rather than supervisory review by the Supreme Court.[135] Such reasoning makes clear that provisions which restrict the rights of parties in limited circumstances intersect with *Kirk* only when they clearly impede supervisory review.

*Kirk* will consign to history many lesser known forms of privative clauses used by the States. Some seek to exclude judicial review in specific areas with a breadth not seen in federal clauses. A useful example is the *Corrective Services Act 2006* (Qld), which contains several clauses purporting to entirely exclude recourse to the *Judicial Review Act 1991* (Qld).[136] The exclusion of statutory review is not necessarily problematic but Queensland's version of the *ADJR Act* abolishes the Supreme Court's power to issue prerogative writs.[137] The privative clauses in Queensland's correctional legislation therefore seek to exclude most of the judicial review available in that State.[138] The privative clauses contained in the *Corrective Services Act 2006* (Qld) do not simply oust statutory judicial review. They are also clearly expressed to preclude review for jurisdictional error.[139] Such unmistakable language cannot be saved by the wizardry of interpretative reconciliation. In the wake of *Kirk* these clauses are clearly beyond the legislative power of the Queensland parliament and therefore invalid.[140] The remaining clauses would be interpreted in the same manner as the clauses in *Kirk*, namely to exclude judicial review except on the grounds of jurisdictional error.[141]

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134 (2010) 272 ALR 750.

135 Ibid [59] (Spigelman CJ), [107] (Basten JA, McDougall J agreeing on this issue).

136 *Corrective Services Act 2006* (Qld) ss 17(1), 66(6), 68(6), 71(4) and 273(3).

137 *Judicial Review Act 1991* (Qld) ss 41, 42. The privative clauses mentioned in the previous note, as with many such clauses in Queensland legislation, preclude application of the *Judicial Review Act* except for these two provisions.

138 But neither the correctional nor judicial review legislation excludes the Supreme Court's jurisdiction to issue declarations. There is no apparent reason why this obvious remedy was omitted in an otherwise wide ranging attempt to oust review.

139 *Corrective Services Act 2006* (Qld) ss 17(2), 66(7), 68(7), and 71(5).

140 They directly conflict with the statement at: *Kirk* (2010) 239 CLR 531, 581 [100]. As do several other Queensland provisions purporting to apply to decisions or actions affected by jurisdictional error. See, eg, *Mineral Resources Act 1989* (Qld) s 231K(2) *Energy and Water Ombudsman Act 2006* (Qld) s 41(6); *Telecommunications Interception Act 2009* (Qld) s 38(3). The *Security Providers Act 1993* (Qld) s 14B(7) which states that restrictions on appeal of certain decisions 'includes a decisions affected by jurisdictional error' would encounter no such problems because it could be read literally to restrict appeal and not supervisory review.

141 This approach would be textually justified by the existence of other provisions which expressly seek to exclude review for jurisdictional error. Those latter provisions make clear that other clauses ousting review are not intended to extend to jurisdictional error.

The more common restriction on review in Queensland is an express exclusion of the *Judicial Review Act 1991* (Qld). Some Queensland cases have held that the prerogative writs might remain available for decisions excluded from statutory judicial review,[142] but the issue was significantly revisited by the Queensland Court of Appeal in *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* (*Northbuild Constructions*).[143] *Northbuild* was another case in which judicial review was sought of an adjudication of a dispute over a construction contract. The decision under challenge was expressly excluded from the scope of the *Judicial Review Act 1991* (Qld),[144] but the Court of Appeal found that the exclusion of statutory review did not directly offend *Kirk*.[145]

Chesterman JA identified two key means by which this might be so. First, Chesterman JA reasoned that the specific provision which operated to place a scheduled statute or class of decisions outside the scope of the *Judicial Review Statute 1991* (Qld) was not privative in character because it did not 'purport to destroy the court's pre-existing jurisdiction to control the unlawful exercise of power.'[146] Murdo P appeared mindful of the same concerns when she accepted that review remained possible, though her Honour pointedly declined to explain the precise operation of any possible review.[147] There is an obvious reason why the limitation or exclusion of statutory judicial review cannot be privative, at least in the sense proscribed by *Kirk*. Statutory judicial review is precisely that. It is a legislative creation that must surely be capable of removal or restriction by the legislature that created it. The supervisory jurisdiction recognised by *Kirk* is not necessarily the same as any that might be available by statute. Statutory review can therefore be introduced, amended or removed without constitutional difficulty.

The second reason offered by Chesterman JA was far more radical. His Honour reasoned that the legislative exclusion of decisions made under some statutes or classes of decisions simply precluded their review under the *Judicial Review Act 1991* (Qld) but did not preclude their review under the pre-existing jurisdiction of the Supreme Court

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142 See, eg, *De Neefe Signs Pty Ltd v Build1 (Qld) Pty Ltd* [2010] QSC 279, [13] (Fryberg J).

143 [2011] QCA 22.

144 The *Justice and Other Legislation Amendment Act 2007* (Qld) s 91 placed adjudication and other decisions made under the *Building and Construction Industry Payments Act 2004* (Qld) on the *Judicial Review Act 1991* (Qld). Section 18 of the *Judicial Review Act* provides that decisions or statutes on schedule 1 are not subject to its substantive provisions.

145 The Court of Appeal acknowledged that the issue had not been fully argued. Murdo P indicated her remarks on the issue were 'preliminary': *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 22, [9]. Chesterman JA similarly stated that his remarks were 'tentative': [23].

146 Ibid [34]–[35]. His Honour accepted that, if it were otherwise, the legislative exclusion of statutory review could be interpreted to 'prohibit the exercise by the Supreme Court of its jurisdiction to grant prerogative relief' which would make the section 'unconstitutional and of no effect': [33].

147 Her Honour suggested that relief was available under the *Constitution of Queensland 2001* (Qld) s 58, *Supreme Court of Queensland Act 1991* s 128 and *Judicial Review Act 1991* (Qld) pt 5 but did not clearly explain the combined effect of these provisions: *Northbuild Constructions Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 22, [9].

which was preserved in a revised form by the judicial review statute.[148] Chesterman JA suggested that all judicial review proceedings, whether those subject to the substantive provisions of Part 3 of the *Judicial Review Act 1991* (Qld) or the residual jurisdiction preserved by Part 5 of the Act, could be subject to the broad power granted to the court to stay or dismiss proceedings by s 48. The overall effect of this approach enabled limited supervisory review of decisions that were infected by an error of law on the face of the record or jurisdictional error under the residual jurisdiction of the Supreme Court, but prompt dismissal of the other applications under s 48. Remarkably, Chesterman JA frankly admitted that his reasoning required the legislative exclusion of decisions made under building payments legislation to be read not as applying to the '*Judicial Review Act 1991* (Qld)' but instead to 'Part 3 of the *Judicial Review Act 1991* (Qld).'[149] Chesterman JA reasoned that his approach would also 'prevent invalidation of any part of the *Judicial Review Act* by reason of the ratio expressed in *Kirk*.'[150] While there is some authority that courts may imply vital words into legislation, Chesterman JA did not explain in detail precisely how the case at hand fell within those very limited circumstances.[151]

Cases such as *Chase Oyster* and *Northbuild Constructions* make it clear that *Kirk* requires close attention to many of the existing limits to State judicial review in order to determine the initial question of whether they are truly privative in character. A close inspection may reveal they are not privative but, where they are, the limits such clauses impose will, as far as their language reasonably allows, be interpreted as not attempting to intrude on the constitutionally protected jurisdiction of the State Supreme Courts. That may not always possible.

Other legislative means have been used to exclude the supervisory jurisdiction of the State Supreme Courts. One arises from s 85 of the *Constitution Act 1975* (Vic), which enables the jurisdiction of the Supreme Court of Victoria to be wholly excluded so long as legislation is enacted with a sufficiently clear intention to do so.[152] This procedure was regularly adopted by express reference to s 85 during second reading speeches of legislation which seeks to limit or wholly extinguish any jurisdiction of the Supreme Court of Victoria and the inclusion of a provision which states its purpose it to 'alter or

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148 Ibid [27]. White JA noted that the old rules and procedures governing prerogative writs were clearly abolished as part of the changes made by the *Judicial Review Act 1991* (Qld) but that proceedings not otherwise covered by existing procedural rules could be regulated by the express power granted to the Supreme Court for such unusual cases in s 118E of the *Supreme Court of Queensland Act 1991* (Qld): ibid [76].

149 Ibid [29].

150 Ibid [28].

151 Chesterman JA made reference to his own previous discussion of the circumstances in which a court may supplement the words of the legislature in *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QCA 333, [25]–[47] where he considered the extremely limited circumstances in which a court might supplement the words of parliament as suggested by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74, 105. That approach was approved by McHugh J in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113, 116; and *Mills v Meeking* (1990) 160 CLR 214, 243–4.

152 On the operation of the provision, see Carol Foley, 'Section 85 of the Victorian Constitution Act 1975: Constitutionally Entrenched Right...or Wrong?' (1994) 20 *Monash University Law Review* 110.

vary section 85 of the Constitution Act'.[153] Neither s 85 of the *Constitution Act 1975* (Vic) nor provisions enacted in reliance upon it are necessarily invalid, particularly as neither s 85 nor clauses enacted in reliance upon it expressly seek to exclude supervisory review for jurisdictional error.[154] The process of interpretive reconciliation assume that such clauses intend to exclude supervisory review but not for jurisdictional error. That would leave such clauses with the same fate as the privative clause examined in *Plaintiff S157/2002*, which is to remain on the statute books but in name only.

## VII 'NO INVALIDITY' CLAUSES

A 'no invalidity clause' typically provides that the validity of a decision is not affected by any failure to comply with statutory procedural requirements. Such clauses seek to indirectly preclude review by confirming the status of a decision that might otherwise be reviewable for procedural defect. Narrower clauses, which applied to either a limited class of decisions made or procedures that might not be observed, could be upheld on the basis that they simply provided a clear legislative statement on the intended consequences of non-compliance with the procedure.[155] If so, such clauses could be viewed as valid legislative attempts to assist the interpretive function of the courts rather than impermissible ones to exclude supervisory review. Different considerations might arise for clauses of wider scope, such as one stating that *any* breach of *any* provision in an Act, or any norm the breach of which might attract a ground of review, was not intended to affect the validity of the decision. In theory, such clauses could make it almost impossible for decision makers to fall into jurisdictional error. In practice, such wide ranging clauses could easily be interpreted as a constitutionally impermissible attempt to confer an unfettered discretion upon a decision maker.[156]

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153 See, eg, *EastLink Project Act 2004* (Vic) s 257 which adopts this wording to cover several sections of that Act, one of which (s 193(4)) purports to exclude statutory judicial review and the issue of all of the equitable and prerogative writs except habeas corpus. A similar exclusion of judicial review is contained in the *Major Transport Projects Facilitation Act 2009* (Vic) ss 263(4), 265.

154 In the wake of *Kirk* the Victorian legislature made clear that two wide ranging exclusions of appeal rights did not include appeal on the basis of jurisdictional error: *Personal Safety Intervention Orders Act 2010* (Vic) ss 95(2), 97(2); *Family Violence Protection Act 2008* (Vic) ss 118(2), 120(2). The relevant provisions of the latter Act were included as consequential amendments made by the former. Such additions to restrictions on appeal rights, which are traditionally interpreted as not to include supervisory review, are arguably unnecessary because they apply in an Act which grants no rights of appeal.

155 A path anticipated in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 374–5 [41] (Brennan CJ), 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ).

156 Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 208. See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 250–1 [129] (Kirby J). The wider issues are examined in careful detail in Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

The High Court kept its cards close to its chest on these issues in *Futuris,*[157] when it examined a clause stating that the validity of a tax assessment was not affected by a failure to comply with any part of a tax statute.[158] Kirby J doubted that such a clause could sit with the minimum provision of judicial review identified in recent times.[159] Gummow, Hayne, Heydon and Crennan JJ held that the clause was, by implication, not intended to apply to a 'deliberate failure to comply with the provisions of the Act.'[160] Their Honours reached a similar conclusion for a further clause which provided that the production of any assessment by tax officials in legal proceedings was 'conclusive evidence of the due making of the assessment.'[161] The result was that no conflict arose between the two provisions, or any reason for interpretive reconciliation. This reasoning indicates that no invalidity clauses will be interpreted as intended to extend only to decisions taken in good faith and an intention to comply with procedures.

A similar approach appears to be favoured by Justice Basten, who suggested that parliament ought to be able to 'validly identify with precision the criteria or conditions which were intended to delimit the boundaries of a statutory power...so long as the degree of discretion conferred is not unlimited.'[162] This approach need not be limited to no invalidity clauses though it could be particularly useful for those clauses when applied to decisions taken in good faith and with an apparent intention to comply with any procedures contained in the source of power itself. Those factors could, in combination, provide a coherent way to strike a balance which allows no invalidity clauses some limited operation.

Malfeasance and deliberate non-compliance might in theory be capable of protection, though the High Court need not consider the possibility unless a legislature ventures down the unlikely path of using express language to that effect. Although *Futuris* found no tension in key provisions of the tax legislation, nothing in the case precludes the use of interpretive reconciliation to balance a no invalidity clause with other provisions creating inviolable restraints or imperative duties.[163] Where that process is invoked, the result would inevitably narrow the effect of a no invalidity clause.

Aronson argues that no invalidity clauses may contradict wider assumptions arising from the rule of law.[164] According to this view, such clauses do not necessarily conflict with other provisions within an Act so as to require interpretive reconciliation but are instead in tension with more general principles about the position of the courts

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157 *Federal Commissioner of Taxation v Futuris Corporation* (2008) 237 CLR 146.

158 *Income Taxation Assessment Act 1936* (Cth) s 175.

159 *Federal Commissioner of Taxation v Futuris Corporation* (2008) 237 CLR 146, 183 [124] citing *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–514 [103]–[104]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–69 [44]–[46]. It is unclear whether the doubts of Kirby J were due to the width of clause or its very nature.

160 Ibid 164–5 [55].

161 *Income Taxation Assessment Act 1936* (Cth) s 177(1).

162 Basten, above n 1, 286.

163 Each of these characterisations of statutory provisions was seemingly endorsed in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

164 Aronson, above n 124, 37.

and parliament. The question at the heart of such a conflict is whether the courts will accept a legislative power to define, and therefore possibly limit, jurisdictional error. If no invalidity clauses create the tension suggested by Aronson, both broad and narrow clauses may face constitutional peril. Aronson sees an answer in the entrenched jurisdiction of the High Court, which enables an authoritative judicial interpretation of any clause. We should not assume that is true of no invalidity clauses. It is one thing for the High Court to concede it has not, and perhaps cannot, settle the boundaries or meaning of jurisdictional error. It is quite another thing for the Court to deny a parliament the power to enact legislation that provides specified failures by decision makers are not intended to give rise to one or more forms of jurisdictional error it has identified.

## VIII CAN THE STATES CONTRACT OUT OF THE JURISDICTION RECOGNISED IN *KIRK*?

Although *Kirk* emphatically entrenched the supervisory role of State Supreme Courts, it was less clear on precisely who was subject to this jurisdiction. The High Court affirmed the role of State courts to supervise 'the exercise of State executive and judicial power by persons and bodies other than the Supreme Court.'[165] This phrase confirms administrative officials, tribunals and other non-judicial bodies cannot conclusively determine the limits of their power, or questions of law more generally, but does not make clear the identity of those amenable to the new constitutionally entrenched form of review. The equivalent federal jurisdiction is constitutionally mandated to an 'officer of the Commonwealth.'[166] We can assume that the High Court did not omit an equivalent requirement in the jurisdiction recognised in *Kirk* for reasons of fidelity to constitutional text. After all, the jurisdiction recognised in *Kirk* was itself implied. Why might the Court have decided not to imply the requirement of an officer at the State level?

One obvious reason is the limitations of the federal requirement which have become apparent in recent years. For a long time an officer of the Commonwealth was interpreted fairly literally, and without great difficulty, with a focus on the connection between the decision maker and the Commonwealth. In the leading early case of *R v Murray; Ex parte Commonwealth*,[167] Isaacs J reasoned that the phrase 'connotes an "office" of some conceivable tenure, and connotes appointment, and usually salary.'[168] The connection required between an officer and the Commonwealth is normally easy to establish if the officer is appointed, paid and managed by the Commonwealth. It also encompasses officers granted a high level of independence, such as federal judges, tribunal members and the Commonwealth Director of Public Prosecutions.[169] The weight of authority suggests that it does not encompass many officials appointed by

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165 *Kirk* (2010) 239 CLR 531, 580 [98].
166 *Commonwealth Constitution* s 75(v).
167 (1916) 22 CLR 437.
168 Ibid 452.
169 *R v Commonwealth Court of Conciliation and Arbitration and the President thereof; Ex parte Whybrow* (1910) 11 CLR 1 (federal judges); *Pancontinental Mining Ltd v Burns* (1994) 124 ALR 471 (federal tribunal members); *Lovell v Zempilas* (1990) 21 ALD 728 (federal DPP).

Commonwealth corporate bodies.[170] These distinctions might have marked the traditional boundaries of government activity but seem outdated for modern government and its use of 'mixed administration', which draws private providers into public activities.[171] The difficulties mixed administration poses for the public/private divide of administrative law echo in the definition of an officer of the Commonwealth. Can either accommodate people nominally located in the private sector but deeply involved in public sector activity?

The High Court kept its cards close to its chest in *Plaintiff M61/2010E v Commonwealth*[172] when it unanimously decided to:

> leave, for another day, the question of whether a party identified as "an independent contractor" nevertheless may fall within the expression "an officer of the Commonwealth" in s 75(v) in circumstances where some aspect of the exercise of the statutory or executive authority of the Commonwealth has been "contracted out".[173]

One can understand why the High Court side stepped the issue in that case. The incorporation of private officials to review the decisions of public officers, for the purpose of determining whether recommendations should be made to the minister for the grant of a visa, were almost impossible to segregate from the preceding decisions of public officials. The High Court assumed the private officials were not Commonwealth officers,[174] but suggested the surrounding decisions by public officials made it impossible to quarantine the privately employed review officers from those decisions or the laws under which they were made.[175] In other words, a foothold for the jurisdiction of the High Court could be found without determination of the position of outsourced officials.

The immediate lesson is that outsourced decision making may, like privative clauses, fall on the sword of their own complexity. Private actors integrated into public administrative activity may be part of a wider process that invariably attracts supervisory review, even if not directed to those private officials. A more sophisticated arrangement that might evade this possibility would require the High Court to revisit the point. Recent cases are instructive. In the privative clause cases, the High Court has repeatedly emphasised the limits that its constitutionally entrenched role place upon the legislative power of the Commonwealth. Those cases give no reason to believe the Commonwealth could achieve by administrative arrangements what it cannot by legislation. There is also no reason to suppose the High Court would be any more

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170 See, eg, *Waterhouse v Australian Broadcasting Commission Corporation* (unreported, Federal Court, Wilcox J, 21 October 1987) (staff of the Australian Broadcasting Commission); *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 500 (staff of Telstra Corporation, in its earlier configuration as a corporation fully owned by the Commonwealth); *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 82 ALR 563, 575 (staff of Australia Post, when that body was fully owned by the Commonwealth).

171 The challenges of mixed administration to public law are examined in Mark Aronson, 'A Public Lawyer's Response to Privatization and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 40.

172 (2010) 85 ALJR 133.

173 Ibid 143 [51] (per curiam).

174 Ibid.

175 Ibid 146 [66]–[67], 150 [87]–[90].

sympathetic to an attempt by the States to outsource decisionmaking so as to place decisions beyond the jurisdiction recognised by *Kirk*.

## IX SUBSTANTIVE UNFAIRNESS IN AUSTRALIAN ADMINISTRATIVE LAW

The Australian conception of natural justice is clearly procedural rather than substantive. Its focus is upon the decision making process rather than the quality of the decision itself.[176] The English conception of fairness in administrative law took a giant step with the recognition of substantive rather than procedural expectations by the Court of Appeal in *R v North and East Devon Health Authority; Ex parte Coughlan*.[177] That case accepted expectations created by public officials might sometimes have to be fulfilled, or could be disappointed after compliance with strict principles. This possibility arose from a novel category of promises, expectations and the like, where the Court of Appeal considered that 'a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural.'[178] In such cases the court had to decide whether any frustration of that expectation was unfair and would constitute an abuse of power. The role of the court in this category of unfairness included 'the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.'[179] The court would assume the role of balancing the potential unfairness to the person affected against the policy reasons of the government for disappointing that expectation. In particular, the court claimed the role of deciding whether any reasons advanced by public officials provided an 'overriding' reason to justify disappointment of the expectation.[180]

This reasoning is striking for two reasons. First, it clearly takes account of the fairness of the outcome of the administrative process.[181] Secondly, the Court of Appeal offered little guidance on the scope or meaning of the abuse of power concept upon

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176 The distinction is examined in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 408–14.

177 [2001] QB 213. The case and its consequences are examined in detail in Paul Craig, *Administrative Law* (Sweet & Maxwell, 6th ed, 2008) ch 20. An Australian assessment of the issues is given in Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2003) 32 *Melbourne University Law Review* 470; Greg Weeks, 'Estoppel and Public Authorities: Examining the Case for an Equitable Remedy' (2010) 4 *Journal of Equity* 247, 259–73.

178 *Coughlan* [2001] QB 213, 242 [57] (emphasis in original). The Court of Appeal also reiterated two fairly orthodox instances of promises, expectations and the like. The first, gauged by *Wednesbury* unreasonableness, were cases where officials would have to be mindful of its previous policy and give it appropriate weight: [2001] QB 213, 241–2 [57]. The second was a more precise instance of the first, in which officials had to observe any expectation of a procedure, such as consultation before a change of policy: ibid 242 [57]. This category essentially involved application of principles of procedural fairness, the detail of which depend on the expectation in question.

179 Ibid 242 [58].

180 Ibid 243 [60].

181 A point acknowledged at *Coughlan* [2001] QB 213, 246 [71].

which substantive unfairness rests.[182] Subsequent cases have wrestled with the meaning of abuse of power and also the principles that might underpin it, but offered little clear guidance on the precise meaning of the concept.[183] This approach is at odds with *Quin* and later Australian cases because it draws the court towards the merits of a decision, its ultimate fairness and also the very policy choices that the Australian conception of judicial power allocates to the executive arm of government.

Those concerns were confirmed in *Lam's* case,[184] where the High Court expressed such strong doubts on substantive unfairness that the doctrine was effectively stillborn.[185] Gleeson CJ reasoned that the principle adopted in *Coughlan* provoked very 'large questions as to the relations between the executive and judicial branches of government'. His Honour cautioned that the jurisdiction conferred by s 75(v) of the Constitution 'does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration'.[186] According to this view, the supervisory jurisdiction of the High Court does not and cannot extend to the sort of balancing exercise envisaged by *Coughlan* in which competing objectives must be gauged and the preferable one endorsed.

McHugh and Gummow JJ, with whom Callinan J agreed on this issue,[187] reached a similar conclusion but also acknowledged that the normative values adopted in recent English cases such as *Coughlan* involving abuse of power were not unlike the 'values concerned in general terms with abuse of power by the executive and legislative branches of government' in Australian constitutional law. But, they cautioned, 'it would be going much further to give those values an immediate normative operation in applying the Constitution'.[188] McHugh and Gummow JJ also affirmed the central role of s 75(v) to the exposition of judicial review doctrine. Their Honours explained:

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182 The Court of Appeal simply stated that the court retained the function of determining whether 'the consequent frustration of an individual's expectation was so unfair as to be a misuse ... of power': *Coughlan* [2001] QB 213, 251 [82]. It gave no guidance on what might be a 'misuse' of power.

183 Many cases are usefully reviewed in Mark Elliott, 'Legitimate Expectation, Consistency and Abuse of Power' [2005] *Judicial Review* 281 and Paul Reynolds, 'Legitimate Expectations and the Protection of Trust in Public Officials' [2011] *Public Law* 330.

184 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

185 A curious feature of *Lam* was that counsel for Lam did not rely on *Coughlan* and it was not strictly necessary for the High Court to consider the case because the claimed benefit was entirely procedural and could have been disposed as such.

186 (2003) 214 CLR 1, 10 [28].

187 Callinan J agreed with McHugh and Gummow JJ that the legitimate expectation could 'on no view…give rise to substantive rights rather than procedural rights': ibid 48 [148].

188 Ibid 23 [72].

> Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the Constitution or otherwise, inevitably involves attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.[189]

According to this view, the normative values espoused in recent English cases concerning abuse of power, such as notions of good administration,[190] or conspicuous unfairness,[191] may not be adopted in Australian judicial review. They may be adopted by other arms of government but not the judicial arm. This reasoning precludes the adoption of both substantive unfairness and arguably also any successor or variant to that doctrine which English courts might develop if their musings about the foundations of abuse of power reach a coherent conclusion.

That limitation might not be confined to the federal level. The reference by McHugh and Gummow JJ to the principles of judicial review devised 'under s 75 of the *Constitution* or otherwise' echo the approach of Brennan J in *Quin* and suggest that fundamental principles governing judicial review in the original jurisdiction of the High Court will not differ from other avenues of review. That possibility can only be stronger in light of the emphasis in *Kirk* on doctrinal unity between the Commonwealth and the States. Substantive unfairness therefore faces the same basic constitutional obstacles at the State level as it does at the federal level. The additional obstacle of the disapproval of the concept in *Lam* means any change can only occur after a significant shift of opinion in the High Court.

## X PROPORTIONALITY AT THE STATE LEVEL

England and some other common law jurisdictions seem to be slowly edging towards the adoption of a principle of proportionality in judicial review.[192] In simple terms, proportionality requires that an 'administrative action must be rationally connected to its stated objective and impair the right(s) no more than is reasonably necessary in

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189 Ibid 24–5 [76]. See also 34 [102].

190 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68]–[69] (Laws LJ) and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453, [181]–[182] (Lord Mance). It has been suggested that a better explanation of this line of reasoning is the need to protect the trust reposed in public officials: Reynolds, above n 183.

191 *R v Inland Revenue Commissioners, Ex p Unilever plc* [1996] STC 681, 695 (Simon Brown LJ).

192 These first steps in England are clearly a response to European influences. The European Court of Human Rights made clear that the traditional *Wednesbury* standard of review did not provide sufficient protection to the rights protected by European laws to which England was a party: *Lustig-Prean v Ministry of Defence (No 1)* (2000) 29 EHRR 548. The House of Lords then showed some sympathy to the doctrine in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. Proportionality was not fully adopted in that or other cases and seems largely to apply in cases concerning fundamental rights where the *Human Rights Act 1998* (Eng) does not apply. See Mark Elliott and Robert Thomas, *Public Law* (2011) 521–8.

order to accomplish those objectives.'[193] Although many aspects of proportionality remain unsettled the ground clearly obliges courts to examine the *quality* of a decision more closely and in a way that is not required by the ground of unreasonableness.[194] The nature and strictness of that scrutiny depends in large part on where the dust settles about the balancing act proportionality requires. That part of the ground in which the courts must weigh the nature of the official intrusion against right sought to be protected is the most unsettled aspect of proportionality.[195] Should the application of the ground differ between cases involving important rights and other arguably lesser rights?[196] Should these differences be decided on a sliding scale?[197] There are related questions on whether any ground of proportionality should subsume existing grounds of review that can touch on substantive issues, such as reasonableness and rationality.[198] In the absence of clear answers to these questions many argue that proportionality lacks an accepted or coherent central principle.[199]

The potential of proportionality to transcend the merits/review divide which lies at the heart of Australian public law presents a more immediate obstacle in Australia. English scholars have warned that proportionality may 'lower the threshold of judicial intervention and involve the courts in considering merits and facts of administrative decisions.'[200] English courts remain at pains to deny that proportionality has or will become merits review,[201] but the continued denials simply highlight the Icarus like quality of the ground which appears to bring judicial review dangerously close to the sun. That danger remains unless and until the balancing act at the heart of proportionality is settled.

The signals from Australian courts are predictably mixed, guarded and non-committal.[202] Professor Aronson and his co-authors suggest the issue is necessarily

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193 This is the definition offered in Taggart, above n 109, 24. I cannot improve it and so adopt it gratefully. It should be noted that some authors argue that the requirement a measure must impair rights no more than necessary should be discarded: Tom Hickman, 'The Substance and Structure of Proportionality' [2008] *Public Law* 694, 714.

194 Aronson, Dyer and Groves, above n 176, 380

195 Problems explained in Hickman, above n 193, 701–14.

196 Michael Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] *New Zealand Law Review* 423.

197 A possibility examined in Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174.

198 Opposing views on the issue are put in Paul Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265 and Tom Hickman, 'Problems for Proportionality' [2010] *New Zealand Law Review* 303.

199 Hickman, above n 193, 714–5; Aronson, Dyer and Groves, above n 176, 380–1.

200 Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review* (6th ed, 2007) 584.

201 The denials began at the very birth of the doctrine: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 548. They continue to be issued. See, eg, *R (SB) v Governor of Denbigh High School* [2007] 1 AC 650, 673; *Tweed v Parade Commission (Northern Ireland)* [2007] 2 AC 532, 548.

202 These include *Bruce v Cole* (1998) 45 NSWLR 163, 185 (where Spigelman CJ noted that proportionality lay 'at the boundaries of accepted administrative law' but shed little light on which side of those boundaries his Honour thought it should lie); *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 (where McHugh and

more advanced in the two Australian jurisdictions which have adopted a Charter of Rights.[203] In particular, they suggest that s 7(2) of the *Charter of Rights and Responsibilities* 2006 (Vic) will force the issue because of its explicit adoption of a balancing test that includes considerations such as the right affected and whether any less restrictive means is available to achieve the limitation in question. It was explained above that this issue was side stepped in *Sabet v Medical Practitioners Board of Victoria*.[204] Although Hollingworth J essentially tried to hand ball the issue to a higher court, her Honour clearly believed the ground is not presently recognised in Australian judicial review.[205]

The fate of proportionality cannot be predicted. There is no conceptual or constitutional reason why Australian courts cannot adopt a more intense or variable approach to unreasonableness review, assuming that is ultimately how proportionality could operate. Neither the *Constitution* nor the relatively strict Australian exposition of the separation of judicial power precludes that. It might also be argued that the division drawn between unreasonableness and severe irrationality by the High Court in *S20*[206] has laid the foundation for the eventual adoption of a form of proportionality, in which the severe irrationality anticipated in *S20* might naturally lead into some form of proportionality review incorporating a balancing exercise. That would not be problematic if the balancing exercise at the heart of the English test is clarified, to provide a clearer statement of principle by which the courts can weigh legal rather than normative issues. That would avoid the equivalent danger that *Lam* identified at the heart of substantive unfairness. It is possible that a balancing test used to decide whether and why an infringement of right is no more necessary than is required could pass constitutional muster if it operated by reference to fairly transparent legal principles. The existence of Charters of Rights at the State level might provide the most likely path by which this option can be explored.

## XI A RESIDUAL REMEDY FOR SERIOUS ADMINISTRATIVE INJUSTICE?

Administrative decisions may sometimes appear so gallingly unfair that they provoke an instinctive response: surely courts that administer the law cannot allow such decisions to stand. The issue becomes thornier if the decision does not reveal an obvious legal flaw. Such cases will not fit within established grounds of review. Can there be a new ground of review for decisions that cause grave administrative injustice? An immediate obstacle is the often repeated remarks by Brennan J in *Quin*[207] that the constitutional province of judicial review necessarily led it away from the merits of the case at hand. The fact that the courts might indirectly ensure justice to individuals while exercising their supervisory power over administrative officials was a consequence rather than driving purpose of their role. Brennan J reasoned that if 'the

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Gummow JJ referred to the operation of proportionality in other jurisdictions but did not reveal their thoughts the issue).

203 Aronson, Dyer and Groves, above n 176, 382–3.

204 (2008) 20 VR 414.

205 Ibid 424 [57].

206 *Re Minister for Immigration and Citizenship; Ex parte S20* (2003) 198 ALR 59.

207 (1990) 170 CLR 1.

court avoids administrative injustice or error, so be it' but, he cautioned, 'the court has no jurisdiction simply to cure administrative injustice or error.'[208]

The English experience of late is instructive on why such a jurisdiction may prove difficult to forge. Several recent English cases have openly speculated about the precise basis for judicial intervention, which might arise from more general principles of abuse of power. Some have speculated about the precise reason to find an abuse of power and have done so by reference to vague or normative notions of fairness, which include finding that the actions of a decision maker amount to 'conspicuous unfairness',[209] or that the unfairness before the court is particularly 'bad'[210] or somehow contrary to requirements of 'good administration'.[211] Such cases can be criticised for their doctrinal thinness. They are results in search of a principle.[212] They are also arguably embryonic attempts to seek a principled solution to very bad decisions. Whether such issues can and should be encompassed within judicial review is another matter.

Laws LJ unwittingly drew attention to this point when he reviewed several cases concerning abuse of power flowing from a change or proposed change to a policy or practice. Laws LJ acknowledged that the cases contained 'ills expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case.' He also conceded that the 'excoriation' of the administrative problems identified in those cases 'no doubt shows that the law's heart is in the right place, but it provides little guidance for the resolution of specific instances.'[213] Therein lies the problem. The pursuit of open ended or very broad notions of unfairness invites judges to think with their hearts rather than their heads. That may be a harsh criticism of any judge, particularly one trying to address perceived serious unfairness arising from the administrative process, but it also places the limited expertise of judges into sharp focus. The further any conception of fairness or unfairness moves from clear legal principles, the weaker the judicial claim to any expertise to identify those concepts necessarily becomes. The problem is not therefore simply the territorial limits that Brennan J identified on judicial review's reach over unfair results but the thin ice upon which any such pursuit leads a judge.

Kirby J appeared untroubled by such problems in *S20*[214] when he considered the adoption of a general principle enabling relief against serious administrative injustice.

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208 Ibid 36.

209 *Ex parte Unilever* [1996] STC 681, 695. This same terminology was applied in *Secretary of State for the Home Department v R (Rashid)* [2005] EWCA Civ 744.

210 *IR (R, H and AH) v Secretary of State* [2006] EWHC (Admin) [34] (Collins LJ).

211 *R (on the application of Nadarajah & Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68] (Laws LJ, Thomas LJ and Nelson J agreeing).

212 Similar criticisms have been made of some English cases in which the courts have essentially decided that a decision can be impeached on the ground of proportionality and then sought to articulate the reason why the ground applies. See, eg, Hickman, above n 193, 714–6.

213 *Bhatt Murphy (a firm), R (on the application of) v The Independent Assessor* [2008] EWCA Civ 755 [28]. The wider examination of such issues by Laws LJ was arguably not required given that Court of Appeal had rejected an attempt by the applicants to essentially require government ministers to adhere to a compensation scheme that had been replaced.

214 *Re Minister for Immigration and Multicultural Affairs; Ex parte S20* (2003) 198 ALR 59.

His Honour began by stressing the 'important constitutional protection' that s 75(v) provided to people affected by administrative action, and reasoned that the scope of relief available under the constitutional writs should evolve and do so partly by reference to developments in other jurisdictions.[215] Kirby J also noted the increasingly sophisticated principles by which the validity of administrative action was gauged under s 75(v).[216] So much is uncontroversial but his Honour then turned to the principles by which courts might overturn serious factual errors in their appellate jurisdiction.[217] Kirby J stressed that those principles sought to uphold:

> the rule of law itself, the maintenance of minimum decision-making standards and the correction of clear injustices where what has occurred does not truly answer the description of the legal process that the parliament has laid down.'[218]

His Honour returned to developments in English law of recent decades enabling review of factual findings that were fundamentally flawed, and hinted that the constitutional writs ought to take account of such developments. The tentative reason his Honour offered was that, despite the caution of Brennan J in *Quin*, the High Court 'should not shut its eyes and compound the potential for serious administrative injustice...'[219]

It is unclear whether Kirby J envisaged a new ground of review or the grant of relief on some other nebulous basis but there are several difficulties with any move towards a general remedy against serious administrative injustice, however it might be expressed. One is that Kirby J began from the position of the unique nature of the constitutional writs and the special protection that they offer people affected by administrative action. The introduction of the broad principles adopted in other jurisdictions within the scope of the constitutional writs cannot fly in the face of the structural limitations imposed by the *Constitution*. Put simply, the obstacles identified in *Lam* to substantive unfairness apply equally to even more vague principles of fairness or abuse of power. A closely related point arises from Kirby J's suggestion that the remedy he envisaged might arise in 'extreme circumstances [where] the maintenance of minimum standards of decision-making was required.'[220] The apparent absence of legal principle and the move towards standards of decision-making appears to have drawn his Honour away from the very judicial power underlying the constitutional writs upon which he began.

The reasoning in *Kirk* makes clear that similar obstacles now stand before such a remedy at the State level. The supervisory role of the State Supreme Courts that the High Court held to be assumed, preserved and entrenched by s 73 of the Constitution is broadly similar to that of the High Court.[221] If State Supreme Courts have a constitutionally protected role to determine and enforce the limits of executive power, they must do so in accordance with fundamental constitutional principles that cannot

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215 Ibid [153].
216 Ibid [160].
217 Ibid [161].
218 Ibid.
219 Ibid [169]. At this point Kirby J cited the caution of Brennan J in *Quin* (1990) 170 CLR 1, 36.
220 Ibid [161].
221 *Kirk* (2010) 239 CLR 531, 580–1 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

be significantly at odds with limits applicable at the federal level. Accordingly, an unstructured remedy to address administrative unfairness must also clearly lie beyond the reach of State Supreme Courts.

## XII CONCLUDING OBSERVATIONS

*Kirk* may confirm the dominant role of the *Constitution* but it is arguably also a State based chicken coming home to roost. Many of the principles governing Australian judicial review can be traced to earlier cases arising from State courts, such as *Quin*, *Craig* and *Enfield*. These cases settled important elements of the nature and limits of supervisory review and, perhaps more importantly, proceeded on the assumption that those elemental aspects of judicial review did not differ significantly in their application to the Commonwealth or the States. The federal constitutional basis that *Kirk* identified for judicial review at the State level was, therefore, the product of a longstanding process that aligned judicial review doctrine within Australia's federal structure.

The entrenchment by *Kirk* of a minimum level of judicial review at the State level imposes two forms of limitations. The obvious limit is upon the ability of State parliaments to remove or restrict the supervisory jurisdiction identified in *Kirk*. The Commonwealth experience indicates such limitations preclude privative clauses imposing substantive restrictions upon judicial review and that the courts will interpret such clauses in a way that limits their effect and avoids a finding of invalidity on constitutional grounds. This will be the fate of most existing State privative clauses but such judicial delicacy will not be possible for clauses which expressly exclude review of decisions affected by jurisdictional error. Such clauses are now constitutionally invalid. The fate of State legislation imposing procedural rather than substantive limitations upon review is less clear because they must be gauged by the vague principles of *Bodruddaza's Case*. The fate of 'no invalidity' clauses is even less certain until the constitutional standing of such provisions is settled by the High Court. We can at least be sure that principles devised for either the States or the Commonwealth will be equally relevant to the other.

A less obvious consequence of *Kirk* is the constitutional limitations which now clearly encumber the grounds of judicial review at the State level. The constitutional role that *Kirk* recognised for State courts presumes their subordinate role to the High Court. The current approach of the High Court leaves the States with limited capacity to foster radical innovations within the common law. Judicial review is surely no exception. Australian public law doctrine currently places clear obstacles in the path of new or expansive grounds of review, such as proportionality, substantive unfairness or any remedy for serious administrative injustice. It has also seen the entrenchment of jurisdictional error, despite its acknowledged difficulties as a core principle. The *Constitution* therefore seems to preclude some principles of review and entrench others. The doctrinal changes required for any shift on these issues now lie firmly and solely with the High Court. The question then is whether the High Court may move from the role of the protector of judicial review, to that of innovator.