Kirk v Industrial Court of New South Wales: Its Implications for the Supreme Court

by The Honourable Justice Peter Applegarth*

In *Kirk v Industrial Court of New South Wales* the High Court held that the State legislature cannot remove a State Supreme Court’s supervisory power to review certain decisions to ensure they do not exceed lawful authority by reason of jurisdictional error. The Supreme Court’s power to correct jurisdictional error was said to be a defining characteristic of a Court exercising judicial power under Chapter III of the Constitution. Chapter III contemplates that each State will have a Supreme Court that exercises supervisory jurisdiction, subject to the ultimate control of the High Court. The principle at stake is the institutional integrity of a Supreme Court which forms part of an integrated system of courts.

The effect of *Kirk* is to entrench a system of judicial review of State decision-makers, including courts and tribunals, and to limit the operation of privative clauses that seek to oust the jurisdiction of the Supreme Court to review decisions for jurisdictional error. Another consequence is to align the constitutional status of judicial review of State decision-making with the constitutional status of judicial review of Commonwealth decision-makers. In *Kirk* the High Court completed, in respect of judicial review of State decision-making, the process of giving judicial review a constitutional dimension and confirming the centrality of jurisdictional error.

This constitutional dimension was evident in respect of Commonwealth decision-making in *Plaintiff S157/2002 v The Commonwealth*. The alignment of constitutionally protected judicial review undertaken by State Supreme Courts with the constitutionally protected forms of judicial review of Commonwealth decisions should not disguise their different constitutional origins. The constitutional protection given to supervisory review by State courts in *Kirk* has its origins in s 73 of the Constitution, whereas Commonwealth judicial review for jurisdictional error derives from s 75(v) of the Constitution. Still, both constitutionally-protected forms of judicial review have a common theme, namely the institutional role of courts in correcting jurisdictional error and thereby applying the rule of law to the exercise of official power.

In 1996 in *Kable v Director of Public Prosecutions (NSW)* the High Court confirmed that State and federal courts form part of an integrated system of courts recognised by the Constitution and, accordingly, State legislative power is constrained in altering the constitution, jurisdiction or procedures of State courts. The reference to ‘Supreme Court’ in s 73(ii) of the Constitution gives such a court, from which a right of appeal exists to the

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High Court, a constitutional status. *Forge v Australian Securities and Investments Commission* confirmed that it was beyond the legislative power of a State to alter the constitutional character of its Supreme Court so that it ceases to meet the constitutional description.

In *Kable* a New South Wales law that empowered the Supreme Court to order the continued detention of a named prisoner beyond his sentence on account of the likely danger he posed to others was invalidated. By 2004, with the upholding of State laws that empowered Supreme Courts to order the continued detention of certain offenders, Kirby J wondered whether *Kable* was a ‘constitutional guard-dog that would bark but once’. In recent years the guard-dog has barked a few times, and with the judgment in *Kirk*, some commentators have wondered whether ‘this dog may need a bark collar’.

That the Chapter III or institutional integrity guard-dog should have barked in *Kirk* was not entirely unpredictable. In *Kable* McHugh J had observed that under the Constitution, the State Courts have a role that extends beyond their status and role as part of the State judicial system. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power. Legislatures could not alter or undermine this constitutional scheme. In *Forge* the principle discussed in *Kable* was identified as the preservation of the institutional integrity of State courts. This hinged upon maintenance of the defining characteristics of a State Supreme Court. Against that background, it is not surprising that in *Kirk*, after observing that there is but one common law of Australia, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ continued:

> The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint.

In this paper I wish to address four topics. The first is the essential facts of the decision in *Kirk*. The background to the decision has been discussed by a number of commentators and I do not intend to dwell upon it. The second topic is the post-*Kirk* decisions about the entrenched minimum supervisory review jurisdiction of State Supreme courts. There have been hundreds of cases that have considered *Kirk* and time only permits me to discuss a few of them, and my focus will be on decisions in Queensland. Thirdly, I wish to turn to the notion of ‘jurisdictional error’ which the supervisory review jurisdiction exists to correct. *Kirk* touched upon what is meant by ‘jurisdictional error’ but its scope remains necessarily imprecise. The categories of jurisdictional error identified in *Craig v The State of South Australia* were said to provide examples, not a rigid taxonomy. Finally, given the potential width of the concept of

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4 (2006) 228 CLR 45, 76 [63].  
6 *Baker* (ibid) 535 [54].  
8 Supra 76 [63].  
9 Supra 581 [99].  
‘jurisdictional error’, even within the categories of error posited in Craig, questions arise as to the scope for legislatures to limit the practical implications of Kirk. An associated issue is the controls the courts themselves might apply in the exercise of the constitutionally-guaranteed State supervisory jurisdiction. Two particular matters warrant consideration. The first is the imposition of a leave requirement on the exercise of judicial review: a matter addressed by Justice Basten. The second is the appropriate bases upon which a court might decline, as a matter of discretion, to exercise the supervisory jurisdiction.

Kirk and its Background

Mr Kirk was a director of Kirk Group Holdings Pty Ltd, which owned a farm in New South Wales. Mr Palmer was employed by Kirk Group Holdings as the manager of the farm and was killed in an accident while driving the farm’s All Terrain Vehicle.

Kirk Group Holdings was charged under ss 15 and 16 of the Occupational Health and Safety Act 1983 (NSW) (OH&S Act). Section 15 imposed a duty on an employer to ensure the health, safety and welfare at work of all its employees. Section 16 imposed a duty on an employer to ensure that persons not in the employer’s employment were not exposed to risks to their health and safety arising from the conduct of the employer’s undertaking while those persons were at the employer’s place of work. Mr Kirk was charged under s 50 of the OH&S Act, which deemed a director of a company to be liable for offences of the company.

Mr Kirk and Kirk Group Holdings were convicted in the Industrial Court of New South Wales and received fines. Despite the right of appeal to the Full Bench of the Industrial Court, Mr Kirk and Kirk Group Holdings brought proceedings in the Court of Appeal. The Court of Appeal declined to intervene until the appellants had exhausted their rights of appeal. An appeal by Mr Kirk and Kirk Group Holdings to the Full Bench of the Industrial Court was unsuccessful.

A further appeal was made by Mr Kirk and Kirk Group Holdings to the Court of Appeal, seeking an order in the nature of certiorari quashing their convictions. The appellants sought to challenge their convictions on the basis of several errors they said amounted to jurisdictional errors. A potential barrier to their application was the privative clause contained in s 179 of the Industrial Relations Act 1996 (NSW) (IRA), which provided that a decision of the Industrial Court was final and could not be ‘appealed against, reviewed, quashed or called into question by any court or tribunal’, including proceedings brought for relief by order in the nature of certiorari. It was accepted that the Court of Appeal could exercise its supervisory jurisdiction on the basis of jurisdictional error. However, it did not accept that the errors identified by the appellants amounted to jurisdictional errors. As such, the appeal was unsuccessful.

On appeal to the High Court of Australia, the appellants challenged their convictions on two new grounds. The first ground was an error in the construction of s 15 of the OH&S Act. The second ground was an error by allowing Mr Kirk to be called as a witness. The High Court held that each error amounted to a jurisdictional error.

The High Court further held that privative clauses, such as that contained in s 179 of the IRA, did not affect the availability of judicial review in State Supreme Courts for jurisdictional error. Legislation which removes the power of a State Supreme Court to grant relief for...
jurisdictional error was held to be beyond State legislative power, since it would remove from the Court one of its defining characteristics.

**Kirk and its Context**

In a recent article, Professor Ratnapala and Associate Professor Crowe have positioned *Kirk* in the context of other High Court jurisprudence about the institutional integrity of State courts. The authors argue that these decisions can be placed into four interrelated categories:

(a) The constitution of a Court;
(b) Impermissible grants of jurisdiction;
(c) Impermissible withdrawal of jurisdiction; and
(d) Procedural guarantees.

*Kirk* of course is concerned with the withdrawal of jurisdiction. As the joint judgment stated:

A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature. It is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.

Ratnapala and Crowe argue that the decision in *Kirk* has wide-ranging implications beyond a limitation on State legislature power to divest the Supreme Court of its supervisory jurisdiction. The broader implications include:

- Constitutional limitations on State laws which purport to authorise inferior courts or tribunals to finally determine the legality of their own actions, and the fact that the power to review on grounds of jurisdictional error cannot be removed by Parliament designating an inferior court as a superior court of record;
- The maintenance of a distinction drawn in *Craig* with respect to errors of law made by inferior courts and those of administrative tribunals, and whether the same categories of jurisdictional error apply to inferior courts and administrative tribunals;
- The right to factual particulars and whether a State law may dispense with the requirement for factual particulars of a criminal charge; and
- Whether a State legislature might deprive a Supreme Court of the supervisory jurisdiction to set aside judicial decisions made in breach of the rules of natural justice.

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17 *Kirk* (supra) [100] 581.
18 *Kirk* (supra) [99] 581.
19 ‘Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power’ (2012) 36 *MVLR* 175.
20 *Kirk* (supra) 566 [55].
21 A topic discussed by Vial (supra) 152–4.
The Effect of Kirk

The effect of *Kirk* can be stated at a level of generality, namely that it is not possible to remove certain State decisions from the supervisory jurisdiction of the Supreme Court to correct jurisdictional error.

The practical implications of *Kirk* in this State are hard to assess. Much of the case law has been in areas not far removed from *Kirk* itself, namely prosecutions for breaches of occupational health and safety laws.

An early decision in that regard was *NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland* in which Boddice J found that the President of the Industrial Court had committed jurisdictional error in one respect relating to the provision of particulars. In that case, an applicant sought to review a decision of the President of the Industrial Court dismissing an appeal from a decision of an Industrial Magistrate in a complaint brought against the applicant alleging a breach of the *Workplace Health and Safety Act 1995* (Qld). The issue related to the validity of the complaint. Justice Boddice found that the complaint was not a nullity but that, in dismissing the appeal, the President of the Industrial Court, whilst accepting that there are occasions when a complainant may be required to particularise inadequacies in precautions or lapses in diligence, erroneously held that there was no obligation on a complainant to particularise ‘the measures not taken’ so as to apprise a defendant of the case it was to meet in preparing any defence. Justice Boddice continued:

That finding did not involve the application of established law to the facts as found by the first respondent. That finding constituted a misconstruction of the relevant statute and a misconception of the extent of the Court’s powers in the particular case in relation to a matter which was specifically the subject of a ground of appeal before the first respondent. As such, the finding constitutes a jurisdictional error as that term is identified in *Kirk*.23

Boddice J identified differences which exist between the New South Wales legislation considered in *Kirk* and Queensland legislation.

His Honour’s decision in that regard was followed by Martin J in a more recent case involving the same parties.24 The issue again turned on the adequacy of the particulars, and whether the Industrial Court made a jurisdictional error which permitted its decision to be reviewed by the Supreme Court.

Martin J found that the Industrial Court correctly regarded its task as being one in which it was to determine whether fairness required further and better particulars of the measures not taken. The President answered that question by reference to the decision of the Industrial Magistrate, and in doing so, found against the applicant. The decision by the President wherein he considered the fairness of the Magistrate’s refusal was a matter within his jurisdiction. Accordingly, in the absence of jurisdictional error, it could not be reviewed in the Supreme Court.

In *Bauer Foundations Australia Pty Ltd v President of Industrial Court of Queensland* Chief Justice de Jersey was concerned with an application which alleged that the President of the Industrial Court fell into jurisdictional error in determining an appeal from an industrial magistrate. One of the grounds of challenge related to the President’s treatment of certain alleged factual errors. In that context, the Chief Justice stated:

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23 Ibid [29].
24 *NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland* [2012] QSC 147.
Carrying out the process of evaluation committed to him as an appellate body, it was open (indeed compelling) for the President to conclude as he did. In any event, if he erred in the conclusion he drew, he did so in the course of exercising the jurisdiction committed to him.\textsuperscript{26}

In \textit{Thiess Pty Ltd v President of the Industrial Court of Queensland}\textsuperscript{27} the point at issue concerned the power of an Industrial Magistrate to allow amendment of a complaint. Since the decision is one of mine, the less I say about it, the better. It is sufficient to observe that I concluded that the purported exercise of the power to amend the complaint in the circumstances of that case was undertaken without power and constituted a jurisdictional error. The President of the Industrial Court in hearing the appeal reached a different conclusion about the power to amend. I concluded that the decision of the President was an error within jurisdiction. The decision, although involving an error of law, was not a jurisdictional error.

Simply put, the issue was whether the Industrial Magistrate erred in the respects alleged in the application to appeal to the Industrial Court. That was a matter committed to the Industrial Court to decide. Its decision that the Industrial Magistrate did not err was made in the course of exercising its appellate jurisdiction.

In the end, the Industrial Court was found to have made an error concerning the exercise of the Industrial Magistrate’s power to amend a complaint, in relation to a matter of substance. It was something about which the Industrial Court was authorised to decide. It was not an error about the extent of the Industrial Court’s functions and powers. It was an error about the extent of the Industrial Magistrate’s powers and whether the power to amend arose in the circumstances. It was not, however, a jurisdictional error by the Industrial Court.

The position then was that the defendant in the proceedings was exposed to the risk of conviction for two charges in circumstances where the Industrial Magistrate should have refused the application to amend. The jurisdiction to judicially review the decision of the President of the Industrial Court was not engaged. However, this did not affect the supervisory jurisdiction of the Supreme Court over inferior courts and tribunals in respect of jurisdictional error. I concluded:

I consider that it is an appropriate exercise of the supervisory jurisdiction of the Court to make orders that have the effect of not exposing the applicant to a conviction by reason of a jurisdictional error by the Industrial Magistrate. The applicant should not be exposed to conviction on two separate and distinct offences in circumstances where it finds itself in that position by reason of a jurisdictional error.\textsuperscript{28}

The relief granted was to make appropriately worded declaratory orders in respect of the jurisdictional error of the Industrial Magistrate, being an error that was not corrected on appeal to the Industrial Court. The restrictions on reviews from decisions of the Industrial Court did not affect the court’s supervisory jurisdiction over jurisdictional error by an inferior court before which a party is facing criminal charges.\textsuperscript{29}

In \textit{Newman v President of the Industrial Court of Queensland}\textsuperscript{30} Justice Ann Lyons considered an application for judicial review in respect of an allegation that a complaint was defective in having failed to plead the acts or omissions which were alleged to constitute...
the failure to discharge obligations under the *Electrical Safety Act* 2002 (Qld). Justice Lyons concluded that no jurisdictional error on the part of the President had been established. The President had approached his task in conducting the appeal before him so as to review the facts and apply the law as he found it to be. Even if he misinterpreted the relevant statutory provisions, such an approach did not amount to jurisdictional error. The approach in *Thiess* was followed. In short, the Industrial Court does not fall into jurisdictional error whenever it misinterprets or misapplies statutory provisions which are the subject of a ground of appeal to it.

Her Honour declined to exercise the supervisory jurisdiction. The circumstances of that case were held to be decidedly different to the facts of *Thiess*.

Another field in which the *Kirk* jurisprudence has flowered are challenges to the decisions of adjudicators under the *Building and Construction Industry Payments Act* 2004 (Qld) (BCIPA). In considering comparable New South Wales legislation, the New South Wales Court of Appeal in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*\(^{31}\) concluded that certain provisions restricting reviews of such decisions did not operate to oust the court’s jurisdiction to grant relief in the nature of *certiorari*. That decision was followed by the Queensland Court of Appeal in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd*.\(^{32}\) The Court ruled that it was not within the constitutional power of the State to exclude the power of the Supreme Court to exercise its supervisory jurisdiction as to jurisdictional error, and that an adjudicator’s decision under the Act is a decision over which the Supreme Court has supervisory jurisdiction, being a jurisdiction which is not affected by s 18(2) of the *Judicial Review Act* 1991.

In recent years there have been any number of challenges to adjudicator’s decisions under the BCIPA on the grounds of jurisdictional error. A number of them have been successful.\(^{33}\) However, care is required in the identification of jurisdictional error. The Court of Appeal’s decision in *Thiess Pty Ltd v Warren Brothers Earthmoving Pty Ltd*\(^{34}\) warrants careful attention. Justice Philippides, with whom Holmes and White JJ A agreed, discussed the concept of jurisdictional error at [95] to [105]. The decision emphasised the centrality of the distinction between jurisdictional and non-jurisdictional error. An adjudicator’s determination as to the extent and value of construction work is not a jurisdictional fact. An incorrect determination as to the extent and quantum of the work that comprised ‘construction work’ was not a jurisdictional error. Any other approach would have been contrary to the scheme of the BCIPA which placed the determination as to the extent or value of construction work and related goods and services as a matter that the adjudicator was empowered to determine under s 26 of the BCIPA.

In *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*\(^{35}\) the distinction between jurisdictional and non-jurisdictional errors was considered in the context of the BCIPA. It was observed:

> The adjudicator may lack jurisdiction because the claimed amounts are not referable to ‘construction work’ or ‘related goods and services’. There may be other

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31 (2010) 78 NSWLR 393.
33 For a recent example see *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd* [2012] QSC 388.
35 [2012] QSC 346. The decision was subject to appeal at the time of the address. The Court of Appeal found it unnecessary to decide if an adjudicator’s error in not applying a particular contractual provision was jurisdictional: *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd* [2013] QCA 394 [48].
reasons why a claim cannot be sustained, for example, because the claimant is an unlicensed builder. A jurisdictional error may be made by the adjudicator in proceeding to determine an adjudication for a number of reasons. The determination may be affected by jurisdictional error on one of the grounds discussed in Craig v South Australia. For example, the adjudicator may disregard something which the relevant statute requires to be considered as a condition of jurisdiction or otherwise fall into jurisdictional error by determining something which the adjudicator lacks authority to determine. A distinction may be made between matters which are ‘an essential preliminary to the decision-making process’ and ‘matters which can arise during the course of the decision-making process itself’. Where matters are entrusted to an adjudicator to decide, an error of law made in the course of the decision-making process is not, of itself, a jurisdictional error. An error in construing the terms of the contract under which an entitlement is claimed is not, of itself, a jurisdictional error. The position is otherwise where the error causes the adjudicator to make one or more of the jurisdictional errors identified in the leading authorities which consider the issue of ‘jurisdictional error’ in the context of the [BCIPA] and comparable legislation in other Australian jurisdictions.

Alleged errors in the construction of a contract were found to be not jurisdictional. The adjudicator was found to have not disregarded a limitation on his functions and powers. The jurisdiction conferred on the adjudicator was said to include the authority to construe the contract in order to determine whether there was an entitlement to be paid for latent conditions. Any error in interpreting the relevant clause in that respect would have been one made in the exercise of jurisdiction, and would not constitute a jurisdictional error.

The Meaning of Jurisdictional Error

The distinction between jurisdictional and non-jurisdictional error has been much-criticised. It has been the subject of sustained attack by some jurists and distinguished academic commentators. However, the distinction is well-established and resistant to attack. Chief Justice Spigelman has observed that the distinction between jurisdictional error and non-jurisdictional error is necessitated in Australia by the separation of powers doctrine. Kirk affirmed the distinction. The joint judgment stated:

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

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37 Supra 177.
38 Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (supra) at 405 [43]–[44]; Clyde Bergemann Pty Ltd v Varley Power Services Pty Ltd [2011] NSWSC 1039 [42].
39 Supra [9].
40 Ibid [27].
41 Spigelman (supra) 83.
42 Kirk (supra) 581 [100].
Justice Basten has referred to jurisdictional error as a ‘misnomer’. He described it as a conclusionary label but adopted the view of Professor Aronson that it has a long history of usage, a central core meaning and that we can tolerate its imprecision. There may be no single test or theory by which the distinction between jurisdictional and non-jurisdictional error can be determined. However, as Hayne J stated in Re Refugee Review Tribunal; Ex parte Aala:

The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error when the decision maker makes a decision outside the limits of the functions and powers conferred on her or him, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction … The former kind of error concerns departures from limits upon the exercise of the power the latter does not.43

In Craig the High Court was concerned with the distinction between jurisdictional and non-jurisdictional error in the case of an inferior court. The majority identified three categories of jurisdictional error. These may be summarised as follows:

1. The mistaken denial or assertion of jurisdiction, or (in a case where jurisdiction does exist), misapprehension or disregard of the nature of or limits on functions and powers;
2. Entertaining a matter or making a decision of a kind that lies, wholly or partly, outside the limits on functions and powers, as identified from the relevant statutory context;
3. Proceeding in the absence of a jurisdictional fact; disregarding something that the relevant statute requires to be considered as a condition of jurisdiction, or considering something required to be ignored; and misconstruction of the statute leading to misconception of functions. (Of this last example, it was said in Craig (at 178) that — the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern.)44

In Kirk these categories were said not to provide ‘a rigid taxonomy of jurisdictional error’ and that the examples given of the ambit of jurisdictional error by an inferior court were just that: examples.45 In Kirk the joint judgment stated that it was neither necessary nor possible ‘to attempt to mark the metes and bounds of jurisdictional error’.46

Certain comments in the joint judgment in Kirk have cast doubt on the distinction between inferior courts and administrative tribunals in the context of jurisdictional error. Some commentators consider that these observations should be considered strictly as obiter.47 Kirk itself was concerned with jurisdictional error by an inferior court.

The distinction has arisen in the past based on the theory that an error, if made by a court, would not ordinarily constitute jurisdictional error since an ordinary court is competent to determine authoritatively questions of law, whereas an administrative tribunal is not.48 In Kirk, the joint judgment cast doubt on whether a distinction can readily be made between

43 (2000) 204 CLR 82, 141 [163].
44 This summary is taken from the judgment of McDougall J in Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (supra) 426–7 [158], drawing in turn from Kirk (supra) 177–8 [72].
45 Kirk (supra) 574 [73].
46 Ibid 573 [71].
47 Finn (supra) 96.
48 Craig (supra) 179–80.
a court and an administrative tribunal. Their Honours observed that at a State level that distinction may not always be drawn easily, for there is not, in the States’ constitutional arrangements, that same separation of powers that is required at a federal level by Chapter III of the Constitution. The distinction was also said to break down when consideration is given to what questions of law a court is permitted to ‘authoritatively’ determine. To observe that inferior courts generally have authority to decide questions of law ‘authoritatively’ is not to conclude that the determination of any particular question is not open to review by a superior court. The ‘authoritative’ decisions of inferior courts were those which were not attended by jurisdictional error.

Jurisdictional error may be corrected in the case of an inferior court and also in the case of an administrative tribunal or administrative decision-maker which is amenable to the writ of certiorari. This is not, however, to doubt that there is an important distinction between the two for the purposes of jurisdictional error and some post-Kirk cases have continued to apply the Craig distinction. I leave to one side the circumstances in which a tribunal may have power conferred upon it to determine questions of law. The proposition that emerged from Craig is really one of statutory interpretation: namely that one is likely to infer a legislative intention to allow a court to determine a question of law as part of its jurisdiction, whereas ‘with a tribunal, which may not be composed of lawyers, the final determination of all legal issues is more likely to be intended to rest with a reviewing court’. Whether this reasoning has now been discarded is unclear.

What is clear is that Kirk questioned the usefulness of saying that an inferior court has jurisdiction to ‘authoritatively’ determine questions of law. Inferior courts and tribunals have whatever authority is conferred upon them by law, and their precise authority turns upon a careful consideration of the legislation which constitutes them and gives them power. Neither has power to ‘authoritatively’ decide a matter in a manner which places any resultant jurisdictional error beyond review. Both courts and tribunals are amenable to judicial review for jurisdictional error. But not every determination of a question of law is jurisdictional in nature. The body may have jurisdiction to decide that question of law, rightly or wrongly.

The distinction between a court and an administrative tribunal has implications in other contexts. In a different context the Court of Appeal last year ruled that the Queensland Civil and Administrative Tribunal is a court for Chapter III purposes. However, a body’s status as a Chapter III court does not immunise it from supervisory review at either federal or State level. We are familiar, having practised in the landscape created by the Administrative Decisions Judicial Review Act (1977) (Cth) and the Judicial Review Act 1991 (Qld), with judicial review of administrative decisions. But federal judicial review under the constitutional writs referred to in s 75(v) of the Constitution has not been confined to administrative decision-making or administrative tribunals. The High Court can issue constitutional writs against judges of the Federal Court and the Family Court. Historically, judicial review has not been confined to control of the executive. It also applies to ensuring that the exercise of judicial power is free from jurisdictional error. But this does not necessitate the same approach to the correction of administrative decision-making and judicial decision-making. There are fundamental differences between the two. However, Kirk has challenged the existence of a strict distinction between the approach to judicial review of the decisions of courts and

49 Kirk (supra) 572–3 [68]–[70].
administrative tribunals for the purpose of reviewing jurisdictional error. Needless to say the fact that a State law describes a body as a court or even a superior court of record does not immunise it from the supervisory jurisdiction of the Supreme Court or the ultimate supervisory jurisdiction of the High Court.

*Kirk* does not provide a closed list of categories of jurisdictional error. It is doubtful that one ever could, since what is a jurisdictional error has long escaped a definitive definition. The famous American jurist Felix Frankfurter remarked about the morass in which one can be led by ‘loose talk about jurisdiction’, and observed that ‘jurisdiction’ competes with ‘right’ as one of the most deceptive legal pitfalls. Judges and academic commentators have observed that ‘jurisdictional error’ is a conclusionary label. But as Justice Basten noted, there is no necessary harm in that. The scope of ‘jurisdictional error’ will continue to challenge us. The distinction is a real one. Chief Justice Gleeson once pointed out that twilight does not invalidate the distinction between night and day. In the same vein, the difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction does not invalidate the distinction. The distinction is central to federal and State administrative law. As Chief Justice Spigelman stated:

… there is a distinction between ensuring that powers are exercised for the purpose, broadly understood, for which they were conferred and in the manner in which they were intended to be exercised, on the one hand, and the reasonableness or appropriateness of the decisions made in the exercise of such powers on the other hand. Reasonable minds can and will differ as to where the line is to be drawn. The former is an integrity function which is inherent in the concept of ‘jurisdictional error’.

The amenability of decision-making to supervisory review for jurisdictional error calls attention to distinguishing between facts, opinions or steps that are jurisdictional, being a matter, a condition of mind or a requirement that enlivens the power of the decision-maker and is an essential condition of the existence of jurisdiction, and matters which are not jurisdictional in this sense. Ultimately, the difference involves the application of principles of statutory interpretation and reasonable minds will differ in hard cases over whether something is a jurisdictional fact.

As to other categories of jurisdictional error, the matters referred to in *Craig*, whilst described merely as examples in *Kirk*, remain a useful point of reference, and it is to those categories that the Supreme Court has turned in the cases that I have noted. To remind you, these are:

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

Those categories were noted in the context of the function of an inferior court. In the area of administrative decision-making the scope of jurisdictional error will continue to be illuminated by the High Court’s jurisprudence in applications involving constitutional writs.

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53 City of Yonkers v United States, 320 US 685, 695 (1944); Spigelman (supra) 84.
54 Spigelman (supra) 85.
The most recent exploration of that issue (although I have not checked today’s news) was in Minister for Immigration and Citizenship v Li. In very short summary, the High Court held that a refusal by the Migration Review Tribunal to adjourn review proceedings was unreasonable. The Tribunal’s reasons failed to identify any consideration weighing in favour of the abrupt conclusion it brought to the review, and none was suggested by the Minister on appeal. The failure of the Tribunal to discharge its function under the Migration Act 1958 (Cth) according to law meant, according to the High Court, that it had acted beyond its jurisdiction in affirming the delegate’s decision.

The judgments warrant reading for their statements of principle to the effect that a presumption exists that a statutorily conferred power will be exercised reasonably. Chief Justice French explained what is meant by reasonableness in this regard, and starts with the proposition that every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred. Officials exercising discretion must comply with the ‘canons of rationality’. He stated:

A decision made for a purpose not authorised by statute, or by reference to considerations irrelevant to the statutory purpose or beyond its scope, or in disregard of mandatory relevant considerations, is beyond power. It falls outside the framework of rationality provided by the statute. To that framework, defined by the subject matter, scope and purpose of the statute conferring the discretion, there may be added specific requirements of a procedural or substantive character. They may be express statutory conditions or, in the case of the requirements of procedural fairness, implied conditions. Vitiating unreasonableness may be characterised in more than one way susceptible of judicial review. A decision affected by actual bias may lead to a discretion being exercised for an improper purpose or by reference to irrelevant considerations. A failure to accord, to a person to be affected by a decision, a reasonable opportunity to be heard may contravene a statutory requirement to accord such a hearing. It may also have the consequence that relevant material which the decision-maker is bound to take into account is not taken into account.

Wednesbury unreasonableness was discussed by the Chief Justice, who remarked:

After all the requirements of administrative justice have been met in the process and reasoning leading to the point of decision in the exercise of a discretion, there is generally an area of decisional freedom. Within that area reasonable minds may reach different conclusions about the correct or preferable decision. However, the freedom thus left by the statute cannot be construed as attracting a legislative sanction to be arbitrary or capricious or to abandon common sense.

In the same vein:

The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker.

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57 Li (supra) 630 [26] (emphasis added).
58 Ibid 630 [28].
59 Ibid 631 [30].
The joint judgment of Hayne, Kiefel and Bell JJ likewise ruled that a legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably,\(^60\) and explored the meaning of reasonableness. There was said to be an area within the ‘bounds of legal reasonableness’ in which there is a genuinely free discretion.\(^61\) After discussing the concept of unreasonableness, their Honours concluded in respect of the review of the exercise of statutory discretion that unreasonableness may be an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power.

Even where some reasons have been provided … it may nevertheless not be possible for a court to comprehend how the decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.\(^62\)

Justice Gageler gave a separate, and highly illuminating judgment about reasonableness as a statutory implication, and judging unreasonableness. Each judgment complements the other, and so I will not describe Justice Gageler’s judgment as the icing on the cake. It includes the following about Wednesbury unreasonableness:

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\begin{align*}
[108] & \text{Judicial determination of Wednesbury unreasonableness is constrained by two principal considerations. One is the stringency of the test that a purported exercise of power is so unreasonable that no reasonable repository of the power could have so exercised the power. The other is the practical difficulty of a court being satisfied that the test is met where the repository is an administrator and the exercise of the power is legitimately informed by considerations of policy.}

[109] & \text{The conception underlying the stringency of the test as applicable in Australia is captured by the observation made 50 years ago that:}\(^63\)

‘This Court has in many and diverse connexions dealt with discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised … We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case.’

[110] & \text{The same observation lends force to the suggestion that, for the purpose of applying the test, ‘guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion’.}\(^64\) There is, in particular, a close analogy with the settled principle that an appellate court will review the exercise of a judicial discretion ‘if upon the facts it is unreasonable.

\(^{60}\) Ibid 637 [63].
\(^{61}\) Ibid 637–8 [66].
\(^{62}\) Ibid 640 [76].
\(^{63}\) Klein v Domus Pty Ltd (1963) 109 CLR 467, 473, quoted in Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165, 1178 [69].
\(^{64}\) Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 42.
KirK v inDustrial Court of new south wales: its impliC ations for the supreme Court

It has nevertheless been observed that 'in practice the comparative familiarity of an appellate court with judicial discretions and the usual confines of a judicial discretion make the appellate court more sensitive to an unreasonable exercise of discretion and more confident of its ability to detect error in its exercise'.68 That is because it is 'harder to be satisfied that an administrative body has acted unreasonably, particularly when the administrative discretion is wide in its scope or is affected by policies of which the court has no experience'.69 Similar observations have been made as to the inability of a court 'effectively' to review a state of satisfaction forming a pre-condition to an exercise of a statutory power or performance of a statutory duty 'where the matter of which the [repository] is required to be satisfied is a matter of opinion or policy or taste'.70 71

His Honour concluded in respect of the test of unreasonableness:

Yet the stringency of the test remains. Judicial determination of Wednesbury unreasonableness in Australia has in practice been rare. Nothing in these reasons should be taken as encouragement to greater frequency. This is a rare case.72

Any discussion of the concept of reasonableness in administrative law will require a whole day seminar or more. This decision in Li does not suggest that decisions are amenable to judicial review on the grounds they are unreasonable in some general sense of that word. Li revisits an area that has been much-visited in the High Court's jurisprudence in immigration cases over the last two decades. Those of us who studied administrative law when the ADJR Act was in its infancy were taught about Wednesbury unreasonableness. In such a case the courts can interfere, as Lord Greene said in Wednesbury, if a decision on a competent matter is so unreasonable that no reasonable authority could ever come to it. He went on to say that to prove a case of that kind would require something overwhelming. Earlier Lord Greene referred to a decision that could be 'so absurd that no sensible person would ever dream that it lay within the powers of the authority'.73

Since then judicial review in this area has supplemented Wednesbury unreasonableness with other epithets such as perversity and illogicality. At the risk of attempting to simplify an area of great subtlety, one can say that a decision-maker acts beyond jurisdiction in a case in which there is no evidence or where the decision is so unreasonable that no reasonable authority could ever come to it. These categories of case might be loosely described as cases of judicial review on the grounds of error of fact, rather than error of law. However that

65 House v The King (1936) 55 CLR 499, 505. See Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165, 1178 [68].
71 Li (supra) 645 [108]–[111].
72 Li (supra) 646 [113].
73 Associated Provincial Picture Houses Ltd v Wednesbury [1948] 1 KB 223, 229.
distinction is unhelpful. Instead, it is preferable to resort to first principles and describe such extreme cases for what they are: a decision-maker acting beyond power. The lawful authority of the decision-maker does not extend to making a decision that no reasonable authority could ever come to. And there is no authority to make a decision in a case in which there is absolutely no evidence. But where there is evidence it is difficult to challenge a decision on the grounds of *Wednesbury* unreasonableness.

The danger is that the court is drawn into merits review rather than focussing upon the legality of the decision. The distinction between merit review and legality was made in the often cited judgment of Brennan J in *Attorney-General (NSW) v Quin*. That distinction lies at the centre of Australian administrative law and is concerned with the maintenance of the institutional integrity of courts, tribunals and administrative decision-makers. The principle of jurisdiction confines decision-makers to their lawful authority. Decision-makers have the authority to decide matters within their jurisdiction, absent jurisdictional error, and for a court to interfere with such decision-making would mark entry into the forbidden field of merit review.

Finally, on the topic of whether a decision is amenable to judicial review on the grounds of *Wednesbury* unreasonableness or because it is ‘absurd’ or ‘perverse’ or ‘illogical’, it is worth recalling the cautionary remarks of Gleeson CJ and McHugh J in *Eshetu*:

> Someone who disagrees strongly with someone else’s process of reasoning on an issue of fact may express such disagreement by describing the reasoning as ‘illogical’ or ‘unreasonable’, or even ‘so unreasonable that no reasonable person could adopt it’. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequence.

If someone thought that I was going to illuminate the scope of judicial review for jurisdictional error this afternoon, then I have to disappoint them. The categories of jurisdictional error were not exhaustively stated in *Kirk*. Some might say they were left deliberately imprecise. A fairer assessment would be that the High Court in *Kirk* did not attempt the impossible, namely positing a single test by which jurisdictional and non-jurisdictional error can be distinguished. It was sufficient for the purposes of deciding *Kirk* to identify the respects in which the New South Wales Industrial Court had fallen into jurisdictional error. What is meant by jurisdictional error can be found in other cases and in the textbooks. Some might say that it is an elastic concept on the simple basis the concept can be stretched to cover entirely unsupported findings of fact. However, the concept cannot be stretched too far and courts, in the interests of not exceeding their legitimate authority, will decline to describe errors of fact and law made in the exercise of jurisdiction as jurisdictional errors, unless they qualify as one of the jurisdictional errors that masters of this subject, like Emeritus Professor Aronson, have spent a professional lifetime analysing and categorising. An erroneous finding of fact or an error of law in the course of exercising jurisdiction is not enough to qualify as a jurisdictional error.

In summary, the distinction between jurisdictional error and other errors, whilst elusive, is firmly entrenched in our constitutional jurisprudence and *Kirk* confirms that it is here to stay.

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74. (1990) 170 CLR 1, 35–6.
75. (1999) 197 CLR 611, 626 [40].
Possible Future Legislative Developments

*Kirk* signals that privative clauses will be of limited effect. Just as privative clauses in the federal arena cannot immunise decisions (or purported decisions) from judicial review for jurisdictional error, privative clauses under State legislation cannot immunise decisions from supervisory review. This prompts consideration of other means by which decisions can be placed beyond review or, at least, the potential for review limited.

One way, and this is not meant as any kind of encouragement, is to replace objective facts with states of satisfaction, judgment or belief (reasonable or otherwise) as the basis upon which a power arises. This, however, may give rise to different grounds of constitutional challenge if, for example, someone is exposed to adverse consequences for their liberty, property or other interests because of the existence of a state of mind in a decision-maker rather than the existence of some more definite and more easily proven state of facts. Common law constitutional principles, or ‘fundamental principles of public law’ may constrain legislative power to confer on an official an ill-defined discretion to deprive a citizen of liberty, property or other entitlements on the basis of a suspicion or state of belief that to do so is in the public interest.

And it always must be recalled that a power that depends upon the existence of a decision-maker’s state of satisfaction is still amenable to judicial review.

Finally, important questions of public policy arise as to whether executive powers should be exercised on the basis of such broad discretionary judgments. Such a judgment may amount to little more than a whim or be the product of prejudice. Even if such an exercise of power is legal, and beyond effective judicial review in a case where the state of satisfaction relates to a matter of opinion, policy or taste about which views may reasonably differ, a system of public law which confers such uncontrolled powers is hardly conducive to good public administration.

An alternative to the privative clause is the enactment of a ‘no invalidity’ provision. These kind of provisions exist in revenue law and one such provision was discussed by the High Court in *Federal Commissioner of Taxation v Futuris Corporation*. Whereas a privative clause purports to remove the jurisdiction of a court to review and the power to grant prerogative and other forms of relief, a ‘no invalidity’ clause does something different. It purports to change the substantive law by providing that certain administrative defects are not to lead to the invalidity of a decision. Both share the same troubling feature of limiting or avoiding judicial review. And as McDonald observed in ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ there are serious doubts about the constitutionality of no-invalidity clauses purporting to have general application. Finn shares this view.

Another possible device (to use the neutral term) is the enactment of time bars.

I turn to consider something close to the facts of *Kirk* itself and a matter which is featured in post-*Kirk* decisions in this State, namely the obligation to provide particulars in a criminal case. Professor Ratnapala and Associate Professor Crowe suggest that amongst the broader implications of *Kirk* may be that a State legislature may not constitutionally be able to deprive a person charged with a criminal offence of notice of the factual particulars on which the charge is based. There is, of course, a longstanding common law rule that a charge

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79 McDonald (supra) 20.
80 Finn (supra) 106.
81 Spigelman (supra) 89.
of committing a criminal offence must not only describe the nature of the offence, but should also state the particular acts or omissions of the defendant that violated the provision. The learned authors question whether a State Act may dispense with the requirement for factual particulars of a charge under State law, and suggest that such a provision would abrogate one of the basic common law requirements of natural justice. I will simply mention that in *R v CAZ* the Queensland Court of Appeal was concerned with a State law that removed the general law obligation on the prosecution to provide particulars in respect of certain aspects of a sexual offence. The argument was that these were beyond power because they infringed the principles established in *Kable* and *Kirk*. The argument was rejected. Justice Basten has observed that the decision illustrates ways in which a State legislature can remove what might otherwise be grounds for asserting jurisdictional error by varying the procedural obligations in the exercise of judicial power.

The question then shifts to the nature of the procedural obligations which are essential to the exercise of judicial power and the extent to which State legislatures can validly limit what would otherwise be requirements of natural justice. At a certain point, laws which require courts to act in circumstances which would otherwise amount to a denial of natural justice may be open to challenge on the basis of the jurisprudence in *Kirk* and other Chapter III cases. The institutional integrity and character of the Court would be adversely affected and it would cease to be a Supreme Court within the meaning of the Constitution.

**Judicial Controls on the Exercise of Supervisory Jurisdiction**

The final topic that I wish to address is the extent to which State courts might themselves control the exercise of their constitutionally entrenched supervisory review jurisdiction. One means would be the introduction of a requirement that leave be obtained to pursue such a case. Justice Basten has noted that in other common law countries, including the United Kingdom, applications for judicial review are by leave. I must remark that some of those other countries have abandoned the distinction between jurisdictional and non-jurisdictional errors and their generally expansive view about the limits of judicial review incorporating concepts of proportionality, may explain the introduction, on pragmatic grounds, of a leave requirement. However, the creation of a requirement for leave has a functional and pragmatic justification and leave might be declined in a case in which an appeal is available. I do not ignore the predictable argument that a decision tainted by jurisdictional error is no decision at all and that, in the event of success on judicial review and an order quashing the decision there would be no decision against which to appeal. The competing argument is that unless and until the decision is set aside or quashed, it has a certain operational and legal effect and is amenable to appeal or review if such an appeal or review process is provided by law.

It should be recalled that in the first round of the *Kirk* litigation, the New South Wales Court of Appeal held that the applicants should exhaust their rights of appeal before invoking the supervisory jurisdiction.

Justice Basten remarks that a leave requirement has the constitutional benefit of vesting control of the supervisory jurisdiction in the hands of the courts which exercise it. Still, there remains the issue of the criteria to grant or refuse leave. One such criterion would be

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83 Basten 2012, 102.
84 Ibid 98.
85 *Thiess Pty Ltd v Industrial Court (NSW) (2010) 78 NSWLR 94, 109 [75]–[77].
86 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (supra) 162, 185 [46], [154].
the availability and scope of rights of appeal. Another, potentially controversial, pragmatic consideration is the seriousness of the alleged jurisdictional error.

It should be recalled that traditionally prerogative relief was obtained in two stages. It was necessary to obtain an order nisi calling on the respondent to show cause why the relevant relief should not be granted. This order nisi might be made absolute if the applicant succeeded at the final hearing. The process of first obtaining an order nisi operated as a kind of filter, but has been abandoned in most Australian jurisdictions. In Queensland it has been replaced by an application for judicial review without a leave requirement. In South Australia there remains a requirement for leave or permission to proceed.

Another means by which the court itself might control the exercise of its supervisory jurisdiction is the exercise of the discretion to decline relief in an appropriate case.

Prerogative remedies and similar statutory remedies for jurisdictional error are discretionary, and the discretion is to be exercised judicially. In a clear case of want or excess of jurisdiction a prerogative writ will issue ‘almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course.’ In Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd, McDougall J observed that even in a case of clear jurisdictional error there is a residual discretion to not make an order in the nature of certiorari and that, in the ordinary case, such an order would be made ‘almost as of right.’ One discretionary ground to decline to order certiorari is where there are ‘alternative and adequate remedies for the wrong of which complaint is made.’

The High Court in R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd, in referring to the jurisdiction under s 75 of the Constitution to issue a writ of mandamus against an officer of the Commonwealth, referred to ‘well recognised grounds upon which the court may, in its discretion, withhold the remedy’ and continued:

For example the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made. The court’s discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld.

This passage has been cited with approval in more recent times. Those observations are often made in the cases involving the grant of a constitutional writ, however, Chase is authority that similar principles apply to the discretion to withhold a remedy in the exercise of the Court’s supervisory jurisdiction. Where relief is sought in the form of an order quashing or setting aside an adjudication decision, or an order is sought declaring the decision to be void, an aggrieved applicant who has established a jurisdictional error ordinarily will be entitled to such a remedy, but the remedy may be withheld as a matter of discretion if the circumstances make it just to do so. One example is if a more convenient and satisfactory remedy exists.

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87 R v Ross-Jones; Ex parte Green (1984) 156 CLR 185, 194 per Gibbs CJ; followed in Solution 6 Holdings Ltd and Others v Industrial Relations Commission of New South Wales and Others (2004) 60 NSWLR 558, which was in turn followed in Chase Oyster Bar Pty Ltd v Hamo Industries Ltd (supra) 446–9 [267]–[284].
88 Supra 448 [275].
89 Ibid 449 [284].
90 (1949) 78 CLR 389, 400 (emphasis added).
91 SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609 [28]. In the same case Kirby J at [77] referred to ‘the need to conserve relief to cases where it is appropriate and required to do practical justice.’
A right of appeal, or review on the merits, from an adverse decision may constitute a strong discretionary ground for declining to embark upon the hearing of an application that seeks to invoke the supervisory jurisdiction of the Supreme Court.

Instead, I will conclude with the observation that public lawyers faced with applications for the Supreme Court to exercise its supervisory jurisdiction will need to pay close attention to the extent to which such relief might be declined by a court on discretionary grounds because of the availability of alternative relief. This directs attention to the availability of appeals, including the grounds upon which appeals are allowed, the existence of merit review and other means by which alleged jurisdictional errors might be rectified. This is not entirely unfamiliar territory to an administrative lawyer. In the context of judicial review of administrative decisions one has the jurisprudence under s 48 of the Judicial Review Act 1991 (Qld).

In the area of the court’s supervisory review jurisdiction there is a constitutional dimension, and it might be said that compelling grounds would be required to persuade a court to decline to grant appropriate relief in a case in which a citizen has demonstrated that a decision-maker has committed jurisdictional error. Instead, the issue may become whether a party, seeking to have the Court exercise its supervisory jurisdiction, should be required to first exhaust reasonable alternative remedies which may be apt to correct the alleged error. If such remedy exists, and resort to it does not cure the alleged error, then it might be appropriate for the applicant to return to the Supreme Court and demonstrate that there has been a jurisdictional error that warrants relief of the kind provided for in Part 5 of the Judicial Review Act 1991 (Qld) or declaratory relief.

Conclusion

*Kirk* has its foundation in the principle that Chapter III of the Constitution preserves the institutional integrity of State Supreme Courts. This institutional integrity principle has many other applications. *Kirk* established that a legislature cannot remove a State Supreme Court’s supervisory jurisdiction which exists to ensure that inferior courts do not exceed the limits of their lawful authority. It casts doubt on the distinction drawn in *Craig* between inferior courts and administrative tribunals. The list of jurisdictional errors stated in *Craig* that an inferior court might commit should not be taken to be exhaustive. However, decisions since *Kirk* in relation to inferior courts have continued to apply the principles formulated in *Craig*.92 Still, it remains to be seen whether, for example, a denial of procedural fairness amounts to a jurisdictional error by an inferior court.

The distinction between jurisdictional and non-jurisdictional errors, whilst elusive, remains. The notion of jurisdictional error reflects a fundamental principle in our constitutional arrangements. However, pragmatists or cynics may see the label of jurisdictional error as being something which a reviewing court assigns to a demonstrated error due to its seriousness. It would be contrary to well-established principles of Australian law to abandon the distinction between jurisdictional and non-jurisdictional errors. The correction of mistakes, even serious mistakes involving the construction of a statute, is no function of a court undertaking judicial review if those errors are non-jurisdictional or do not appear on the face of the record.

Working out the distinction between jurisdictional and non-jurisdictional errors will remain a demanding task for those who advise citizens and corporations affected by official conduct, and by public lawyers who seek to resist challenges to the validity of decisions.

92 Finn 103.
It is not simply because we are Queenslanders that we pay respect to what was said by Justice Brennan in *Quin*.93 It is because it is a statement of principle which informs the fundamental distinction between merit review and review of the legality of a decision. The court enforces the law which determines the limits and governs the exercise of a decision-maker’s power.

If in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.94

The same respect for institutional boundaries should be expected of the exercise of the Supreme Court’s constitutionally entrenched supervisory jurisdiction. In exercising that authority, the Court has no general jurisdiction to enforce principles of good public administration and administrative justice. It does not sit as a merit review tribunal. It subjects certain bodies, including inferior courts and tribunals, to scrutiny concerning the legality of their conduct.

The recent High Court decision in *Li* is a reminder that the legislature is taken to have intended that a statutory power is exercised reasonably. Acting on that principle, the court (to quote Brennan J in *Quin*) ‘holds invalid a purported exercise of power which is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action’.95 Such a limitation is confined, and invalidity on that ground is rare. But *Li* shows that tribunals can fall into such errors.

The level of scrutiny to which a decision will be subjected may depend on the function being exercised by the decision-maker, and whether the power to make the decision is one which rests upon the existence of concrete facts or matters of ‘opinion or policy or taste’. Some would argue for a heightened level of scrutiny where the power is capable of affecting ‘the fundamental human rights or freedoms of the individual, whether by interfering with an existing freedom or by denying a benefit that would otherwise be available, as compared with the exercise of routine regulatory powers’.96

*Kirk* places the supervisory review jurisdiction of State Supreme Courts on a similar though different constitutional pedestal to the system of judicial review entrenched by s 75(v) of the Constitution in respect of federal decision-making. These jurisdictions cannot be removed by privative clauses.

The Supreme Court has this constitutionally-entrenched supervisory review jurisdiction. The issue then turns to the manner in which it exercises it. Should the court itself by rules and procedures create an initial filter in the form of a requirement for leave, and refuse leave in appropriate cases where, for example, other forms of relief are available? In cases that are taken on, how will the courts develop and better define the distinction between jurisdictional and non-jurisdictional errors? Is a different approach required in the case of inferior courts to that which applies in the case of tribunals?

Finally, in what circumstances will it be appropriate for the court to decline to embark upon a substantive hearing in the exercise of its supervisory jurisdiction in a case in which an arguable case of jurisdictional error is alleged? Should the existence of alternative, equally effective remedies by way of appeal or review be a basis upon which the court declines, as a matter of discretion, to grant relief in the form of prerogative remedies, until at least those alternative procedures have run their course?

These, and other questions, will engage, and dare I say gainfully employ, public lawyers in the years and decades to come.

93 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36.
94 Ibid.
95 Ibid.
96 Basten 2011, 297.