CASE NOTE

PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INC V INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA [2012] HCA 25

NICHOLAS LENNINGS*

The *Second PSA Case*[1] is now one of a number of decisions limiting the capacity of State legislatures to encroach upon the supervisory jurisdiction of the State Supreme Courts. The decision draws heavily on the seminal case of *Kirk v Industrial Court (NSW)*,[2] and continues the line of authority that treats attempts by the State legislature to limit review of jurisdictional error with substantial caution, if not outright acrimony.[3]

The *Second PSA Case* concerns two central questions: first, to what extent, if any, can jurisdictional error be precluded from review; and second, whether a superior court can issue mandamus to correct the decision of the subordinate court or tribunal.

I HISTORY OF THE PROCEEDINGS

A *The Commission and the Full Commission*

The Public Service Association of South Australia (PSA) notified the Industrial Relations Commission of South Australia (Commission) of disputes between the PSA and the Chief Executive of the Department of Premier and Cabinet of South Australia (Chief Executive). In sum, the 'dispute' arose from an announcement by the Treasurer in the budget speech that the government would be seeking to reduce the number of public service employees and to reduce recreation leave loading and long service leave entitlements.[4] The Chief Executive denied that the announcements gave rise to a 'dispute' as defined under the *Fair Work Act 1994* (SA),[5] on the basis that the Treasurer, as a Minister for the Crown, was not an employer – that function being

* BA (Psych) LLB (Hons) (*Macq*); Research Officer, Macquarie Law School, Macquarie University, Australia.
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1 [2012] HCA 25.

2 (2010) 239 CLR 531.

3 See John Basten, 'The supervisory jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 284.

4 *The Public Sector Association of SA Incorporated v Chief Executive Department of the Premier and Cabinet* [2010] SAIRComm 11.

5 A reference to a section of an Act hereinafter is a reference to a section of the *Fair Work Act 1994* (SA).

performed by the Chief Executive, who had not made any such announcement.[6] The Commission, at first instance, in accepting that argument, denied that it had jurisdiction to hear the matter. This was upheld on appeal by the Full Commission.[7]

B *The Full Court of the South Australian Supreme Court*

The PSA appealed the decision of the Full Commission to the Full Court of the Supreme Court of South Australia (SASC). An appeal to that court is, per s 206(1), subject to a privative clause that provides that 'a determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act'. Section 206(2) limits the scope of the privative clause insofar as an appeal to the SASC lies where there has been 'an excess or want of jurisdiction'. The PSA submitted that the Full Commission had erred in finding that there was no dispute before it.[8] In essence, the SASC was moved to rule against the decision in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch*,[9] which considered a privative provision in similar terms to s 206, namely, s 95 of the *Industrial Conciliation and Arbitration Act 1972* (SA). The PSA sought orders in the nature of mandamus, thereby correcting the decision of the Commission below pursuant to r 199(2)(b) of the *Supreme Court Civil Rules 2006* (SA) (*Rules*) to hear the appeal. The SASC declined to do so.[10]

In applying the *First PSA Case*, Doyle CJ noted that in terms of the phrase 'excess or want of jurisdiction', a distinction is drawn between a wrongful failure to exercise jurisdiction (after hearing and determining the appeal) on the one hand, and failing to consider the application prior to refusing leave and dismissing the appeal on the other.[11] The former, according the *First PSA Case*, may be a jurisdictional error, but it is not a decision made in excess of jurisdiction. The latter is tantamount to acting without jurisdiction and therefore in excess of it.[12] The SASC found that the present case fits within the first, namely, a wrong conclusion as to jurisdiction may be an error on the basis that the tribunal wrongfully failed to exercise jurisdiction, but it was not an act that was in excess of jurisdiction.[13] The SASC dismissed the appeal. It found that, as the Commission was not in excess of its jurisdiction, neither did the SASC have jurisdiction to determine the appeal per s 206.[14] The appellant PSA appealed to the High Court. The Commission entered a submitting appearance. The second respondent, South Australia, was the primary respondent to the appeal. The Commonwealth, Queensland, Tasmania, Victoria and Western Australia intervened. The High Court found unanimously for the appellant PSA.

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6 *The Public Sector Association of SA Incorporated v Chief Executive Department of the Premier and Cabinet* [2010] SAIRComm 11, [23]-[26].

7 Ibid [28], [31].

8 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [5]-[6] (Doyle CJ).

9 (1991) 173 CLR 132.

10 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [6] (Doyle CJ).

11 (1991) 173 CLR 132, 142-144.

12 Ibid 144-145.

13 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [16]-[17].

14 Ibid [17]-[18].

II *KIRK* AND PRIVATIVE CLAUSES

It is necessary at this point to canvass briefly the decision in *Kirk* regarding the effect of privative clauses, as the position taken towards such provisions by the High Court has evolved. In general terms, a privative clause is designed to limit the supervisory jurisdiction, exercised by way of judicial review, of a superior court of record, namely the Supreme Court of any Australian State. The very purpose of such a clause is to deny reviewability by an appellate court, and, to some extent, they have been successful. The leading interpretative decision on privative clauses by the High Court was *R v Hickman; Ex parte Fox* where Dixon J noted that such clauses would be valid where the decision of the relevant body is 'a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body'.[15] Clearly, not all errors going to jurisdiction would fit within those criteria. Doubt was cast on the *Hickman* principle over time,[16] and finally undermined in *Plaintiff S157/2002 v Commonwealth*, whereby the High Court held that administrative decisions, purportedly protected by way of privative clauses, would nevertheless by vitiable if the decision was affected by jurisdictional error, because it would be 'in law, no decision at all'.[17]

Until recently, the protection afforded by the *Hickman* principle continued to be applied in the State Courts.[18] *Kirk* finally made an end to that line of authority.[19] Prosecutions made under occupational health and safety legislation, manifest in different forms in all States and Territories (and the Commonwealth),[20]very rarely reach the High Court. *Kirk* was one of those rare decisions. In that case, by way of brief overview, Mr Kirk and the company of which he was a director were prosecuted for the death at work of a manager who ran a farm owned by the company. Mr Kirk was convicted under ss 15 and 16 of the *Occupational Health and Safety Act 1983* (NSW) (*OHS Act*). Mr Kirk appealed his conviction to the High Court. He complained that his conviction was entered on the basis of a jurisdictional error as the offences had not been sufficiently particularised, thereby inhibiting his ability to meet the defence offered under s 53 of the *OHS Act*. He also complained that his call to give evidence in the proceedings as a prosecution witness was in breach of the rules of evidence that were to be applied by the Commission sitting in Court Session. That proposition was, prima facie, stymied by the presence of an 'all inclusive' privative clause in s 179 of the *Industrial Relations Act 1996* (NSW) (*IR Act*) in the following terms: 'a decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'. The respondent prosecutor relied on that provision to deny jurisdiction to the NSW

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15 *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 615 ('*Hickman*'). This later became known as the "*Hickman* principle".

16 See Joshua Knackstredt, 'Judicial review and Kirk v Industrial Court (NSW)' (2011) 18 *Australian Journal of Administrative Law* 203, 208 ff.

17 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 547, [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

18 See, eg, *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212; *Commissioner of Police for New South Wales v Industrial Relations Commission of New South Wales & Raymond Sewell* (2009) 185 IR 458.

19 See also *Fish v Solution 6 Holdings Limited* (2006) 225 CLR 180, [33] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

20 It is noted that the occupational health and safety legislative space is gradually being filled by harmonised legislation in the form of the Model Work Health and Safety laws.

Court of Appeal. Mr Kirk argued that the provision was invalid insofar as it extended to jurisdictional error and, therefore, the Supreme Court of NSW could make orders in the nature of certiorari quashing the conviction. The High Court accepted this argument and found that such a clause could not extend to protect error of a jurisdictional nature by removing the supervisory jurisdiction of the Supreme Court.[21]

There are some differences in the substrata between the decision in *Kirk* and the *Second PSA Case*. First, the order considered in *Kirk* was in the nature of certiorari, whereas in the *Second PSA Case*, the order contended for was mandamus. Second, the impugned privative clause in *Kirk* designed to remove, in its entirety, the supervisory jurisdiction of the superior court. That was not so in the *Second PSA Case*, which permitted review for decisions 'in excess or want of jurisdiction'. These differences were noted by Doyle CJ and led to his Honour's conclusion that the SASC was not entitled to find that *Kirk* had overruled the *First PSA Case* on point in this respect.[22] These two differences were considered by the High Court in the *Second PSA Case* and, in particular, whether the decision in *Kirk* was in contradiction to the decision in the *First PSA Case*.

III JURISDICTIONAL ERROR

Determination of the *Second PSA Case* rested upon the question of whether the SASC had jurisdiction to entertain the appeal from the Full Commission after the Commission had denied itself jurisdiction for a lack of industrial dispute. Section 206, referred to above, purported to limit the review of decisions of the Commission and the Full Commission by the SASC unless such a decision was infected by an 'excess or want of jurisdiction'. Certain jurisdictional error falling outside that definition could not be the subject of review. The previous decision of the High Court in the *First PSA Case* supported this notion. The majority in that case determined that whilst an act in excess of jurisdiction would not preclude judicial review, '[excess or want of jurisdiction] appears to permit erroneous assumptions of jurisdiction to be checked by judicial review, but not erroneous refusals to exercise jurisdiction'.[23] That statement stands for two propositions: first, that judicial review is confined to errors made for 'excess or want of jurisdiction', and second, that erroneous refusals to exercise jurisdiction are beyond the scope of review on the basis that such refusals are not in 'excess or want of jurisdiction'. Although submitted by the PSA at first instance, the SASC declined to find that the *First PSA Case* was reversed by *Kirk*, primarily on the basis that such a step could only be taken by the High Court.[24] The High Court has now done so unequivocally albeit, at times, for different reasons.

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21 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580-581 [96]-[100].

22 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [5]-[6] (Doyle CJ), citing, inter alia, *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, [39] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

23 *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132, 142 (Brennan J).

24 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [6] (Doyle CJ).

IV THE SUPERVISORY JURISDICTION

It is apposite to commence this discussion by reference to the context in which the *First PSA Case* was decided, that is, without the benefit of the High Court's jurisprudence in *Kirk*. In *Kirk*, the High Court propounded three facets of the status of the State Supreme Courts by reference to the *Constitution*. Firstly, the Legislature cannot alter 'the constitution or character of its Supreme Court [so] that it ceases to meet the constitutional description' of a 'Supreme Court of a State' found in Chapter III of the *Constitution*.[25] Secondly, the supervisory role of the Supreme Court is manifest by its ability to grant prerogative writs, including certiorari and mandamus, for jurisdictional error.[26] Finally, the High Court is the ultimate superintendant of the supervisory jurisdiction of the State Supreme Courts through the common law of Australia and to deny a State Supreme Court its supervisory jurisdiction would leave 'islands of power immune from supervision and restraint', contra s 71 of the *Constitution*.[27] The High Court concluded in *Kirk* that 'legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power'.[28]

The respondent, South Australia, in the *Second PSA Case* contended that the State Supreme Court's supervisory jurisdiction did not extend to a court's wrongful refusal to exercise its jurisdiction. South Australia sought to limit the powers of review held by the State Supreme Courts, and ultimately the High Court, to certain types of jurisdictional error on two bases per the advice of the Privy Council in *Colonial Bank of Australasia v Willan*:[29] first, by limiting the definition of 'excess or want of jurisdiction' to circumstances where there was a 'manifest defect of jurisdiction; and second, by suggesting that mandamus was, per the *First PSA Case*, an adjunct to certiorari, and did not fall within the scope of the supervisory jurisdiction. Both contentions were rejected in the *Second PSA Case*.

A *Manifest Defect of Jurisdiction*

The High Court noted that the delineation of judicial review was not based on the type of jurisdictional error (that is, whether it was 'manifest') but rather by reference to the distinction between jurisdictional error and non-jurisdictional error.[30] It also noted that 'manifest' in the context of *Willan* did not in fact support the argument of the respondents; it referred to error 'on the face of the record', rather than some quality or type of jurisdictional error.[31] In that sense, 'legislation like s 206 which precludes judicial review for one type of jurisdictional error while leaving it open for another type of jurisdictional error is not the permitted type of legislation'.[32] As identified in *Kirk*, not all legislation inhibiting judicial review is invalid. For example, errors of

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25 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 580 [96].
26 Ibid 580 [98].
27 Ibid 581 [99].
28 Ibid 581 [100].
29 (1974) LR 5 PC 417.
30 *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [230] (French CJ), [66] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [72], [78] (Heydon J).
31 Ibid [29] (French CJ), [61]-[63] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [75]-[76] (Heydon J).
32 Ibid [78] (Heydon J).

law or fact (but not jurisdictional fact) may be precluded by way of a privative clause. What demarcates the boundary between what can or cannot be protected by a privative clause is the characterisation of the error as being one of 'jurisdictional error'. If the privative clause denies review for errors of a non-jurisdictional nature, the clause will not be beyond power.[33]

B *Mandamus as adjunct to certiorari*

As noted above, the SASC refused the application on the grounds that it did not have jurisdiction to hear the appeal. What the PSA sought from the SASC (although this does not appear in terms in the decision of that court – instead it refers to a request in the nature of certiorari)[34] was an order in the nature of mandamus compelling the Commission as to jurisdiction. It was put to the High Court by South Australia and the interveners that merely because certiorari may be granted by a superior court exercising its supervisory jurisdiction, it does not follow that mandamus ought to be accorded a similar status. Rather, the respondents submitted that mandamus was an 'adjunct' to certiorari.[35]

The respondents relied upon the *First PSA Case* and, in particular, the decision of Brennan J (as his Honour was then). In that case, his Honour noted:

> But the order in the nature of a mandamus to hear and determine afresh the application for leave to appeal commands the exercise of a jurisdiction which the Full Commission undoubtedly possesses though it has constructively failed to exercise it. That order is not, in my view, founded on an excess or want of jurisdiction. Certiorari is required to quash an order made ultra vires; *mandamus issues as an adjunct to compel the making of an intra vires order* [emphasis added].[36]

Victoria, as intervener, submitted that the reference in *Kirk* at 581 to mandamus was in support of the proposition that mandamus was incidental to an award of certiorari. The joint judgment (and Heydon J) rejected this argument, concurring that mandamus is not an adjunct at all, but a pivotal component of a Chapter III court exercising its supervisory jurisdiction.[37] Heydon J noted that '…the Court [in *Kirk*] treated mandamus as a remedy of equal significance to certiorari and prohibition in its capacity to carry out the supervisory role of the Supreme Courts'.[38] In addition, his Honour held that if such a distinction was drawn, this would effectively limit the supervisory jurisdiction to decisions of a certain class and would thereby leave intact the 'islands of power' prohibited by *Kirk*.[39]

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33 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

34 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223, [3].

35 *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [62] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

36 *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132, 145 (Brennan J) (emphasis added).

37 *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [60]-[62] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), [73], [80] (Heydon J).

38 Ibid [74] (Heydon J).

39 Ibid.

V WRONGFUL REFUSALS OF JURISDICTION AND SECTION 206

The High Court found that the decision of the Commission that there was no industrial dispute was a jurisdictional fact insofar as 'it was a matter which the Commission had jurisdiction to decide as an essential preliminary to the exercise of its substantive jurisdiction'.[40] It was not a matter of discretion. It was incumbent on the Commission to make a correct decision as to its jurisdiction.[41] It could not, for example, decline to exercise its jurisdiction because the terms of the Act suggested that it had a duty to exercise it.[42] In that circumstance, and without drawing any ultimate conclusions as to the existence of an industrial dispute in this case, the High Court found that the SASC did have the jurisdiction to hear and determine the appeal from the Commission, namely, whether there was an industrial dispute, and issue an order in the nature of mandamus if appropriate.[43] However, their Honours adopted distinct approaches to the manner in which s 206 should be handled.

The Chief Justice and the plurality, contra to the High Court's earlier decision in the *First PSA Case*, and based on the decision in *Kirk*, rejected the argument that jurisdictional error did not extend to 'erroneous refusals to exercise jurisdiction'. The Chief Justice[44] in particular affirmed an earlier decision of the SASC in *R v Industrial Commission of South Australia; Ex parte Minda Home Incorporated*.[45] In that case, the SASC construed the term 'excess or want of jurisdiction' to include all errors of jurisdiction that could be relieved by prerogative writ.[46] This interpretation had been rejected previously by the High Court in the *First PSA Case*.[47]

The Chief Justice held that, specifically, an erroneous refusal of jurisdiction was an error for 'excess or want of jurisdiction'[48] but, curiously, given his Honour's remarks in what appear to be absolute terms that jurisdictional error cannot be protected against, left open the question that s 206 may not cover every form of jurisdictional error.[49] Otherwise, his Honour stated that the privative provision should be read down, allowing the review of jurisdictional error by State Supreme Courts but maintaining protection for errors made within jurisdiction.[50] This approach is consistent with that in *Plaintiff S157*. In that case, a 'decision' excluded from review was, in accordance

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40 Ibid [31] (French CJ).

41 The joint judgment relied on the decision of Latham CJ in *R v Blakeley; Ex parte Association of Architects of Australia* (1950) 82 CLR 54, 75 where his Honour the Chief Justice noted that "If an authority with limited jurisdiction has no power to make a conclusive decision as to the existence or non-existence of a collateral matter upon which jurisdiction depends, and makes a wrong decision either way, the mistake will be corrected by mandamus… if he wrongly decides that he has no jurisdiction…".

42 Ibid [92] (Heydon J).

43 Ibid [31] (French CJ), citing *R v Blakeley; Ex parte Association of Architects of Australia* (1950) 82 CLR 54, 75 (Latham CJ).

44 *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [31] (French CJ). Similar reasoning is adopted by the plurality at [65].

45 (1975) 11 SASR 333 ('*Minda Home*').

46 Ibid 337 (Bray CJ).

47 (1991) 173 CLR 132, 142-143 (Brennan J), 151-152 (Deane J), 165 (McHugh J).

48 Ibid [34] (French CJ).

49 Ibid [35] (French CJ).

50 Ibid.

with previous authority, taken not to extend to decisions made on the basis of jurisdictional error, which are 'regarded, in law, as no decision at all'.[51]

The joint judgment went one step further and complied with the principles of federal statutory interpretation laid down by Isaacs J in *Federal Commission of Taxation v Munro*, wherein his Honour stated:

> There is always an initial presumption that Parliament did not intended to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail,[52]

The plurality found that 'excess or want of jurisdiction' is apt to include jurisdictional error rather than merely some species of jurisdictional error.[53] The plurality's conclusion is substantively similar to that of the Chief Justice, but in more emphatic terms.

Heydon J departed from the reasons of the Chief Justice and the joint judgment on this point. His Honour opined that the text of s 206 was not capable of being read to include a failure to exercise jurisdiction[54] and rejected the interpretation, adopted in *Minda Home*, that the phrase 'excess or want of jurisdiction' could be read to include all errors going to jurisdiction.[55] In dissent on this point, his Honour held that the privative provision was invalid insofar as it purported to limit review by the Supreme Court for errors going to jurisdiction.[56]

VI EXTENT OF REVIEWABILITY

Heydon J also considered the arguments of the interveners. Victoria submitted contra to the position of South Australia that the constitutional protection for judicial review espoused in *Kirk*[57] was limited to decisions from courts, and not tribunals or administrative bodies. Little authority was given for the submission. It would appear that the submission arose out of a convenient and literal reading of *Kirk*. In *Kirk*, the High Court was confronted with a decision of the Industrial Court of NSW that was appealed to the NSW Court of Appeal, and gave its reasons accordingly. It was not necessary for it to consider whether the protection extended to the review of decisions of tribunals.

Such authority now, unambiguously, exists by way of the reasons of Heydon J. His Honour noted that 'the application of *Kirk's* case beyond courts is rational, for it can be hard to distinguish between adjudicative bodies which are courts and those which are not, particularly in the case of non-federal bodies, for State constitutions do not

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

52 (1926) 38 CLR 153, 180.

53 *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [65] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

54 Ibid [87]-[88] (Heydon J).

55 Ibid [88].

56 Ibid [88] (Heydon J).

57 (2010) 239 CLR 531, 581 [99].

embody any strict separation of powers'.[58] This is consistent with subsequent jurisprudence on this point. In *South Australia v Totani*, a decision applying the principles of *Kirk*, the High Court held that the legislative power of any State would not extend to limiting judicial review of decisions infected by jurisdictional error of the State, its Ministers or authorities by the superior court of record.[59]

VII CONSIDERATION

The decision in the *Second PSA Case* reaffirms the High Court's position towards privative clauses and the usurpation of the supervisory jurisdiction; simply, it will not tolerate it. That this now applies to State privative clauses is incontrovertible. Admittedly, the decision is hardly surprising. The High Court has been leaning this way for some time.[60]

Logically, in the *Second PSA Case*, the High Court upheld that Parliament cannot impinge upon a superior court's power to review decisions of courts, tribunals and administrative bodies that are infected by jurisdictional error. Now, privative clauses that previously acted to protect against the review of decisions made by those bodies are invalid. Whilst inherently correct, it places great importance upon the determination of what is an error going to jurisdiction. Unfortunately, that determination is far from clear. In *Kirk*, the High Court recognised that the boundaries of jurisdictional error are not closed.[61] Indeed, the borders may be said to be expanding. That uncertainty may be problematic. For decisions that are patently beyond jurisdiction, such as where the relevant official has no power to make a particular order and does so, it cannot rationally be said that a decision of that kind should be protected. More difficult, perhaps, are decisions that may later be impugned for denial of procedural fairness, for example, which may not be readily apparent. Denial of procedural fairness, unless specifically exempted (for tribunals and administrators),[62] is an error going to jurisdiction.[63] This lack of clarity could give rise to probing appeals to appellate courts on what may otherwise be futile grounds.

The effect on the decision maker may also be marked. For decision makers who are judges, this lack of clarity ought not be a problem; it goes without saying that the judiciary will keep pace with the development of the law and be abreast of its vagaries. Tribunal members and administrators may not be so fortunate. Often, such officers are not legally trained. Whilst it is not suggested that decisions made without jurisdiction should be protected from review, if the borders of jurisdictional error are not closed, it may leave non-legal decision makers in the precarious position of trying to distil complex legal principle that is transient. In situations of high volume, it is likely that such decision makers will become reactive to appeals, rather than

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58 *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [82] (Heydon J). His Honour relied, inter alia, on *Wainhou v New South Wales* (2011) 243 CLR 181, 95 (French CJ) in coming to that inevitable conclusion.

59 (2010) 242 CLR 1, 27 (French CJ).

60 See, eg, *Fish Solution 6 Holdings Limited* (2006) 225 CLR 180.

61 (2010) 239 CLR 531, 581 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

62 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

63 *South Australia v Totani* (2010) 242 CLR 1; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; Basten, above n 3, 288; Leighton McDonald, 'The entrenched minimum provision of judicial review and the rule of law' (2010) 21 *Public Law Review* 14, 17.

proactively applying the law correctly. In turn, this could increase the cost and time of applications as legal practitioners test the boundaries of jurisdictional error in the appellate sphere. This is further complicated by the difficulty in demarcating what is jurisdictional error and what is an error made within jurisdiction.[64]

What is also worthy of note is the comment of Heydon J that 'it can be hard to distinguish between adjudicative bodies which are courts and those which are not'.[65] There has long been a distinction between an error of jurisdiction committed by a court and an error committed by an administrative body such as an administrative tribunal.[66] Care must be exercised in adhering to the intention of his Honour's remarks. By treating a tribunal as a court, it places a more onerous burden on the tribunal to apply the law as if the member were a judicial officer. In many cases tribunal members are judicial officers or eminent legal professionals, making that comment, practically speaking, largely uncontroversial. Caution may be needed however to avoid that comment being extended to tribunals constituted by non-legal professionals. It would be improper to hold such persons to a judicial standard. As noted by Basten JA, writing extra-judicially, 'it is unhelpful to seek to state the bases for judicial review in terms which do not take account of the function being exercised by the initial decision maker'.[67] Decisions of such tribunals should be reviewed according to the magnitude and importance of the decision made, and should take into account the status and resources of the decision-maker.

The *Second PSA Case* also clarifies the applicability of the decision in *Kirk* in relation to the remedies that may be given for jurisdictional error. In summary, an appellate court is entitled to employ not only certiorari to correct the erroneous decisions of courts below, but also mandamus. The decision of the High Court in the *First PSA Case* has been overturned and mandamus reinstated as an equal partner in the arsenal of judicial review.

64 See Basten, above n 3, 287.

65 *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* [2012] HCA 25, [82] (Heydon J).

66 *Craig v South Australia* (1995) 184 CLR 163, 177-178.

67 Basten, above n 3, 297.