IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A7 of 2011

B E T W E E N:

PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED

Applicant

and

INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA

First Respondent

CHIEF EXECUTIVE, DEPARTMENT OF THE PREMIER AND CABINET

Second Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 12 August 2011

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PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia ("Western Australia") intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in the special leave application and any appeal that may follow the grant of special leave. If it is necessary to seek leave to intervene in the special leave application, Western Australia seeks that leave. Western Australia intervenes in support of the Second Respondent.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

10 3. If leave is necessary, Western Australia should be granted leave because it has a statutory right to appear in any appeal resulting from the present application and it is the more efficient course to grant leave at this stage.

PART IV: APPLICABLE LEGISLATION

4. The legislation applicable to the determination of this matter is set out in the written submissions of the Applicant and Second Respondent.

PART V: SUBMISSIONS

Western Australia's Contentions

5. Western Australia adopts the submissions of South Australia. If those submissions are not accepted Western Australia makes the following alternative submissions, on
20 the assumption, for the purposes of this argument, that a State Parliament may not exclude the jurisdiction of its Supreme Court to grant relief for a failure to exercise, as opposed to an excess or want, of jurisdiction:

(a) A State Parliament may modify the breadth and nature of the authority which it confers upon officers and tribunals, so as to define the circumstances in which an error of law will amount to jurisdictional error and so reduce the circumstances in which the supervisory jurisdiction of the Supreme Court of that State may be engaged;[1]

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[1] See paragraphs [6]-[27] below.

(b) The availability of a writ of mandamus, and equivalent relief, depends on the existence of an unfulfilled public duty;[2]

(c) When a tribunal with no duty to exercise jurisdiction, or consider whether jurisdiction should be exercised, merely fails to exercise jurisdiction, because of an incorrect conclusion that jurisdiction does not exist, the tribunal will not ordinarily commit any jurisdictional error the correction of which forms part of any Constitutionally entrenched supervisory role of Supreme Courts;[3]

(d) If a statute confers power or jurisdiction on a person or body other than the Supreme Court then it is a question of statutory construction as to whether or not there is a duty to exercise the power or jurisdiction, or consider whether the power or jurisdiction should be exercised;[4] and

(e) The question of whether the Industrial Relations Commission of South Australia has a duty to exercise its jurisdiction, or consider whether that jurisdiction ought to be exercised, is to be resolved by construing the *Fair Work Act 1994* (SA), including s 206 of that Act which suggests that no such duty exists.[5]

Capacity of Parliament to define the breadth and nature of the authority conferred upon officers and tribunals

6. *Kirk v Industrial Court (NSW)*[6] identified that s 73(ii) of the Constitution mandates a "supervisory role"[7] for State Supreme Courts, namely "to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error".[8] That relief was in the form of "the grant of prohibition, certiorari and mandamus (and habeas corpus)"[9] or equivalent relief. From that constitutional principle, it followed that:[10]

> "Legislation which would take from a State Supreme Court the power to grant relief on account of jurisdictional error is beyond legislative power."

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2 See paragraphs [28]-[38] below.
3 See paragraphs [39]-[43] below.
4 See paragraphs [44]-[49] below.
5 See paragraphs [50]-[64] below.
6 (2010) 239 CLR 531.
7 (2010) 239 CLR 531 at 581 [98] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
8 (2010) 239 CLR 531 at 566 [55] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
9 (2010) 239 CLR 531 at 581 [98] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
10 (2010) 239 CLR 531 at 581 [100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

7. *Kirk* and *Plaintiff S157/2003 v Commonwealth*[11] confirm that ss 73(ii) and 75(v), respectively, of the Constitution entrench the role of State Supreme Courts and this Court in determining whether the limits on executive and judicial power have been exceeded and enforcing compliance with those limits. However, the formulation of those limits which are not provided for by the Constitution is a matter for Parliaments. That is, subject to the Constitution, it is the laws made by Parliaments which define the conditions for the valid exercise of statutory powers and it is the courts which enforce adherence to those conditions.

8. While the same provision may incorporate more than one category, there is a distinction to be drawn between:

(a) a law which creates a norm of conduct;

(b) a law which provides a remedy for breach of a norm; and

(c) a law which confers authority on a court to decide whether the norm has been breached and to grant a remedy for the breach.[12]

9. The supervisory role of the State Supreme Courts, which is entrenched by s 73 of the Constitution, does not extend beyond the last two categories. *Kirk* itself affirms that the first category is a matter for legislative determination. In this context that category comprises the definition of the limits of the powers and jurisdiction of a body other than the Supreme Court, which are to be identified from the relevant statute establishing the body and regulating its work.[13]

10. As Deane and Gaudron JJ noted in *DCT v Richard Walker Pty Ltd*[14] in relation to s 75(v):

> "The various legislative powers which are conferred upon the Parliament by s 51 of the Constitution are all 'subject to' the provisions of s 75. That being so, the jurisdiction which s 75(v) confers and the right of a relevantly affected person to invoke it cannot be withdrawn, negated or diminished by the Parliament. Nonetheless, the right to invoke the jurisdiction is essentially an auxiliary or facultative one in the sense that the jurisdiction which the sub-section confers upon the Court is to hear and determine the designated matters in accordance with the

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11 (2003) 211 CLR 476.

12 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590-1 [66]-[67] per Gleeson CJ, Gaudron and Gummow JJ.

13 (2010) 239 CLR 531 at 574 [72] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

14 (1995) 183 CLR 168 at 205 (footnote omitted).

> independently existing substantive law. In other words, the right to invoke the jurisdiction will be unavailing unless the decision or conduct of the officer of the Commonwealth in respect of which the designated relief is sought is invalid or unlawful under that substantive law. The result of that is that, while the Parliament cannot withdraw or diminish the jurisdiction of the Court to hear and determine the matters which the sub-section designates including the jurisdiction to determine the critical issue of the validity or lawfulness of an impugned decision or conduct, it can, consistently with the sub-section and within the limits of the legislative powers conferred upon it by the Constitution, alter the substantive law to ensure that the impugned decision or conduct is in fact valid or lawful."

11. The High Court's jurisdiction under s 75(v) of the Constitution is not engaged when a decision has been made in conformity with the statute which creates and confers power or jurisdiction. Similarly, the entrenched supervisory role of Supreme Courts to grant relief on the ground of jurisdictional error is not engaged when a decision has been made in conformity with such a statute.

Classification of error as jurisdictional

12. Whether an error of law made by a person or body other than a Supreme Court amounts to jurisdictional error depends on the terms of the statute conferring power on that person or body. So, for example, the question of whether a failure to comply with a statutory provision invalidates the exercise of executive power will be answered by an examination of the language, scope and purpose of the statute. In that context, the test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.[15] That is, Parliament may lawfully prescribe the kind of duty to which an officer is subject and may lawfully prescribe the way in which that duty shall be performed.[16] In *Plaintiff S157/2002*, Gleeson CJ observed in the context of s 75(v) of the Constitution:[17]

> "Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted."

13. Even in the case of fraud, the question of whether there has been jurisdictional error may depend on the effect of the fraud on the process for which Parliament has

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15 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 [93] per McHugh, Gummow, Kirby and Hayne JJ; *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at 156-157 [23] per Gummow, Hayne, Heydon and Crennan JJ.

16 *Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82 at 142 [166] per Hayne J.

17 (2003) 211 CLR 476 at 483 [5].

provided.[18] So in *SZFDE v Minister for Immigration*[19] the third party fraud produced jurisdictional error because it had the immediate consequence of stultifying the operation of the legislative scheme to afford natural justice to the appellants in that case. In such a case, it is the provisions of the statute providing for the conditions for the valid exercise of a statutory power that are controlling.[20]

14. At the State level, subject to the Constitution, a State Parliament may modify the breadth and nature of the authority which it confers upon officers and tribunals. This modification may affect the circumstances in which an error of law will amount to jurisdictional error, so as to concomitantly reduce the number of occasions on which the supervisory role of the State Supreme Court will be engaged.

15. A State Supreme Court's supervisory role is not interfered with by a privative clause which excludes review of a decision that is not attended by jurisdictional error[21] or where prerogative writs or equivalent relief would not otherwise be available.

Expressly excluding procedural fairness

16. Breach of an obligation to accord procedural fairness is ordinarily a species of jurisdictional error.[22] However, this Court has recognised that Parliament could, subject to expressing the intention with sufficient clarity, provide that the rules of procedural fairness do not apply to condition the authority of an administrative decision-maker.[23]

17. If Parliament does exclude the rules of procedural fairness by employing sufficiently clear language, then a failure to comply with those rules will no longer amount to

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18 *SZFDE v Minister for Immigration* (2007) 232 CLR 189 at 200-201 [29] and 205-206 [47]-[52].

19 (2007) 232 CLR 189.

20 The present case is not concerned with the question of power which might arise in the "unlikely eventuality" that Parliament authorised a fraudulent exercise of power. As in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 663 [28] per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, the theoretical question of the validity of such a law need not be pursued here.

21 (2010) 239 CLR 531 at 581 [100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

22 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 100-101 [39]-[41] per Gaudron and Gummow JJ, Gleeson CJ concurring at [5]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 612 [42]-[44] and 618 [61] per Gaudron and Gummow JJ, McHugh J concurring at 618 [63] and Hayne J concurring at 644 [149].

23 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396 per Dixon CJ and Webb J; *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [41] per Gaudron and Gummow JJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [14]-[15] and 271 [58]-[59] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ, 280 [81] and 282 [85] per Heydon J; *Plaintiff M61/2010E v Commonwealth* (2010) 85 ALJR 133 at 148 [74].

jurisdictional error. As Gleeson CJ stated in *Plaintiff S157/2002* in discussing the requirement to afford "natural justice" or "procedural fairness":[24]

> "A statute may regulate and govern what is required of a tribunal or other decision-maker in these respects, and prescribe the consequences, in terms of validity or invalidity, of any departure[25]. Subject to any statutory provision, denial of natural justice or procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power, and jurisdictional error." (Emphasis added.)

18. The Western Australian Court of Appeal has recently held in *Seiffert v The Prisoners Review Board*[26] that s 115 of the *Sentence Administration Act 2003* (WA) was in sufficiently clear terms that it was effective to exclude a requirement upon the Board to provide natural justice in considering whether to exercise its power under s 44 of that Act to cancel a parole order at any time during the parole period.[27]

19. The express statutory exclusion of the rules of procedural fairness in relation to decision-making by an authority does not deprive the State Supreme Courts of their supervisory jurisdiction with respect to jurisdictional error. The consequence of such an express statutory exclusion is that if the authority fails to accord procedural fairness in making a decision then the decision will not be attended by jurisdictional error by reason of that failure.

Conferring jurisdiction upon a tribunal to conclusively determine questions of law

20. Parliament may also, in at least some circumstances, determine whether or not to confer jurisdiction upon a tribunal to conclusively determine questions of law.

21. This Court held in *Craig v South Australia* that:[28]

> "At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with law."

22. The Court then referred with approval to the statement by Lord Diplock in *In re Racal Communications Ltd*[29] to the effect that Parliament can confer power upon administrative tribunals or authorities to decide questions of law provided that clear words are used so as to overcome the presumption that Parliament did not intend to confer such a power.

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24 (2003) 211 CLR 476 at 490 [25].
25 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142 [166] per Hayne J.
26 [2011] WASCA 148. The decision was delivered on 8 July 2011.
27 [2011] WASCA 148 at [97] per Martin CJ, Murphy JA agreeing at [219], and [212]-[213] per McLure P.
28 (1995) 184 CLR 163 at 179.
29 [1981] AC 374 at 383.

23. The conferral of jurisdiction upon an administrative tribunal by a State Parliament to authoritatively determine questions of law is permissible because "there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution."[30]

24. Ordinarily, an error of law by an administrative tribunal will amount to a jurisdictional error. However, if Parliament confers a power upon a tribunal to conclusively determine questions of law then an error of law made by that tribunal would not necessarily constitute a jurisdictional error.

25. The position of the tribunal in this regard would be analogous to that of an inferior court as described in *Craig*. The tribunal would then make a jurisdictional error if it makes an order or decision "which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction".[31] However, a mistake by a tribunal with authority to conclusively determine questions of law in identifying, formulating and determining questions of law would not ordinarily involve jurisdictional error.[32] Such an error of law "may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision".[33]

Parliament may grant a power without a duty to consider whether to exercise the power

26. In *Plaintiff M61/2010E v Commonwealth*, this Court held that it was not inconsistent with s 75(v) of the Constitution to confer a power upon the Minister for Immigration and Citizenship in circumstances where there was no duty upon the Minister to consider whether to exercise that power.[34] The Court observed:[35]

> "Maintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise."

27. It follows that a failure to exercise a power in circumstances where Parliament has not imposed a duty to exercise the power will not amount to jurisdictional error.

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30 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [69] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
31 (1995) 184 CLR 163 at 177.
32 (1995) 184 CLR 163 at 180.
33 (1995) 184 CLR 163 at 180.
34 (2010) 85 ALJR 133 at 144-145 [57].
35 (2010) 85 ALJR 133 at 144-145 [57] (footnote omitted).

The writ of mandamus

28. The proposition that there may not be a public duty to exercise a power, with the result that the writ of mandamus will not lie to compel the exercise of the power, is supported by the history of that writ.

Matters of history

29. Although the prerogative writs can be regarded as "lineal descendants" of the "old executive writ" of the era following the Norman Conquest,[36] *Bagg's* case[37] in 1615 has been suggested as being, for practical purposes, the starting point in the history of the writ of mandamus.[38] The writ issued in *Bagg's* case was referred to as a writ of restitution and commanded the mayor and commonalty of Plymouth to restore Bagg to the office of the capital burgess of Plymouth.

30. From at least the first half of the eighteenth century, mandamus would issue to compel authorities to exercise their jurisdiction. In *R v Montague*, the Court of King's Bench issued mandamus to compel justices of the peace to "put in execution the Statute 8 H. 6, c. 9, of Forcible Entries".[39]

31. Lord Mansfield, Chief Justice of King's Bench from 1756 to 1788, made a major contribution to the development and understanding of the writ of mandamus. Lord Mansfield was emphatic that mandamus should be classified as a prerogative writ:[40]

> "A mandamus is certainly a prerogative writ, flowing from the King himself, sitting in this Court, superintending the police, and preserving the peace of this country; and will be granted wherever a man is entitled to an office or a function, and there is no other adequate legal remedy for it."

32. By the second half of the eighteenth century, "the primary function of the writ [of mandamus] was to compel inferior tribunals to exercise jurisdiction and discretion according to law."[41]

33. The question of whether the writ of mandamus would lie to compel the performance of a function or the exercise of jurisdiction has long been understood to turn on the existence of a legal obligation to perform the function or to exercise jurisdiction.

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36 Van Caenegem, "Royal Writs in England from the Conquest to Glanvill" (1959) 77 *Selden Society*, 178, footnote 2.

37 (1615) 77 ER 1271.

38 Woolf, Jowell and Le Sueur, *De Smith's Judicial Review* (2007), 795 [15-035].

39 Sess. Cas. 106.

40 *R v Barker* (1762) 96 ER 196 (footnote omitted).

41 Woolf, Jowell and Le Sueur, *De Smith's Judicial Review* (2007), 796 [15-037].

34. In *Ex parte Napier*,[42] Lieutenant General Sir Charles Napier sought the issue of mandamus commanding the East India Company to pay him monies due to him as Commander of the Queen's forces in India and as Commander of the forces of the East India Company. Lord Campbell speaking for the Court of Queen's Bench observed:[43]

> "The applicant must make out that there is a legal obligation on the East India Company to pay him the sum he demands, and that he has no remedy to recover it by action. The latter point becomes material only when the former has been established; for the existence of a legal right or obligation is the foundation of every writ of mandamus."

The Court would not issue a writ of mandamus because "the attempt to shew that there was any obligation upon the East India Company ... entirely failed."[44]

35. In *R v Secretary of State for War*,[45] the Court of Queen's Bench held that mandamus would not lie to compel the Secretary of State for War to carry out a royal warrant regulating the pay and retirement allowances of retiring officers on the basis that there was no "duty of a public nature in which the applicant [for mandamus] is interested" but duty "owing to the Sovereign alone".[46]

36. The decision that mandamus did not lie was upheld on appeal to the English Court of Appeal. The Master of the Rolls, Lord Esher agreed with the reasoning of the Court of Queen's Bench but added that:[47]

> "what we are asked to do is really to direct a servant of the Crown, who is only responsible to the Crown, to do that which the Crown itself, his principal, is under no legal obligation to do."

37. The modern understanding of the writ of mandamus as being for the purpose of enforcing the performance of a public duty emerges clearly in the House of Lords' decision of *Julius v The Lord Bishop of Oxford*. In *Julius*, it was held that mandamus would not lie to compel the bishop to issue a commission for the purpose of inquiring into whether an offence had been committed against the *Church Discipline Act* (3 & 4 Vict. c. 86). The Lord Chancellor, Earl Cairns observed:[48]

> "Whether the power is one coupled with a duty ... is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus."

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42 (1852) 18 QB 692.
43 (1852) 18 QB 692 at 695.
44 (1852) 18 QB 692 at 695.
45 [1891] 2 QB 326.
46 [1891] 2 QB 326 at 334-335.
47 [1891] 2 QB 326 at 338-339, Kay LJ agreeing at 339.
48 (1880) 5 App Cas 214 at 223. See also Lord Penzance at 230-232, Lord Selborne at 235 and Lord Blackburn at 238 (but see 240).

The bishop was held to have a complete discretion regarding whether to issue a commission and so mandamus did not lie.

Modern understanding

38. The modern understanding is demonstrated in *Plaintiff M61/2010*, the case in which this Court most recently considered the availability of mandamus. This Court held that mandamus did not lie because there was no duty upon the Minister to consider whether to exercise the powers conferred by s 46A and 198A of the *Migration Act*. There being no duty upon the Minister to consider whether to exercise the powers, there was no correlative right of the offshore entry person to have the Minister decide to exercise those powers.[49]

The supervisory role of the State Supreme Courts in relation to tribunals

39. It follows from the principles discussed at paragraphs 6 to 27 above that the scope of the supervisory role which s 73 of the Constitution contemplates the State Supreme Courts will exercise in relation to tribunals is a function of the nature and breadth of the powers, functions and jurisdiction conferred, and duties imposed upon, a tribunal. Determining the scope of that supervisory role therefore requires analysis of the powers, functions, jurisdiction and duties of the tribunal.

40. When a tribunal with no duty to exercise an administrative power, or consider whether the power should be exercised, wrongly decides that the power does not exist, the tribunal generally does not commit a jurisdictional error the correction of which forms part of any Constitutionally entrenched supervisory role of Supreme Courts.

41. The tribunal's decision in such a case is not ordinarily amenable to certiorari because it has no legal effect which is capable of being quashed.[50] The decision neither:

(a) discharges a duty to exercise a power, or consider whether the power should be exercised; or

(b) prevents the future exercise of the power on the basis that the tribunal is *functus officio*.

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49 (2010) 85 ALJR 133 at 148 [77].

50 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159-65 per Brennan CJ, Gaudron and Gummow JJ. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580-581 per Mason CJ, Dawson, Toohey and Gaudron JJ and 595 per Brennan J; *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* (1976) 50 ALJR 471 at 473-475 per Stephen J; *R v Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 QB 864 at 888 per Diplock LJ.

42. Similarly the Court would not declare the decision to be invalid where the decision did not have any effect of the rights of any party. As Gaudron and Gummow JJ noted in *Minister for Immigration v Bhardwaj*:[51]

> "In the context of administrative decisions, the expression 'judicial review' tends to obscure the fact that the reviewing court is not simply examining the decision in question to see whether it is affected with error of the kind that requires it to be set aside or varied. Judicial review is an exercise of judicial power. As such, it is an exercise directed to the making of final and binding decisions as to the legal rights and duties of the parties to the review proceedings.[52]
>
> When an administrative decision is challenged in judicial proceedings, the question that is ultimately decided is not whether the decision was affected by error but whether the rights of the party to whom the decision relates are determined by that decision which, they will not be, if the decision must be set aside. And that question is answered by application of the relevant body of law to the decision in issue."

43. It follows from the understanding of mandamus since at least *Julius* that mandamus or equivalent relief will not lie against a tribunal with no duty to exercise an administrative power because there is no undischarged duty to be performed. The supervisory jurisdiction of the Supreme Court is thus not engaged by parity of reasoning with that of this Court in *Plaintiff M61/2010*, regarding the interaction of s 46A of the *Migration Act 1958* (Cth) and s 75(v) of the Constitution:[53]

> "The repository of the power given by s 46A does not determine the limits of the power. If the power is exercised, s 75(v) can be engaged to enforce those limits. No "island of power" is created. Rather, what s 46A(7) does is provide that the repository of the relevant power need not consider whether to exercise it. That is, there being no duty to exercise the power, mandamus will not go to compel its exercise. But that does no more than deny that the particular grant of power entails a duty to consider its exercise."

Determining whether a tribunal has a duty to exercise its jurisdiction is a matter of statutory construction in the context of relevant constitutional principles

44. Whether the conferral of jurisdiction on a tribunal carries with it a duty to exercise the jurisdiction, or consider whether jurisdiction should be exercised, is a matter of statutory construction.

45. A privative clause which states that judicial review lies only for want or excess of jurisdiction, and not for a failure to exercise jurisdiction, may be relevant to that question of statutory construction.

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51 (2002) 209 CLR 597 at 617 [57]-[58] but see McHugh J contra at 618 [64].

52 See *Nicholas v R* (1998) 193 CLR 173 at 207 [70] per Gaudron J and the cases there cited.

53 (2010) 85 ALJR 133 at 145 [59].

46. A statute which contains such a privative clause might be construed in two ways:

(a) The statute may be construed as conferring a duty to exercise the power, or consider whether the power should be exercised, but purport to exclude the jurisdiction of the Supreme Court to enforce compliance with that duty by the grant of mandamus or similar relief;

(b) Alternatively, the statute construed as a whole may not impose any such duty.

47. On the former construction, the validity of the statute may be open to question on the grounds identified in *Kirk*.[54] On the latter construction, the supervisory jurisdiction of the Supreme Court is not excluded. Rather, the tribunal has not acted contrary to its powers and duties.

48. As Dixon J noted in *R v Hickman; ex parte Fox*;[55]

> "In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them. Further, if there is an opposition between the Constitution and any such provision, it should be resolved by adopting any interpretation of the provision that is fairly open."

49. While a privative clause of the kind referred to in paragraph 45 above cannot always be controlling, it may suggest that powers conferred by the statute in which it is found are not to be construed as implicitly carrying with them a duty to exercise the power or consider whether it should be exercised. As this Court recognised in *Plaintiff S157/2002* the question will always be one of statutory construction having regard to the terms of the privative clause, the provision conferring power and the statute as a whole.[56] That process of construction takes place against the background of a presumption that an interpretation which is consistent with the Constitution should be preferred where constructional choices are open, and that Parliament does not intend to cut down the jurisdiction of the Courts.[57]

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54 See paragraph [6] above.
55 (1945) 70 CLR 598 at 616.
56 (2003) 211 CLR 476 at 501-3 [60]-[63] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
57 (2003) 211 CLR 476 at 504-5 [71]-[72] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

Construing the *Fair Work Act*

50. Western Australia takes no position on the correct construction to be given to the *Fair Work Act* save that it seeks to illustrate how the above process of statutory construction might be applied to that Act.

51. Section 23 of the *Fair Work Act* provides that the "Industrial Commission of South Australia continues in existence as the Industrial Relations Commission of South Australia." Section 7(3) identifies the Commission as "an industrial authority with the jurisdiction conferred by this Act to regulate industrial matters and to prevent and settle industrial disputes".

52. Sections 26 and 27 provide for the jurisdiction of the Commission. That jurisdiction includes "jurisdiction to resolve industrial disputes".[58] "Industrial dispute" is defined in s 4(1) and that definition includes "a dispute ... about an industrial matter" and "industrial matter" is also defined in that sub-section.

53. The issue of whether the Commission has a duty to exercise that jurisdiction is to be determined in the context of other provisions in the Act.

54. One provision which is clearly relevant to that issue is s 206, which provides:

> **"Finality of decisions**
>
> (1) A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act.
>
> (2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction."

55. "Determination" is defined in s 4(1) of the *Fair Work Act* and includes a "decision", which is, in turn, defined to include "a refusal or failure to make a decision".

56. Consistently with the second of the possible interpretations of such a privative clause set out in paragraph 46 above, it may be that this privative clause is an indication that there is no duty on the Commission to exercise its jurisdiction to resolve industrial disputes.

57. There are a number of other provisions in the *Fair Work Act* which are pertinent to the question of whether there is a duty upon the Commission to exercise its jurisdiction.

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58 *Fair Work Act*, s 26(c).

58. Section 168 provides:

> **"Power to desist from hearing**
>
> The Court or the Commission may desist from hearing proceedings if –
>
> (a) the proceedings are frivolous or vexatious; or
>
> (b) further hearing of the proceedings is not, in the opinion of the Court or the Commission, in the public interest."

59. This provision would ordinarily be interpreted as requiring the Commission to exercise jurisdiction unless the conditions set out in paragraphs (a) or (b) were satisfied.[59] However, this provision might also be understood as only providing specific instances but not an exhaustive list of when the Commission may cease exercising jurisdiction.

60. It is noteworthy that s 82 of the *Fair Work Act*, which deals with the exercise of the Commission's jurisdiction in relation to industrial disputes between an employer and employees bound by an enterprise agreement, provides in s 82(2)(a) that before the Commission intervenes in such an industrial dispute, it must ensure the procedures in the enterprise agreement for resolving disputes have been followed but have failed to resolve the dispute.[60] This provides a reason in addition to those set out in s 168 for the Commission not to exercise its jurisdiction to resolve industrial disputes.[61]

61. Section 192 provides:

> **"Commission to conciliate where possible**
>
> In exercising its jurisdiction, the Commission must make every practicable attempt to conciliate, to prevent impending industrial disputes and to settle existing disputes and claims by amicable agreement."

62. This provision might be seen as being consistent with a duty to exercise jurisdiction, or consider whether jurisdiction should be exercised. However, it may be that the preferable interpretation of this section is that it requires the Commission to make use of conciliation to the fullest possible extent when it does exercise its jurisdiction to resolve disputes and does not suggest that the Commission must exercise jurisdiction. The latter interpretation would be consistent with construing s 192 as

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59 *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 136-137 per Brennan J, 146 per Deane J, 157-159 per Dawson and Gaudron JJ, 163-164 per McHugh J.

60 "Enterprise agreements" are agreements "between 1 or more employers and a group of employees regulating remuneration or other industrial matters": *Fair Work Act*, s 4(1), definition of "enterprise agreement".

61 See, however, s 199 which appears to be less clear that the Commission may not exercise jurisdiction until all dispute resolution procedures in an enterprise agreement have been exhausted. See further s 202(3)(b).

dealing with the conferring of a power to conciliate upon the Commission in the same way that s 197 confers a power to mediate.

63. Finally, s 174 of the *Fair Work Act* provides:

> **"Power to re-open questions**
>
> The Court or Commission may re-open a question previously decided and amend or quash an earlier determination."

64. This provision means that the Commission is not *functus officio* after having made a determination. As a result, a decision by the Commission that it does not have jurisdiction is not a final decision and, as such, does not generally have the legal effect of precluding a subsequent exercise of jurisdiction.[62] Consistently with the principles discussed in paragraphs 41 to 42 above, this further suggests that a decision by the Commission that it does not have jurisdiction is not a jurisdictional error within the supervisory jurisdiction of the Supreme Court.

65. Ordinarily conferral of jurisdiction on a tribunal such as the Commission for the public benefit, or for the purpose of conferring rights or benefits upon persons, would be construed as carrying with it a duty to exercise the jurisdiction, or consider whether it should be exercised, in an appropriate case.[63] The presumption that such a duty is imposed may be reinforced by a number of the provisions noted above. However, if the constructional choices are that the *Fair Work Act* either:

(a) invalidly imposes an unenforceable duty, or

(b) validly imposes no duty at all,

then a construction of the Act as a whole, in light of both the privative clause and the presumption noted at paragraph 49 above, is capable of leading to the conclusion that no such duty is imposed.

Conclusion

66. It may be that, having regard to s 206 of the *Fair Work Act* and other relevant provisions, the Act is to be construed as not imposing any duty on the Commission to exercise its jurisdiction, or consider whether its jurisdiction should be exercised in a particular case. If the *Fair Work Act* were to be construed in that manner, then the

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62 It should be observed, however, that s 208(4) provides that a decision of the Commission cannot be altered while subject to an appeal to the Full Commission.

63 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 398.

Act would not invalidly purport to deprive the Supreme Court of South Australia of its supervisory jurisdiction.

Dated the 12th day August of 2011

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