IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A7 of 2011

BETWEEN:

PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED

~~Appellant~~ Applicant

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and

INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA

First Respondent

and

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CHIEF EXECUTIVE, DEPARTMENT FOR PREMIER AND CABINET

Second Respondent

~~APPELLANT'S~~ WRITTEN SUBMISSION
APPLICANT'S

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Part I: Suitability for Publication

1. The Appellant certifies that this submission is in a form suitable for publication on the Internet.

Part II: Issues

2. Does the privative provision constituted by s.206 of the *Fair Work Act 1994 (SA)* preclude judicial review by the Supreme Court of South Australia of jurisdictional error not encompassed by the phrase "in excess or want of jurisdiction"?

3. If so is such section beyond the scope of the South Australian Parliament?

4. Did *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 ("*Kirk*") supersede and/or impliedly overrule *Public Service Association of South Australia v Federated Clerk's Union of Australia, South Australian Branch* (1991) 173 CLR 132 ("*PSA*")?

Part III: Section 78B of the *Judiciary Act*

5. The Applicant certifies that it has given notice in compliance with section 78B of the *Judiciary Act 1903.*

Part IV: Citations

6. The primary Court:

   The Public Service Association of SA Inc v Chief Executive Department of the Premier and Cabinet [2010] SAIRComm 11

7. The Court below:

   Public Service Association of SA Inc v Industrial Relations Commission of SA and Another [2011] SASCFC 14.

Part V: Facts

8. Two disputes were notified in the Industrial Commission of South Australia, ("*the Commission*"). They were:

   8.1. The expressed intention by the government to withdraw from the "no forced redundancy" commitment contained in the current Enterprise Agreement ("*EA*");

   8.2. The expressed intention by the government to reduce the benefits to public servants in respect of recreational leave loading and long service leave, contrary to the EA.

9. Both the Commission constituted by a single Commissioner and the Full Commission ruled that the Commission did not have jurisdiction in the matter. The primary basis for that ruling was that for jurisdiction to be activated an "industrial dispute" was required and for an industrial dispute to exist there had to be something impacting "directly on employee/employer relations".

10. The Commission determined that the government was not the employer and because of that there was presently no industrial dispute and hence no jurisdiction. The Commission determined that the employer was the Chief Executive, Department of Premier and Cabinet, ("*CE*"). The Commission did not accept the Applicant's submission that the CE was merely the government's agent.

11. The Plaintiff in the judicial review application to the Supreme Court (the Appellant here) sought to challenge the findings which led to a determination of no jurisdiction namely:

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11.1. The finding that the Government was not the employer; and

11.2. The conclusion that the Industrial Commission only has jurisdiction in an industrial dispute if the dispute is between an employer and its employees.

12. S.206 is a privative provision purporting to restrict access to the Supreme Court. The decision the subject of potential review by the Supreme Court was the decision by the Full Commission to dismiss the appeal from a single Commissioner for the reasons appearing in paragraphs 9 and 10 hereof. The Appellant asserts that in erring in the two respects indicated in paragraphs 9 and 10, the Full Commission, when considering its jurisdiction to intervene in and *"resolve"* the dispute[1],
20 necessarily fell into jurisdictional error: it mistakenly denied the existence of jurisdiction.[2]

13. The Appellant asserted to the Supreme Court that a mistaken denial of the existence of jurisdiction was encompassed by "excess or want of jurisdiction" or that to the extent that it did not s.206 was beyond the power of the State legislature.

14. Before the Full Court the Respondent accepted that the Court had jurisdiction to hear and determine the judicial review proceedings. The Respondent accepted that there was jurisdictional error which involved the Full Commission acting in excess of
30 jurisdiction.

15. The Full Court considered that it was bound by *PSA*. That decision had identified that a mere refusal or failure to exercise jurisdiction was not embraced within the phrase "excess or want of jurisdiction".[3]

16. The expressed intention by the Government to reduce the benefits to public servants in respect of recreational leave loading and long service leave (contrary to the EA) was effected by the enactment of the *Statutes Amendment (Budget 2010) Act ("the Budget Act")*. The relevant provisions were to come into operation on
40 1 July 2011.

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1 *Fair Work Act 1994* (SA), s26(c)

2 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at 573 [72]

3 *Fair Work Act 1994* (SA), s206

Part VI: Argument

17. The Applicant says that it is beyond the power of the State legislature to proscribe review by the Supreme Court of jurisdictional error, however described or arising *(Kirk).*

18. The privative clause in *Kirk*, in terms, sought to exclude the full range of the prerogative writs.[4] This Court in *Kirk* held that State legislative power did not extend to altering the constitution or character of a State's Supreme Court [96]. A privative provision cannot remove the jurisdiction of State Supreme Courts to exercise judicial review where jurisdictional error has occurred: [100]. The decision in *Kirk* has been favourably received by commentators and academic lawyers.[5]

19. It might be suggested that *Kirk* must be distinguished from the position here where s.206 seeks only to limit, not preclude altogether, the prerogative writs. There is nothing in *Kirk* which would limit the principle. There is no basis for treating jurisdictional error based on a body purporting to exercise jurisdiction that it has no jurisdiction to exercise, differently from jurisdictional error based on a body wrongly failing or refusing to exercise jurisdiction that it does in fact have.

20. It might otherwise also be suggested that the principle established by *Kirk* in respect of courts of inferior jurisdiction should not be extended to tribunals.

21. The Appellant says that there is no justification for any such distinction to be drawn. Judicial review addressing jurisdictional error applies to the function being exercised by the original decision maker; such review is as relevant to a decision maker which is a specialist tribunal as it is an inferior court.[6]

22. *Kirk* itself does not express such a limitation. *Colonial Bank of Australasia v Willan*" ("*Willan*") which addressed "*a manifest defect of jurisdiction in the tribunal that made it*",[7] combined with the absence of any reference to inferior courts or tribunals in *Kirk,* suggests to the contrary;

> *"This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, 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*

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4 Refer s.179 of the NSW Act, set out in footnote 68 in *Kirk.*

5 Spigelman JJ, "The centrality of jurisdictional error" (2010) 21 PLR 77; Zines L, *Recent Developments in Ch III: Kirk v Industrial Relations Commission of New South Wales* and *South Australia v Totani* (Paper presented Centre for Comparative Constitutional Studies AACL Seminar, Melbourne, 26 November 2010); Basten, *The supervisory jurisdiction of the Supreme Courts* (2011) 85 ALJ 273.

6 Spigelman JJ, "The centrality of jurisdictional error", supra, highlights the significance of *Kirk* to administrative law in its full scope.

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

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".[8]

23. Moreover, this Court in *Kirk* did not draw a distinction between inferior courts and tribunals. At paragraph [99] the Court concluded as follows:

> *"To deprive a State Supreme Court of its supervisory jurisdiction in 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"*[9]. [Emphasis added].

24. The constitutional holding in *Kirk* speaks to the integration of the Australian judiciary. It addresses the power of the State legislature in respect of its courts, i.e. its Supreme Courts. It is the jurisdiction of those courts (in each State) which must be considered, not the functions of inferior courts or tribunals. So much was asserted by Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476* at [7] to [9]. See also Kirby J in *Fish v Solution Six Holdings Ltd* (2006) 225 CLR 180 at [146].

25. The rationale for the holding in *Kirk* acknowledges the position of the High Court at the apex of the State's judicial system. The State's judicial system included the incorporation of the prerogative writs which ensured compliance with the law speaking to all of inferior courts, tribunals and public officers. At [97] the court in *Kirk* referred to the jurisdiction at Federation of the Court of Queen's Bench to issue the writ certiorari; such writ extended beyond inferior courts[10].

26. Today, substantial matters are addressed by tribunals not having the status of courts. Thus in public service legislation it is common for disciplinary tribunals to have powers of major significance to public servants. In the area of discrimination and employment a significant role is given to State tribunals such as the Equal Opportunities Tribunal in South Australia; professions are regulated by tribunals, viz the Legal Practitioners Disciplinary Tribunal. *Willan* addressed the jurisdiction of a mining court. The function of that court might as easily have been given to a tribunal with the title Mining Rights Tribunal.

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8 *Kirk* (2010) 239 CLR 531 at 581 [100]

9 *Kirk* (2010) 239 CLR 531 at 581 [99]

10 *Halsbury's Laws of England* Volume X, Butterworth and Co, London, 1909:

> *Certiorari also lies to remove, for the purpose of quashing, the determinations of persons or bodies who are by statute or charter entrusted with judicial functions out of the ordinary course of legal procedure (i), but within the general scope of the common law. The determinations of such authorities are not judgments in the sense required to admit of a writ of error being brought in respect of them (k). Thus, the determinations of censors of the Royal College of Physicians (l), of commissioners of sewers (a), of canal commissioners empowered to hold inquiries with regard to the construction of bridges (b), and of sheriffs empowered to hold inquiries under the Lands Clauses Consolidation Act, 1845 (c), may be removed in order to be quashed.*

See also *Baldwin and Francis Ltd v Patents Appeal Tribunal* [1959] 2 All ER 433, per Lord Denning at p444

27. Tribunals are frequently determining the rights of subjects and are obliged to afford natural justice[11].

28. In respect of such tribunals, the only way of preserving the High Court's position is to restrict the State's power to prevent appeals to the Supreme Court. Only then is the goal of ensuring that the High Court, through the Supreme Courts, is determining principles of general law and interpretation, achieved.

29. The Appellant otherwise observes that the present case does not concern an error of law made by an administrative tribunal that amounts to jurisdictional error, as identified by the court in *Craig.*[12] The Commission's failure to exercise jurisdiction is an error that would ordinarily constitute a jurisdictional error by an inferior court.[13] Moreover, as noted in paragraph 12 hereof the Full Commission did not fail to exercise jurisdiction, it wrongly determined that it did not have jurisdiction.

30. The *PSA* case did not consider the constitutional question. The decision must in the light of *Kirk* be no longer considered to be good law. The decision of Bray CJ in *R v Industrial Commission of South Australia; ex parte Minda Home Incorporated* (1975) 11 SASR 333 at 337 is restored. What Bray CJ treated as a matter of statutory construction is now addressed as a question of power of State legislatures. It might similarly be addressed as a presumption of statutory interpretation.[14]

31. The Appellant notes that the scope of the original dispute has been narrowed following actions taken by the South Australian government as announced in the 2011 Budget Speech. Whilst narrowed the dispute has not been resolved and there is no basis for the within appeal not proceeding.

Part VII: Legislation

32. The relevant statutory and constitutional provisions are:

Fair Work Act 1994 (SA), s206:

> *(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.*

Commonwealth Constitution, Ch III

33. The above statutory and constitutional provisions are in force at the date of this Submission.

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[11] ss154(2) of the *Fair Work Act (1994) SA* provides that both the Industrial Relations Court and the Industrial Relations Commission of South Australia "*must observe the rules of natural justice*".

[12] *Craig* (1995) 184 CLR 163 at 179 cited in *Kirk* (2010) 239 CLR 531 at 572.

[13] *Craig* (1995) 184 CLR 163 at 180; *Kirk* (2010) 239 CLR 531 at 572.

[14] *Fish v Solution 6 Holdings* (2006) 225 CLR 180 at 194 [33]. And note s.22A of the Acts Interpretation Act, (SA).

Part VIII: Orders sought

1. The Orders of the Full Court of the South Australian Supreme Court made on 15 March 2011 be set aside and substituted with an order that the Supreme Court has jurisdiction to determine the appellant's Application for Judicial Review.

2. The appellant's Summons for Judicial Review be reinstated.

3. The matter be remitted to the court below for determination on the merits.

4. The second respondent pay the appellant's costs of and incidental to this appeal.

10 5. The liability for the costs of the hearing before the court below be remitted to that court.

Dated the 15th day of July 2011

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