

Constitutional Law and Jurisdictional Error

The recent High Court decision in *Kirk v Industrial Relations Commission* [2010] HCA 1 is the most significant in a trilogy of High Court cases that have used the constitution to maintain the integrity of State Supreme Courts against legislative inroads.¹ *Kirk* involved the exercise by the Industrial Court of New South Wales of its criminal jurisdiction under the *Occupational Health and Safety Act 1983* ("the OH&S Act").

Mr Kirk and the Kirk Company were convicted of offences related to a fatal accident which occurred on 28 March 2001 at Mount Hercules Farm, located at Razorback Mountain near Picton ('the Farm'). The Farm was owned by Kirk Group Holdings Pty Ltd ("the Kirk Company"). Mr Kirk was a director of the Company. Mr Graham Palmer, a part-time Farm Manager employed by the Kirk Company, died as a result of injuries he sustained when the Polaris All Terrain Vehicle ("ATV") he was driving on the Farm overturned.

Jurisdictional Error in Australia

Until *Kirk* it was accepted that the State had the ability to restrict review for jurisdictional error. This is no longer the case. A privative provision in State legislation, which attempts to limit the authority of the Supreme Court 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.

This does not mean that all privative provisions will be invalid. Rather, the observations the Court made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts confirm the distinction between jurisdictional and non-jurisdictional error.

It is this distinction which defines 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.

¹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *International Finance Trust v New South Wales Crime Commission* [2009] HCA 49 (12 November 2009).

The difficulty of distinguishing between jurisdictional error and error in the exercise of jurisdiction was acknowledged by the Court.

In *Kirk* the jurisdictional errors were twofold: the errors of construction of s 15 of the OH & S Act. Secondly, the Industrial Court misapprehended a limit on its powers by permitting the prosecution to call Mr Kirk at the trial. Section 163(2) of the *Industrial Relations Act* 1996 (NSW) provides that the rules of evidence applied in the Industrial Court. Section 17(2) of the *Evidence Act* 1995 (NSW) was therefore applicable, and provides that a defendant is not competent to give evidence as a witness for the prosecution. The provision made by s17(2) could not be waived. Although section 190 of the *Evidence Act* permits a court with the parties consent, to dispense with certain conditions this does not include the competence and compellability provisions.

Kirk has provided State administrative law with a constitutional foundation and ensured that State Supreme Courts have an entrenched supervisory jurisdiction with respect to both inferior courts and tribunals.

The ramifications of *Kirk* are not limited to criminal proceedings and its impact will be wide because the use of finality or privative provisions is a common feature in Australian legislation. It will now be easier to invoke the supervisory jurisdiction of the Supreme Court. In a speech delivered by Chief Justice Spigelman to the AGS Administrative Law Symposium, Commonwealth and New South Wales on 25 March 2010 ('the Speech'), dealing with the *Kirk* matter, said that *Kirk* requires a reassessment of the legal options available to persons affected by administrative decisions in the contexts hitherto protected from judicial review by privative provisions. It is not yet known how *Kirk* will affect other forms of statutory restriction on judicial review such as 'time bar' and 'no invalidity' clauses.