IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA

No A7 of 2011

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BETWEEN: **PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED**

Applicant

and

INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA

20

First Respondent

and

CHIEF EXECUTIVE, DEPARTMENT OF THE PREMIER AND CABINET

Second Respondent

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SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PARTS II & III: INTERVENTION

2. The Attorney-General for Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the Second Respondent.

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

3. In addition to the provisions of the Constitution and of the *Fair Work Act 1996* (SA) (the **FWA**) identified at [32] of the Applicant's submissions and the provisions of the FWA identified at [5] of the submissions of the Second Respondent and Attorney-General for South Australia (**SA's submissions**), the following provisions are relevant:

   (a) Division 7 of Part 3 of Chapter 2 of the FWA; and

   (b) Divisions 1 (s 192 only), 2, 3 (ss 200-202 only) and 4 (ss 206-208 only) of Part 3 of Chapter 5 of the FWA.

4. The above additional provisions are set out in Annexure A as they existed on 22 October 2010,[1] and they remain in force in that form at the date of this submission.

PART V: STATEMENT ADDRESSING THE ISSUES

A. Introduction

5. These submissions address the following questions that arise in the proceeding:

   (a) What is the correct approach to construction of s 206 of the FWA? (paragraphs 10 to 20 below)

   (b) Was the Applicant's summons for judicial review a challenge to a determination of the Industrial Relations Commission of South Australia (the **Commission**) on the ground of "excess or want of jurisdiction", within s 206(2) of the FWA? (paragraphs 21 to 35 below)

   (c) If not, then to the extent that s 206(1) of the FWA purports to preclude the Supreme Court of South Australia from hearing and determining the Applicant's summons for judicial review, is s 206(1) beyond the

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1 Commissioner McMahon's decision that the Commission did not have jurisdiction was made on 22 October 2010 [Application Book page 1], the Full Commission's decision dismissing the appeal from Commissioner McMahon's decision was delivered on 27 October 2010 and published on 4 November 2010 [Application Book pages 4-14; *The Public Sector Association of SA Incorporated v Chief Executive, Department of the Premier and Cabinet* [2010] SAIRComm 11], and on 15 March 2011 the Full Court dismissed the Applicant's summons for judicial review [Application Book pages 27-39; *Public Service Association of SA Inc v Industrial Relations Commission and Anor* (2011) 109 SASR 223].

legislative power of the Parliament of South Australia, by reason of the principles identified in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (***Kirk***) and liable to be read down accordingly? (paragraphs 36 to 51 below)

6. As to the first question, s 206(1) is to be construed so as to confer on the Commission power to decline to exercise jurisdiction. Put differently, the Commission is not under a duty to exercise its jurisdiction and so is not compellable by mandamus to do so.

7. The second question should be answered "no", because according to the dichotomy identified in *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 (the ***PSA* case**), the Commission refused or failed to exercise its jurisdiction and did not exceed it. Even if the refusal or failure resulted from an error of law, and even if it can be described as a jurisdictional error, it cannot be said that the refusal or failure was in excess or want of jurisdiction.

8. As to the third question, the Full Court was correct in holding that it had no jurisdiction in the matter, by reason of s 206 of the FWA. Section 206 is not beyond power; nor should it be read down. The principles in *Kirk* do not apply in a case where:

   (a) the State legislature has reposed in an administrative body final authority to decide whether or not to exercise its jurisdiction; and

   (b) the administrative body has refused or failed to exercise jurisdiction.

9. In such cases, preclusion of judicial review of an erroneous refusal or failure to exercise jurisdiction is not inconsistent with the defining characteristics of a State Supreme Court, protected by s 73 of the Constitution. That is because such preclusion does not infringe the Supreme Court's 'determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court'.[2]

B. Correct approach to construction of s 206

10. Absent a constitutional restriction on legislative power to enact the relevant privative clause,[3] as the majority noted in *Kirk*, the operation of a privative clause is a matter of statutory construction:

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2 *Kirk* at 580 [98].

3 In the context of Commonwealth legislation, the majority in *Kirk* at [95] noted the two fundamental limitations referred to by the Court in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512 [98], and in the context of State legislation, the majority at [96], citing *Forge v ASIC* (2006) 228 CLR 45 at 76 [63], noted the requirement of Chapter III of the Constitution that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.

> The existence and operation of provisions of that kind are important in considering whether the decisions of particular inferior courts or tribunals are intended to be final.[4]

11. That statutory construction task will involve the process of reconciliation between apparently contradictory provisions requiring conditions to be observed and the privative clause, as described by Dixon J in *R v Hickman; Ex parte Fox and Clinton.*[5]

12. Gaudron and Gummow JJ explained the approach to be taken to State privative clauses in the absence of constitutional considerations in *Darling Casino Ltd v New South Wales Casino Control Authority*:

> The operation of a State privative clause is purely a matter of its proper meaning ascertained in its legislative context. ... [P]rovided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle.[6]

13. The reconciliation process was explained by Mason ACJ and Brennan J in the following terms in *R v Coldham; Ex parte Australian Workers' Union*:

> As Dixon J explained in *Murray*, and in other cases, it is a matter of reconciling the prima facie inconsistency between one statutory provision which seems to limit the powers of the Tribunal and another provision, the privative clause, which seems to contemplate that the Tribunal's order shall operate free from any restriction. The inconsistency is resolved by reading the two provisions together and giving effect to each. The privative clause is taken into account in ascertaining what the apparent restriction or restraint actually signifies in order to determine whether the situation is one in which prohibition lies.
>
> The object of a provision of this kind is generally to protect the award or order from challenge. Consequently, the making of the award or order is the occasion for taking the privative clause into account in interpreting the Tribunal's authority or power more liberally. Before the award or order is made the Tribunal will be held to a strict construction of its powers uninfluenced by the clause, thereby enabling the grant of prohibition, notwithstanding that had the proceedings reached the stage when an award or order was made prohibition could not have been obtained.[7]

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4 *Kirk* at 579 [93].

5 (1945) 70 CLR 598 at 617, quoted in *Kirk* at 579 [94].

6 (1997) 191 CLR 602 at 633-4.

7 (1983) 153 CLR 415 at 418-419, citing *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 398-399.

14. Such reconciliation will not avail where inviolable limitations or restraints upon the jurisdiction or powers of the decision-maker are concerned,[8] or where "imperative duties" are concerned.[9] However:

> To describe a duty as imperative, or a restraint as inviolable, is to express the result of a process of construction, rather than a reason for adopting a particular construction; but it explains the nature of the judgment to be made. Because what is involved is a process of statutory construction, and attempted reconciliation, the outcome will necessarily be influenced by the particular statutory context.[10]

15. The outcome of the process of reconciliation:

> may be that an impugned act is to be treated as if it were valid. Brennan J said in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*, in a passage quoted by Gaudron and Gummow JJ in *Darling Casino Ltd v NSW Casino Control Authority*:
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> 'In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded.' [11]

16. This approach can be applied to reconcile the provisions conferring jurisdiction on the Commission (ss 26, 200-202 and 207 of the FWA) and the privative clause in s 206. A provision such as s 206 enlarges the power of the relevant decision-maker (here, the Commission) to decline to exercise its powers and (what might otherwise have been characterised as) its duties. In other words, the effect of s 206 of the FWA is not to expand the "validity of acts" done by the Commission, but rather to expand the scope within which the Commission might lawfully refuse or fail to exercise jurisdiction.

17. A State legislature has undoubted competence to confer power on an administrative body in such a way as to give the body discretion as to whether or not to exercise the power, or to confer a non-compellable power. No "island of power" would be created in such a case.[12] There is no reason in principle therefore to doubt the competence of preclusion by a State legislature of judicial review of failure or refusal to exercise a power that might otherwise, absent the process of reconciliation, be regarded as a duty.

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8 *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419 (Mason ACJ and Brennan J); *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 512 [98] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

9 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 248.

10 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 489 [21] (Gleeson CJ).

11 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [19] (Gleeson CJ), quoting *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 630.

12 See, in the context of Commonwealth legislation, *Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia* (2010) 272 ALR 14 at 27-28 [54]-[59].

18. Further as to the process of reconciliation, the contextual matters identified by Deane J in the *PSA* case still hold true, and provide good reasons for reconciling s 206 and ss 26, 200-202 and 207 in favour of enlargement of the scope for the Commission's ability to decline to exercise jurisdiction lawfully and authoritatively:

> Industrial tribunals, when they are not themselves specialist courts of law, customarily include members who either are judges of a court or are possessed of legal training and experience comparable to that required of an appointee to judicial office. Their functions commonly extend to the making of awards or orders which lay down general standards of conduct which bind whole sections of the community in their future conduct and relations. The efficient discharge of such quasi-legislative functions may well require departure from traditional curial methods and procedures. Even where the resolution of a narrow actual dispute between individual parties is involved, the advantages of compulsory mediation or conciliation have been availed of by industrial tribunals to an extent unaccepted in most ordinary courts. In a context where prompt action — sometimes at a tribunal's own initiative — to prevent and resolve disputes is necessary in the public interest, there is much to be said for the view that such specialist industrial tribunals should be empowered to determine promptly and with finality the questions involved in the actual and potential industrial disputes which they are called upon to resolve. The delays and expense of proceedings in the ordinary courts of this country serve to reinforce such a policy and its rationale.[13]

19. The Commission has jurisdiction under s 26(c) and (d) of the FWA relevantly as follows:

> (c) jurisdiction to resolve industrial disputes; and
>
> (d) jurisdiction to hear and determine any matter or thing arising from or relating to an industrial matter; ...

20. For the reasons given above, the effect of s 206 is that the Commission is not bound to exercise that jurisdiction and cannot be compelled to do so. It can, however, be the subject of superior court relief if it exceeds or acts without jurisdiction.

C. The Commission's determination and the scope of s 206(2) FWA — "excess or want of jurisdiction"

21. The Applicant sought the intervention of the Commission, requesting a voluntary conference pursuant to s 200 of the FWA to resolve what it submitted were industrial disputes about industrial matters within the Commission's jurisdiction.[14]

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13 *PSA* case at 147-148 (Deane J) (citations omitted).

14 See Application Book page 7; *The Public Sector Association of SA Incorporated v Chief Executive, Department of the Premier and Cabinet* [2010] SAIRComm 11 at [8]; Application Book page 29, *Public Service Association of SA Inc v Industrial Relations Commission and Anor* (2011) 109 SASR 223 at 224 [1].

22. Following voluntary and compulsory conferences,[15] a Commissioner referred the disputes for determination by the Commission under s 202 of the FWA, and then made an order dated 22 October 2010 declining to make orders in relation to these matters and stating "it is the Commission's view that there is no jurisdiction for the commission to do so".[16]

23. The Applicant appealed to a Full Commission pursuant to s 207(1)(a) of the FWA, and the Full Commission dismissed the appeal.[17]

24. The Applicant commenced by summons for judicial review a proceeding in the Supreme Court of South Australia in which it alleged that the Full Commission had made a determination in which it mistakenly concluded that the Commission did not have jurisdiction in relation to the alleged industrial disputes (the **Commission's alleged error**), and sought to have the Full Commission's determination quashed and the matter remitted to the Commission.[18]

25. It appears to have been common ground in the Supreme Court proceeding that s 206 of the FWA applies in relation to the Full Commission's determination (and not only the Commission's determination dated 22 October 2010), even though s 206 refers to the "Commission" (not the Full Commission) and s 207 provides for appeals from the Commission (constituted by a single member, or where the Registrar exercises the Commission's powers) to the Full Commission. It is submitted that the approach adopted in the Supreme Court was correct and that s 206 does apply to a determination of the Full Commission. "Commission" as it appears in s 206 is to be read, in light of ss 39 and 40 of the FWA, as including the Full Commission.

26. The question then arises whether the Commission's alleged error fell outside the scope of s 206(2), because it was not a "ground of excess or want of jurisdiction".

27. On a proper characterisation of its determinations, the Commission (both at first instance and on appeal) declined to exercise any jurisdiction, having reached the conclusion that it had none to exercise.

28. The Applicant contended below[19] that, on the assumption that the Commission was mistaken in reaching that conclusion, its exercise of power should be characterised as having been in excess or want of jurisdiction because it was affected by jurisdictional error.[20] That contention was rightly rejected.

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15 Application Book page 29; *Public Service Association of SA Inc v Industrial Relations Commission and Anor* (2011) 109 SASR 223 at 224 [1]-[2].

16 Application Book page 1.

17 Application Book pages 4-14; *The Public Sector Association of SA Incorporated v Chief Executive, Department of the Premier and Cabinet* [2010] SAIRComm 11.

18 Application Book pages 15-24.

19 Applicant's Reply dated 20 May 2011, at [12.4]; Applicant's Submissions dated 15 July 2011, at [29].

20 Affidavit of Martin Christopher Hynes sworn 7 December 2010, at [8], Application Book page 23; Applicant's Summary of Argument dated 20 April 2011, at [9] and [10]; Applicant's

29. If the Commission erred in law in reaching its conclusion that it had no jurisdiction, it would not follow that its refusal or failure to exercise jurisdiction is necessarily to be characterised as "jurisdictional error". But even if it could be so characterised, it would not follow that such refusal or failure was "in excess or want of jurisdiction".

30. There is a clear and logical dichotomy between review for excess or want of jurisdiction, and review for refusal or failure to exercise jurisdiction. Brennan J explained the dichotomy in the *PSA* case:

> Judicial review on the ground of excess or want of jurisdiction is available when a body purportedly acting in exercise of jurisdiction has no jurisdiction to act in a particular way. Judicial review on that ground stands in contrast with judicial review on the ground of a wrongful failure or refusal to exercise jurisdiction. In the former case, there is no jurisdiction to exercise; in the latter, there is jurisdiction but no exercise of it.
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> ...
>
> When a tribunal, misconceiving its jurisdiction, fails to exercise it the non-exercise of its jurisdiction does not amount to an excess of jurisdiction. The very hypothesis on which judicial review of an erroneous refusal to entertain an appeal must be sought is that the respondent body has jurisdiction to entertain the appeal; it cannot be sought "on the ground of excess or want of jurisdiction".[21]

31. In the event, however, Brennan J held that the Commission exceeded its jurisdiction, as did Dawson and Gaudron JJ.

32. Deane J (dissenting in the outcome) also identified the relevant dichotomy, and explained that the exception in the relevant privative provisions[22] permitting review for "excess or want of jurisdiction" was limited in scope:

> In the absence of any applicable overriding constitutional provisions, identified error of law or fact on the part of the Commission will bring a case within the exception in s 95(b) only if it leads the Commission to purport to make an award or order or to entertain a proceeding which is of a nature which it had no authority to make or entertain in the circumstances of the case.[23]

33. Dawson and Gaudron JJ, like Brennan J, accepted that the relevant privative provision permitted review only on grounds of "excess or want of jurisdiction", and that those grounds would not be made out if all that was established was

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Submissions dated 15 July 2011, at [13] and [14]; see also the concession noted in Second Respondent and Attorney-General for State of South Australia (Intervening) Summary of Argument dated 11 May 2011 at [5].

21 *PSA* case at 142 and 143 (Brennan J).

22 The privative provisions in s 95 of the *Industrial Conciliation and Arbitration Act 1972* (SA) were in similar terms to the provisions of s 206 of the FWA.

23 *PSA* case at 149 (Deane J), citing *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 and 427-428.

that there was a refusal or failure to exercise jurisdiction.[24] Dawson and Gaudron JJ also remarked that a 'failure to exercise jurisdiction is a jurisdictional error, although, prima facie, it is not an error involving an excess or want of jurisdiction'.[25] Brennan J did not express a concluded view as to whether the Commission's failure to exercise jurisdiction was to be characterised as jurisdictional error.[26]

34. McHugh J (dissenting) held that the Commission had committed no jurisdictional error and, in the alternative, s 95 precluded review because the Commission's errors did not constitute an "excess or want of jurisdiction", its orders not having been made 'in breach of the conditions which define the ambit of the Commission's powers'.[27]

35. The above principles apply directly to the present case. The Full Commission found that it lacked jurisdiction and declined to proceed. It thereby refused to exercise its appeal jurisdiction. This was not a case like the *PSA* case in which the tribunal was independently engaged in determining an application for leave. For the additional reasons identified in SA's submissions at [7.2], [7.3], [10]-[14] and [15]-[18], the Full Court was correct to adopt the dichotomy identified in the *PSA* case, and to characterise the Commission's alleged error as a failure or refusal to exercise jurisdiction and not an exercise of power in excess or want of jurisdiction.

D. Principles in *Kirk* do not apply

36. The Applicant contends that the failure of the Commission to exercise its jurisdiction was an error that would ordinarily constitute jurisdictional error on the part of an inferior court, and contends that preclusion of any form of jurisdictional error is beyond the legislative competence of the Parliament of South Australia.[28]

37. In *Kirk*, the Industrial Court of New South Wales had convicted a company and a director of workplace offences without having heard evidence or made findings on a critical element of the offence and after conducting a trial in violation of the *Evidence Act 1995* (NSW). In those circumstances, the High Court held that the convictions were imposed in circumstances where the Industrial Court had no power to convict, and the trial had been conducted in breach of the limits on its powers to try charges of a criminal offence.[29] In other words, the convictions were imposed in excess or want of jurisdiction.

38. The judgment in *Kirk* established that a State Parliament does not have legislative power to enact a privative clause that ousts the jurisdiction of the

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24 *PSA* case at 161 (Dawson and Gaudron JJ).

25 *PSA* case at 160 (Dawson and Gaudron JJ).

26 *PSA* case at 141 (Brennan J).

27 *PSA* case at 166 (McHugh J).

28 Applicant's Reply, at [12.2]; Applicant's Submissions dated 15 July 2011, at [29].

29 *Kirk* at 574-575 [74]-[76] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); 585 [113] and [114] (Heydon J, dissenting from the orders proposed by the majority on another ground).

State's Supreme Court to supervise exercises of State judicial power by inferior courts in excess of authority. The reasoning adopted by the Court in *Kirk*, and observations made by members of the Court in cases following *Kirk*, suggest that the same or a similar restriction on legislative power may also apply to a privative clause that ousts the jurisdiction of a State Supreme Court to supervise exercises of power by the executive in excess of authority.[30] However, that issue does not arise in the present case. For the reasons given, this case concerns failure to exercise jurisdiction rather than excess of jurisdiction.

39. Neither *Kirk* nor the subsequent observations mentioned above address the question of Supreme Court supervision of failure or refusal to exercise jurisdiction. The facts in *Kirk* did not raise the question whether Supreme Court supervision of failure or refusal to exercise jurisdiction can validly be confined by a privative clause in State legislation.

40. In *Kirk*, the majority referred at 581 [99]-[100] to the importance of distinguishing between jurisdictional and non-jurisdictional error, but did not answer the question (because the question did not arise) whether and in what circumstances failures or refusals to exercise power would amount to jurisdictional error in the relevant sense. While the majority at 573-574 [72] quoted the passage from *Craig v South Australia* (1995) 184 CLR 163 (***Craig***) at 177 which contains reference to an inferior court falling into jurisdictional error if it 'mistakenly denies jurisdiction', that passage in *Craig* was not directed to any consideration of privative clauses, and it is clear from 573-574 [72]-[73] that the majority referred to that passage for the light it sheds on the ways in which inferior courts could stray *outside* jurisdiction.

41. There are a number of indications that the principle identified in *Kirk* was intended to be and should be confined to the Supreme Court's supervision of exercises of power in excess of jurisdiction.

42. *First*, the majority judgment in *Kirk* rests[31] on the proposition that at federation, each of the Supreme Courts referred to in s 73 of the Constitution had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England, that the Supreme Courts' jurisdiction extended to granting writs of certiorari against inferior courts, and that the Privy Council in *The Colonial Bank of Australasia v Willan* (***Willan***) had said that notwithstanding an otherwise applicable privative clause, the Supreme Court could quash an order removed upon the ground either of a *manifest defect of jurisdiction* in the tribunal that made it, or of manifest fraud in the party procuring it.[32] There was no suggestion in *Willan* that a privative clause would be ineffective to preclude review in cases of refusal or failure to exercise jurisdiction.

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30 *State of South Australia v Totani* (2010) 242 CLR 1 at 27 [26] (French CJ); 62 [128] (Gummow J); 78 [193] Hayne J; 104-106 [267]-[271] (Heydon J); 153 [415] (Crennan and Bell JJ), in relation to a statutory decision made by the State Attorney-General. See also *Wainohu v New South Wales* (2011) 278 ALR 1 at 8 [15] (French CJ and Kiefel J) and 82 [89] (Gummow, Hayne, Crennan and Bell JJ), in relation to a statutory decision made by a Judge acting as *persona designata*.

31 *Kirk* at 580 [97].

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

43. *Second,* the majority drew from *Willan* the proposition that:

> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court.[33]

44. In doing so, the majority emphasised the determination and enforcement of the limits on the exercise of power, and did not refer to failures to exercise power. Although the majority also described *Willan* as standing for the proposition that certiorari for "jurisdictional error" was not denied by a privative clause,[34] it is clear that the majority were concerned with the enforcement of limits on power and not with some more expansive species of jurisdictional error.

45. *Third,* the majority described the supervisory role of the Supreme Courts through the grant of 'prohibition, certiorari and mandamus (and habeas corpus)' as a 'defining characteristic' of those courts.[35] The reference to mandamus does not amount to an assertion that supervision of failures to exercise power is a defining characteristic. Mandamus may be granted incidentally to the other writs in cases where jurisdiction has been exceeded.

46. *Fourth,* the Supreme Courts' supervisory jurisdiction is exercised subject to the superintendence of the High Court by reason of ss 71 and 73 of the Constitution, and is exercised according to principles that in the end are "set by this Court". The majority referred in this regard to a concept expounded by Jaffe, saying as follows:

> 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. It would permit what Jaffe described as the development of "distorted positions". And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.[36]

47. In doing so, the majority again described the Supreme Courts' constitutionally-protected jurisdiction as being one of enforcement of limits on power. Moreover, when a body declines to exercise jurisdiction that does not, by definition, call for the application of any judicial restraint. As such, no "island of power" is involved.

48. In summary, the rule in *Kirk* is directed to preservation of the supervisory jurisdiction of the Supreme Courts in confining exercises of State judicial (and perhaps executive) power within lawful bounds, with the High Court at the apex of an appellate structure involving appeals from the Supreme Courts on those

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33 *Kirk* at 580-581 [98].

34 *Kirk* at 580 [97].

35 *Kirk* at 580-581 [98].

36 *Kirk* at 581 [99], quoting Louis L Jaffe, 'Judicial review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, at 962-963. See *Kirk* at 570 [64].

matters, in a manner calculated to avoid the creation of islands of power.[37] Since neither the rationale for the principle established in *Kirk* nor its underlying foundation traceable to the law expounded in *Willan* calls for the extension of that principle to cases involving failure or refusal to exercise jurisdiction, the Court should not now endorse that extension.

49. Moreover, to deny the ability of State legislatures to limit judicial review of refusals or failures to exercise power would be anomalous, given the unquestioned power of those legislatures to provide that the exercise of statutory power is not accompanied by any duty to enter upon such exercise, and thereby to render the power non-compellable. As the Court held in *Plaintiff M61/2010E v The Commonwealth*:

> 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.[38]

50. It might be said[39] that the majority judgment in *Kirk* indicates by way of *obiter dicta* that Supreme Court supervision of failure by State inferior courts to exercise their jurisdiction should be regarded as constitutionally protected. However, supervision of inferior courts does not arise for consideration in this case and should be put to one side. While it might be contended that the construction of a provision such as s 206 advanced above is not available in the case of a court, this question does not arise in the present case.

51. To the same effect, Victoria adopts SA's submissions at [20]-[38].

E. Conclusion

52. For these reasons, the principles referred to in *Kirk* do not apply to s 206 of the FWA. Section 206 is a valid exercise of State legislative power in its full terms and effect, and should not be read down by reference to those principles.

53. Accordingly, the Full Court was correct to characterise the determination of the Commission as a mere failure or refusal to exercise jurisdiction, and to conclude that judicial review was not available in relation to the Commission's alleged error pursuant to s 206 of the FWA.

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37 *Kirk* at 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

38 (2010) 272 ALR 14 at 28 [57].

39 See the passage from *Craig* at 177, quoted in *Kirk* at 573-574 [72].

12 August 2011

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Annexure A

***Fair Work Act 1994* (South Australia), Chapter 2 Part 3:**

Division 7—Constitution of Commission

39—Constitution of Full Commission

(1) The Full Commission consists of—

(a) three members; or

(b) the number of members directed by the President under subsection (2).

(2) If a matter of general principle is to be decided by the Full Commission, the President may direct that the Full Commission should consist of more than 3 members.

(3) The members of the Full Commission are to consist of one or more Presidential Members and one or more Commissioners.

(5) A decision in which a majority of the members constituting the Full Commission concur is a decision of the Full Commission.

40—Constitution of Commission

(1) Subject to this section, the Commission, when not sitting as the Full Commission, will, at the direction of the President, be constituted of a Presidential Member or a Commissioner.

(2) If under an Act conferring a jurisdiction on the Commission, the Commission is to sit with assessors in exercising that jurisdiction, then the following provisions apply:

(a) in any proceedings in which a party seeks the exercise of the relevant jurisdiction the Commission will, subject to paragraph (b), sit with assessors selected in accordance with the Act conferring the jurisdiction;

(b) the Commission is not required to sit with assessors—

(i) for the purposes of—

(A) dealing with preliminary, interlocutory or procedural matters; or

(B) dealing with questions of costs; or

(C) entering consent orders; or

(ii) for a part of the proceedings relating only to questions of law,

and may, for that purpose or as a consequence, while sitting without assessors, make any ruling, order or judgment (including a final judgment) it considers appropriate;

(c) where the Commission sits with assessors—

(i) questions of law or procedure will be determined by the member of the Commission presiding at the proceedings; and

(ii) other questions will be determined by majority opinion.

Fair Work Act 1994 **(South Australia), Chapter 5:**

Part 3—Provisions of special application to the Commission

Division 1—General principles

192—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.

...

Division 2—Beginning proceedings

194—Applications to the Commission

(1) Proceedings before the Commission are commenced by an application made to the Commission—

(a) if, in the Minister's opinion, it is in the public interest that the matter be dealt with by the Commission—by the Minister; or

(b) by an employer, or group of employers; or

(c) by an employee, or group of employees; or

(d) by a registered association of employers; or

(e) by a registered association of employees; or

(f) by the United Trades and Labor Council.

(2) A natural person may bring an application as of right if the application is authorised under some other provision of this Act but otherwise must establish to the satisfaction of the Commission—

(a) that the claim arises out of a genuine industrial grievance; and

(b) that there is no other impartial grievance resolution process that is (or has been) reasonably available to the person.

195—Advertisement of applications

(1) Before the Commission deals with the subject matter of an application, the Commission must satisfy itself that reasonable notice of the substance of the application and the day and time it is to be heard has been given.

(2) The substance of an application and the day and time it is to be heard must be—

(a) advertised in the manner prescribed in the rules; or

(b) communicated to all persons who are likely to be affected by a determination in the proceedings or their representatives.

196—Commission may act on application or on own initiative

The Commission may exercise its powers on its own initiative or on application by a party or a person with a proper interest in the matter.

Division 3—Settlement of industrial disputes

...

200—Voluntary conferences

(1) The Commission may, if it appears desirable, call a voluntary conference of the parties involved in an industrial dispute.

(2) A person who attends a voluntary conference called under this section is, on application to the Registrar, entitled to be paid an amount certified by the person presiding at the conference to be reasonable, having regard to the conduct of the person both before and at the conference and to the expenses and loss of time incurred by the person.

(3) The amount certified under subsection (2) will be paid out of money appropriated by Parliament for the purpose.

201—Compulsory conference

(1) The Commission may, if it appears desirable, call a compulsory conference of the parties involved in an industrial dispute.

(2) The Commission may summon the parties to the dispute and any other person who may be able to assist in resolving the dispute to appear at the conference.

(3) A compulsory conference may, at the discretion of the Commission, be held in public or in private or partly in public and partly in private.

(4) A person who fails to attend a compulsory conference as required by the Commission's summons or who, having attended, fails to participate in the conference as required by the person presiding at the conference commits a contempt of the Commission.

(5) A person who attends a conference as directed by the person presiding at the conference will, on application to the Registrar, be entitled to be paid an amount certified by the person presiding at the conference to be reasonable, having regard to the conduct of the person both before and at the conference and to the expenses and loss of time incurred by the person.

(6) The amount certified under subsection (5) will be paid out of money appropriated by Parliament for the purpose.

202—Reference of questions for determination by the Commission

(1) The person presiding at a compulsory conference may, after giving reasonable notice to the persons attending at the conference, refer the subject matter of the conference for determination by the Commission (which may, where the person presiding is a Presidential Member or a Commissioner, be constituted of him/herself).

(2) A matter may be referred for determination by the Commission under subsection (1) orally and without formality.

(3) An order of the Commission on a reference under subsection (1)—

(a) is binding only on persons represented before the Commission or summoned to appear at the conference; and

(b) if parties to the industrial dispute are bound by an enterprise agreement may not affect the terms of the agreement.

...

Division 4—Appeals and references

206—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.

207—Right of appeal

(1) An appeal lies to the Full Commission against—

(a) a determination of the Commission constituted of a single member or a single member sitting with assessors; or

(b) a determination of the Commission made by the Registrar in exercising the Commission's powers.

(2) However—

(a) an appeal lies against a determination in the nature of an interlocutory order or direction only with the permission of the Full Commission; and

(b) an appeal lies against a determination of the Registrar only with the permission of the Full Commission; and

(c) an appeal may only be brought against the approval, variation or rescission of an enterprise agreement by a person bound by the agreement or a representative of such a person.

(3) The Full Commission may direct—

(a) that two or more appeals be joined and heard together; or

(b) that an appeal be heard by the Commission jointly with appellate proceedings under the Commonwealth Act,

(but a party to proceedings to be heard jointly with other proceedings is not entitled to be heard in relation to the other proceedings unless the Full Commission gives permission).

(4) An appeal against a determination of the Commission may be commenced by—

(a) a party to the proceedings in which the determination is made or a registered association acting on the instructions of such a party; or

(b) a person who has a proper interest in the subject matter of the determination and obtains permission from the Full Commission to appeal against the determination.

208—Procedure on appeal

(1) An appeal is commenced by lodging a notice of appeal within 14 days after the date of the determination subject to appeal.

(2) The notice of appeal must specify—

(a) the part of the determination subject to the appeal; and

(b) the grounds of the appeal; and

(c) the relief sought.

(3) On the hearing of an appeal, the Full Commission may—

(a) take fresh evidence;

(b) confirm, quash or vary the whole or part of the determination under appeal;

(c) direct a member of the Commission to furnish a report on a specified matter (and the member of the Commission to whom the direction is given must, after making the necessary investigation, furnish a report accordingly);

(d) refer the subject matter of the appeal, or any matter arising in the course of the appeal, back to the Commission constituted of a single member, with directions or suggestions the Full Commission considers appropriate;

(e) make a determination dealing with the matters under appeal (but no such determination can include any provision that would be outside the powers of the Commission constituted of a single member);

(f) subject to this Act, fix a date as from which a determination or variation of a determination made by the Commission constituted of a single member is to come, or will be taken to have come, into operation;

(g) dismiss the appeal or any part of the appeal.

(4) Until the Full Commission gives its decision on an appeal, the part of the determination under appeal cannot be altered or rescinded.

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