IN THE HIGH COURT OF AUSTRALIA

ADELAIDE OFFICE OF THE REGISTRY

No: A7 of 2011

BETWEEN

PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED

Applicant

10

and

INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA

First Respondent

CHIEF EXECUTIVE, DEPARTMENT FOR PREMIER AND CABINET

20

Second Respondent

WRITTEN SUBMISSIONS OF THE SECOND RESPONDENT AND THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA (INTERVENING)

PART I: CERTIFICATION

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

PART II: INTERVENTION

2. The Attorney-General for South Australia intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

Filed by:
Crown Solicitor's Office
Level 9, 45 Pirie Street
ADELAIDE SA 5000
Solicitor for the Second Respondent
and Attorney-General of South Australia
Ref: 0113860

Ref: Edwina Handshin
Telephone: (08) 8207 1760
Facsimile: (08) 8207 2013
E-mail:handshin.edwina@agd.sa.gov.au

3. Although the Attorney-General's intervention is as of right, the Attorney-General's intervention arises in the context where the Second Respondent, and thus the Executive Government of South Australia, conceded that the Full Court had jurisdiction under s206 of the *Fair Work Act 1994* (SA) (the *Fair Work Act*) to review the error alleged to have been made by the Full Commission. Despite that concession, the Attorney-General intervenes as contradictor on the application for special leave to appeal to assist the Court.

PART III: NOTICES UNDER THE JUDICIARY ACT

10

4. The notices issued by the Applicant under s78B of the *Judiciary Act 1903* (Cth) provide sufficient notice of the constitutional issues arising in this appeal.

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

5. In addition to the provisions identified at [32] of the Applicant's submissions, South Australia adds s4 and Divisions 3 to 5 of Part 3 of Chapter 2 of the *Fair Work Act.*

20 **PART V: FACTS**

6. South Australia adopts the facts set out at [8]–[16] of the Applicant's submissions.

PART VI: ARGUMENT

A: Summary

7. In summary, South Australia submits:

30

7.1. Section 206 of the *Fair Work Act* required the Full Court to consider the application of *Public Service Association (SA) v Federated Clerks' Union of Australia* (*PSA*).[1]

7.2. Following *PSA*, the decision of the Full Commission of the Industrial Relations Commission of South Australia (Full Commission) was properly characterised by the Full Court as a failure to exercise jurisdiction.

7.3. A failure by the Full Commission to exercise jurisdiction does not constitute
40 an act by the Full Commission in "excess or want of jurisdiction" and does not, therefore, fall within the terms of s206 of the *Fair Work Act.*

7.4. *PSA* is directly applicable to the present case and is not inconsistent with the decision in *Kirk v Industrial Court of New South Wales* (*Kirk*).[2]

---

1 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132.
2 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

7.5. One of the defining characteristics of the Supreme Court of South Australia (within the meaning of Chapter III of the Constitution) was the capacity to issue certiorari to inferior courts at Federation in spite of a privative clause. However, that capacity, as explained in *Kirk*[3] by reference to *Colonial Bank of Australasia v Willan* (Willan),[4] was limited to jurisdictional errors amounting to a "manifest defect of jurisdiction". Accordingly, applying *Willan*,[5] relied upon in *Kirk*[6] as authority for the proposition that at Federation, privative clauses were ineffective to limit judicial review for a "manifest defect of jurisdiction", produces the result that the scope of judicial review provided for by s206(2) of the *Fair Work Act* is equivalent to a "manifest defect of jurisdiction" and is thus valid.

B: Jurisdiction of the Supreme Court in light of *PSA*

8. The primary issue determined by the Full Court was its jurisdiction in light of s206 of the *Fair Work Act*. Section 206 of the *Fair Work Act* provides:

> **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.

9. The Supreme Court's jurisdiction under s206(2) was clearly governed by the analysis of the same ground of review in the predecessor provision (s95(b)) of the predecessor Act (*Industrial Conciliation and Arbitration Act 1972* (SA)) by the majority[7] in *PSA*. In order to make good that submission, it is necessary to explain the reasoning of the majority in *PSA*.

10. In *PSA*, Brennan J noted that privative clauses expressed in general terms are construed subject to an implication that they permit certiorari for jurisdictional error.[8] However, as his Honour noted, as s95(b) exempted expressly decisions made in excess or want of jurisdiction from its operation, it was "not appropriate to imply an exemption".[9] The relevant question was whether a wrongful failure to exercise jurisdiction amounted to a decision made in "excess or want of

---

3 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
4 *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442 (Colvile LJ for the Court).
5 *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442 (Colvile LJ for the Court).
6 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
7 Constituted by Brennan J and Dawson and Gaudron JJ.
8 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 141 (Brennan J).
9 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 141 (Brennan J).

jurisdiction". The answer to that question was "no". The Commission's refusal to exercise jurisdiction, though erroneous, was not reviewable. Noting the potential inconvenience of the result, Brennan J nevertheless explained that "[t]he difference between a purported exercise of jurisdiction when no jurisdiction exists and a failure to exercise a jurisdiction that does exist is too radical to permit assimilation of the differing cases into a single category to which the exception in s95(b) can apply". Accordingly, a non-exercise of jurisdiction was not within the terms of s95(b). In the result, inconvenience was avoided because the order of the Commission refusing leave to appeal was held to be founded on a misconception of the jurisdiction conferred upon it and thus was made in excess of jurisdiction. The order being made in excess of jurisdiction, it fell within the terms of s95(b) and was thus subject to certiorari in the Supreme Court.

11. Similarly, Dawson and Gaudron JJ rejected the contention that s95(b) was ineffective in denying review for all jurisdictional errors. Acknowledging that a failure to exercise jurisdiction amounted to jurisdictional error, it was nevertheless "not an error involving an excess of or want of jurisdiction as specified in s95(b) of the Act".[10] This is because:

> [t]he issues raised when it is complained that necessary issues have not been decided, and when it is asserted that, had they been decided, the result might have been different, are different from the issue that arises when it is contended that a discretionary decision is wrong. The Commission considered only whether leave to appeal should be granted to raise the latter question and, thus, *failed to deal with the question whether leave should be granted to raise the different issues presented by the applications.* To that extent, the Commission failed to exercise the jurisdiction upon it by s104 of the Act.[11] (Emphasis added)

Dawson and Gaudron JJ went on to suggest that the Full Court had mistakenly applied Lord Reid's test[12] in *Anisminic Ltd v Foreign Compensation Commission*[13] to overcome the limitation imposed by s95(b). Rejecting Lord Reid's approach, and consistently with the reasoning of Brennan J, their Honours observed that privative clauses expressed in general terms fell to be "construed by reference to a presumption that the legislature does not intend to deprive citizens of access to the courts, other than to the expressly stated or necessarily to be implied." Section 95(b) not being expressed in general terms, it displaced the general presumption and had to be construed as precluding review for jurisdictional errors other than those which manifested errors in "excess or want of jurisdiction".[14]

---

10 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 160 (Dawson and Gaudron JJ).

11 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 160 (Dawson and Gaudron JJ).

12 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171.

13 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

14 In the result, their Honours held that the Commission's refusal to grant leave had in fact amounted to more than a mere refusal to exercise jurisdiction, because the Commission did not

12. On the question of the jurisdiction of the Supreme Court, Deane J held that s95(b) was effective to deny jurisdiction to the Supreme Court to review for failure to exercise jurisdiction. This was on the basis that, absent the overriding constitutional limitation that jurisdiction under s75(v) of the Constitution could not be ousted by a privative clause,[15] a privative clause was effective to deny jurisdiction for "failure fully to exercise jurisdiction which was possessed".[16]

13. In dissent, McHugh J held that the error of the Commission in "improperly limit[ing] the matters which it was entitled to take into account in exercising its discretion to grant or refuse the applications for special leave to appeal",[17] was one within jurisdiction.[18]

14. On the basis of the above reasoning in *PSA*, there was no principled basis for Doyle CJ to read the express terms of s206 as permitting review on the ground of a "failure to exercise jurisdiction". Consequently, in terms of the application of *PSA*, the only relevant issue to be determined was the character of the proceedings before the Full Commission. If those proceedings were of the same character as those considered in *PSA*, the scope of the supervisory jurisdiction of the Full Court fell to be determined by s206 of the *Fair Work Act*.

C: Decision of the Full Commission

15. The Full Court's characterisation of the Full Commission's dismissal of the appeal as a failure to exercise jurisdiction is plainly correct. The basis of that characterisation was explained by Doyle CJ in the following terms:

> [What] ... emerges from [the PSA] decision [is] that *the failure to hear and decide the appeal,* had the matter got to that stage, *would have been a mere failure to exercise jurisdiction, and would not have been founded on an excess or want of jurisdiction.* On the other hand, to dismiss the application for leave to appeal without considering the question posed by the application was to act without or in excess of jurisdiction. This was because there was no power to refuse the application for permission to appeal in the manner in which that was done.

---

have jurisdiction to embark on a consideration of the Registrar's exercise of discretion without first determining whether there were legal grounds to exercise that discretion. In so doing, the Commission had acted in excess of jurisdiction. Consequently, the Supreme Court's jurisdiction to review that error fell within the terms of s95(b) and was thus valid.

15 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 149 (Deane J) citing *Reg v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 (Mason ACJ and Brennan J).

16 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 153 (Deane J).

17 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 165 (McHugh J).

18 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 165 (McHugh J).

> In the present case there was no need for, nor application for, permission to appeal to the Full Commission. *The Full Commission heard and dismissed the appeal.* If the submissions by Mr Heywood-Smith are correct, it erred in doing so, and has failed to exercise its jurisdiction under s 207 of the Act. Mr Heywood-Smith submits that the Full Commission mistakenly denied the existence of jurisdiction and had no jurisdiction to dismiss the appeal. But to accept that submission would be to undermine the distinction drawn by the High Court in the *PSA* case. *A failure or refusal to entertain an appeal, based on an erroneous conclusion that there is no jurisdiction to entertain the appeal, will usually result in an order either striking out or dismissing the appeal. To say that the making of that order changes the decision from a decision involving a failure to exercise jurisdiction to a decision involving an excess of jurisdiction is to deny the very distinction that the High Court drew in the PSA case.*[19] (Emphasis added)

16. Characterising the Full Commission's decision as a failure to exercise jurisdiction rather than one made in "excess or want of jurisdiction" was correct for two reasons.

17. First, a refusal to exercise jurisdiction cannot be in "excess or want of jurisdiction". As Brennan J explained in *PSA*, "[t]he 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'".[20] Thus, the assumption underlying this aspect of the case – that the Full Commission's error should be corrected by the Supreme Court compelling it to exercise jurisdiction – exemplifies a conceptual error: the Full Commission's order cannot have been in excess or want of jurisdiction in circumstances where the remedy sought by the Applicant is an order compelling the Full Commission to exercise the very jurisdiction it was called upon to exercise. No doubt a failure to exercise jurisdiction can be erroneous, but such an error cannot be described as one made in "excess or want of jurisdiction".

18. Second, in the present case, unlike *PSA*,[21] the Full Commission's refusal to exercise jurisdiction was a necessary first step in the process of determining the matter brought before it. There is no question in the present case that the Full Commission "was ahead of itself"[22] in determining substantive questions on the merits that it had no jurisdiction to determine.

19. Having correctly analysed the scope of the jurisdiction conferred on the Full Court by s206 of the *Fair Work Act* in light of this Court's determination of the relevantly indistinguishable provision at issue in *PSA*, and having characterised

---

19 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223 at [15]-[16].

20 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 143 (Brennan J).

21 Cf *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 160 (Dawson and Gaudron JJ).

22 *Public Service Association (SA) v Federated Clerks' Union of Australia* (1991) 173 CLR 132 at 160 (Dawson and Gaudron JJ).

the determination of the Full Commission as a mere failure to exercise jurisdiction, the conclusion of the Full Court with respect to its jurisdiction had to follow unless *PSA* was not good law.

E: *PSA* CONSISTENT WITH *KIRK*

20. South Australia submits that *PSA* remains good law and is not inconsistent with the understanding of the defining characteristics of the Supreme Court of South Australia advanced in *Kirk*. On this point, the Applicant's case is too broad and cannot be sustained on a proper analysis of the Court's reasoning in *Kirk*.

21. The Applicant assumes that *Kirk* renders any privative clause in State legislation invalid to the extent that it limits availability of judicial review for jurisdictional error in State Supreme Courts. That contention appears to be based on two propositions. First, that the limit imposed on judicial review of the sort identified in s206 of the *Fair Work Act* "create[s] islands of power immune from supervision and restraint",[23] such islands relevantly being exercises of State executive and judicial power.[24] Second, and more broadly, that *any* statutory limit imposed on State Supreme Courts to grant judicial review for jurisdictional error committed by inferior courts or tribunals is invalid.

22. The first proposition assumes that there is no legitimate scope for State legislatures to restrain review for certain exercises of State executive and judicial power. The breadth of that assumption is flawed. As the Court itself noted in *Kirk*:

> 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.[25]

23. The second proposition contains two elements. The first element is concerned with the scope of the constitutionally entrenched supervisory jurisdiction of State Supreme Courts identified in *Kirk*. The second element is concerned with the scope of the application of the principle in *Kirk*.

(a) Supervisory jurisdiction of State Supreme Courts.

---

[23] *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[24] *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

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

24. As the joint judgment in *Kirk* made plain, the constitutional limit on State legislative power with respective to privative clauses was derived from the historical power inherent to State Supreme Courts at Federation,[26] such power being referable to the power vested in the Court of Queen's Bench as described by this Court's reference to *Willan* in *Kirk*. Of that inherent power, the joint judgment in *Kirk* stated:

> At federation, each of the Supreme Courts referred to in s73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England. It followed that each had "a general power to issue the writ [of certiorari] to any inferior Court" in the State. Victoria and South Australia, intervening, pointed out that statutory privative provisions had been enacted by colonial legislatures seeking to cut down the availability of certiorari. But in *Colonial Bank of Australasia v Willan*, the Privy Council said of such provisions that:
>
> > "It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. *There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except 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." (Emphasis added.)
>
> That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.[27]

25. Thus, the reference to "Supreme Court" in s73 of the Constitution is to be understood as a reference to a Supreme Court with the capacity to grant certiorari for jurisdictional errors of the sort identified in *Willan*.

26. The limitation imposed on privative clauses explained by *Willan* was derived from a conception of jurisdictional error encompassing two broad categories: "manifest defect of jurisdiction" and "manifest fraud" in a party procuring an order from a court.[28] For the purposes of the present case, the second category can be put to one side.

27. In *Willan*, the Privy Council had to determine whether a privative clause preventing review of winding up orders by a Judge of the Court of Mines was effective in preventing an order for certiorari in the Supreme Court of Victoria on the basis of a "want of jurisdiction" in the primary judge. Thus, the Privy Council had to determine whether a "want of jurisdiction" fell within the terms of a

---

[26] *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[27] *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (footnotes omitted).

[28] *Colonial Bank of Australasia v Willan* (1874) LR 5PC 417 at 442 (Colvile LJ for the Court).

"manifest defect of jurisdiction" in order to determine the availability of certiorari in spite of the privative clause.

28. The Privy Council described "want of jurisdiction" by reference, relevantly, to three jurisdictional limitations: namely, a limitation derived from (1) the "character and constitution of the tribunal"; (2) the nature and subject-matter of the inquiry; and (3) the existence of "essential preliminaries to the inquiry".[29] A breach of any of the three limitations constituted actions "extrinsic to the adjudication impeached"[30] and thus actions in "excess or want of jurisdiction". None of the three limitations identified in *Willan* apply to the proceedings before the Full Commission: there was no question about the character or constitution of the Full Commission; there was no question about the nature of the appeal to the Full Commission or whether the appeal was a matter with respect to which the Full Commission was required to hear (subject to it determining jurisdiction); and there was no issue concerning the existence about jurisdictional facts or other essential preliminaries.

29. As noted in *Kirk*,[31] the three limitations identified in *Willan* were derived from *Regina v Bolton (Bolton)*.[32] The limitations identified in *Bolton* were picked up and applied in *Regina v St Olave's District Board (St Olave's)*.[33]

30. *Bolton* concerned a writ of certiorari quashing orders made by a Middlesex court under s24 of the *Poor Relief Act 1819* the effect of which were to dispossess an occupant of a parish house. The jurisdiction of the court making the order was impugned by the defendant who produced affidavit evidence that he was not in receipt of poor relief. The question for determination by the Court of Queen's Bench was whether the Court below had jurisdiction to make the order it did and whether the Court of Queen's Bench could receive affidavit evidence going to questions of jurisdiction. In the course of holding that the Court's review was limited to reviewing the scope of the jurisdiction exercised by the lower court, Denman CJ said:

> All that we can ... do when their jurisdiction is complained of is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should on the merits be unwise or unjust, on these grounds we cannot reverse it. So far, we believe, was not disputed, but as the inquiry is open ... to see whether the case was within the jurisdiction of the magistrates, it is contended that affidavits are receivable for the purpose of showing that they acted without jurisdiction.
> ...

---

29 *Colonial Bank of Australasia v Willan* (1874) LR 5PC 417 at 442-443 (Colvile LJ for the Court).
30 *Colonial Bank of Australasia v Willan* (1874) LR 5PC 417 at 443 (Colvile LJ for the Court).
31 *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
32 *Regina v Bolton* [1841] 1 QB 66; [1835-1842] All ER 71.
33 *Regina v St Olave's District Board* [1857] 8 E & B 528.

> The question of jurisdiction does not depend on the truth or falsehood of the charge, but on its nature; it is determinable on the commencement, not at the conclusion of the inquiry.[34]

31. Proceedings on the writ of certiorari were thus confined to determining whether the relevant court had jurisdiction over the subject matter of the order and whether the essential preconditions for the making of the order were satisfied.

32. The decision in *Bolton* was picked up and applied in *St Olave's* which concerned an order for certiorari to quash an order of a tribunal in the face of a privative clause contained in s230 of the *Act for the Better Local Management of the Metropolis* (the *Metropolis Act*), which provided:

> No act, order, or proceeding in pursuance of this Act, or in relation to the execution thereof, shall be quashed or vacated for want of form; nor shall the same be removed by certiorari or otherwise into any of the superior Courts, except as herein specially provided.[35]

33. The *Metropolis Act* did not "specially provide" for review on other grounds.[36]

34. The Court in *St Olave's* applied *Bolton* to negative the proposition that the Metropolitan Board of Works had acted without jurisdiction. Campbell LJ stated:

> It is clear that the decision of the inferior tribunal, if on a point which they had jurisdiction to decide, is final. And it seems that, on well established principles quite consistent with all that was said in *Regina v Bolton* [...], in this case the Metropolitan Board of Works had jurisdiction to decide whether the claimant had been an officer or not. It was an appeal they were bound to hear. It was not a case in which their jurisdiction depended on a preliminary point; but on the appeal being lodged, they had at once jurisdiction to dispose of it; and the question whether [the claimant] was or was not an officer entitled to compensation was not a preliminary fact, but the very point which on the appeal they were to inquire into. Then, if they having jurisdiction to inquire, did think that, de jure, he was an officer and entitled to compensation, their order by which they determined that he was so and awarded him compensation was within the Act, and not removable by certiorari.[37]

35. The result in *St Olave's* was that there was not a want of jurisdiction (and thus not a manifest defect of jurisdiction) in the inferior tribunal's exercise of power and accordingly the decision of the Metropolitan Board of Works was final and immune from review by virtue of s230 of the *Metropolis Act*.

36. What emerges from *Willan*, *Bolton* and *St Olave's* is that privative clauses, at the time of Federation, were effective in limiting review in the absence of

---

34 *Regina v Bolton* [1841] 1 QB 66; [1835-1842] All ER 71 at 73C and 73I.
35 As cited in *Regina v St Olave's District Board* [1857] 8 E & B 528 at 531.
36 *Regina v St Olave's District Board* [1857] 8 E & B 528 at 531.
37 *Regina v St Olave's District Board* [1857] 8 E & B 528 at 531 (footnotes omitted).

establishing a "manifest defect of jurisdiction" in the form of an "excess" or a "want" of jurisdiction.

37. In light of the above, the following statements of principle are apparent. The reference to State Supreme Courts in s73 of the Constitution is to be interpreted by reference to the defining characteristics of those Courts at Federation.[38] The power of State Supreme Courts at Federation to review for jurisdictional error in the face of a privative clause was synonymous with the power of the Court of Queen's Bench.[39] Privative clauses were ineffective in denying to the Court of Queen's Bench review for jurisdictional error where such errors amounted to a "manifest defect of jurisdiction".[40] A "manifest defect of jurisdiction" was understood as an exercise of power in "excess or want of jurisdiction". Where a privative clause provides for review on the basis of "excess or want of jurisdiction" the clause will be valid and effective in limiting review for jurisdictional errors that do not amount to an excess or want of jurisdiction. In the absence of a post-federation development brought about by the Constitution, privative clauses in the form of s206 of the *Fair Work Act* must remain effective.

(b) Scope of the application of the principle *Kirk*.

38. The above reasoning demonstrates that *Willan*, *Bolton* and *St Olave's* are consistent with the outcome in *PSA* and *PSA* is consistent with this Court's decision in *Kirk* to the extent that *Kirk* is confined to the authority upon which it is based. Section 206 of the *Fair Work Act* is consistent with that authority and is, therefore, valid.

F: Application of binding authority

39. As *PSA* is consistent with *Kirk*, it is strictly unnecessary to resolve whether State Supreme Courts should adopt an approach to the application of existing High Court authority that distinguishes questions of legal principle on the basis of constructional issues from questions of validity.

40. Nevertheless, if such a question requires resolution, it should be resolved in favour of the approach adopted by Doyle CJ. As this case demonstrates, the process of distinguishing issues of principle from issues of validity rarely gives rise to unequivocal or straightforward analysis. Where constructional principles arising from previous High Court authority are clearly in issue and fall for

---

38 *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [97]-[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

39 *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) citing, relevantly, *Act No 31 of 1855-56* (SA), s7.

40 *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 at [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Regina v Bolton* [1841] 1 QB 66; [1835-1842] All ER 71; *Regina v St Olave's District Board* [1857] 8 E & B 528; and *Colonial Bank of Australasia v Willan* (1874) LR 5PC 417.

application by a lower court, and there is any doubt about the potential application of later High Court authority which may displace the earlier authority, the lower court should clearly adopt existing authority. To do otherwise would be to invite lower courts to draw distinctions between existing High Court authority where such distinctions may not be unequivocally apparent.

Date: 5 August 2011

10

.....
Martin Hinton QC
Solicitor General for the State of South Australia

.....
20 **Alison Harris**
Crown Solicitor's Office of South Australia

.....
Damian O'Leary
Crown Solicitor's Office of South Australia

30