

**Commentary on paper by Dr M Groves,
“Federal Constitutional Influences on State Judicial Review”**

**by
The Hon. Justice Brian J Preston**

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I propose to use as a springboard for my comments on Dr Groves' thoughtful paper his observations on page 20 that:

“The institutional protection arising from *Kable's* case (*Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51) which has to date operated to preclude legislation that invests State courts with functions deemed incompatible with what are regarded as their core functions is now matched by a protection cast over the jurisdiction of those courts. The prohibitions upon legislation affecting States now apply as much to derogations from their jurisdictions as it does inappropriate additions.”

I will start with derogations from the supervisory jurisdiction of the Supreme Court of a State.

The implication of *Kirk v Industrial Court* (NSW) (2010) 239 CLR 531 is that State legislation that seeks to remove the core supervisory jurisdiction of State courts will be read down to preserve constitutional validity or, where reading down is not open, struck down as beyond power. What might be examples of State legislation that seeks to do this?

The first and obvious example is the one considered by *Kirk*: privative provisions which seek to oust or limit the supervisory jurisdiction of State courts in relation to decisions and conduct of the executive arm of government, including creatures of the executive such as tribunals or courts undertaking merits review of administrative decisions.

Prior to *Kirk*, the settled judicial view was that privative provisions would protect administrative decisions from judicial review, other than decisions which did not satisfy the threefold principle in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 or the variously described imperative duties or inviolable restraints. After *Kirk*, a privative provision will not protect administrative decisions involving jurisdictional error but will protect decisions involving non-jurisdictional error of law appearing on the face of the record: *Kirk* at [100].

What will be the effect in practice of this change in judicial approach to privative provisions? The answer is that privative provisions will be less effective in protecting administrative decisions from judicial review. Administrative decisions that previously would have satisfied the *Hickman* principle and not breached imperative duties or inviolable restraints, and hence would have been protected by privative

provisions, now may be able to be challenged if they involve other jurisdictional error. An example may be a decision challenged on the relevant/irrelevant matters grounds.

The precise extent of loss of protection will depend on what are the boundaries of jurisdictional error. As Groves notes, those boundaries are vague and imprecise. I would venture that the vast majority of grounds of review most commonly invoked in judicial review challenges would involve jurisdictional error of one type or another. Very few decisions would involve non-jurisdictional error of law appearing on the face of the record and hence very few decisions would be protected by a privative provision. The result in practice, as Groves observes, is likely to be that privative provisions “may exist but will do so in name only” (p 20). See also C Finn, “Constitutionalising supervisory review at State level: The end of Hickman?” (2010) 21 PLR 92 at 102.

What might be other examples of legislation that risks being beyond power for seeking to take from the State courts the power to grant relief on account of jurisdictional error?

In many States, statutory courts have been established that have been vested by the State legislature with supervisory jurisdiction in relation to certain administrative decisions or subordinate legislation. The Land and Environment Court in NSW is one example. The Land and Environment Court is constituted as a superior court of record (s 5(1) of the *Land and Environment Court Act 1979* (“the LEC Act”)), composed of judges (s 7) with tenure (s 8) who have the same rank, title, status and precedence as a judge of the Supreme Court of NSW (s 9(2)).

By s 20(1)(e) and s 20(2) of the LEC Act, the Land and Environment Court is given the same supervisory jurisdiction as the Supreme Court has to judicially review administrative decisions and subordinate legislation made under specified planning or environmental legislation. Section 71(1) provides that proceedings of the kind referred to in s 20(1)(e) may not be commenced or entertained in the Supreme Court. The combined effect of the statutory provisions is to invest the Land and Environment Court with the supervisory jurisdiction of the Supreme Court in relation to certain specified matters and to divest the Supreme Court of that jurisdiction in relation to those matters. Does this infringe *Kirk*?

An important point of difference between such a legislative arrangement and privative provisions, is that, viewing the two State courts’ jurisdictions collectively, there is no derogation from the supervisory jurisdiction of the State courts. Rather, the supervisory jurisdiction is distributed between two courts of Supreme Court status, the distribution depending upon the enactment under which the administrative decisions or subordinate legislation is made. This raises the question whether, by force of s 73 of the Commonwealth Constitution, the entrenched minimum provision of judicial review of State administrative decision-makers must solely be exercised by the original Supreme Court of a State or whether it can be distributed between the original Supreme Court of a State and one or more other superior courts of the State of Supreme Court status.

Let me come to another example of a legislative provision that has the potential to be seen to limit the supervisory jurisdiction of State Supreme Courts. In each State, and at the federal level, there are tribunals or courts vested with the function of merits review of administrative decisions. The function of merits review is one of the executive arm of government. The repository of that function (whether it be a tribunal or a court) lacks the power to authoritatively determine questions of law, only the superior courts can authoritatively determine questions of law. Furthermore, the superior courts have a supervisory jurisdiction over these tribunals or courts which exercise the merits review function.

The legislation conferring the merits review function on a tribunal or court usually provides for an “appeal” from a decision or order of that body to a superior court. These provisions for appeal take various forms but they are of the same nature. In *Osland v Secretary to the Department of Justice* [2010] HCA 24 (23 June 2010), the High Court considered s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the VCAT Act”) which resembles s 44 of the *Administrative Appeals Tribunal Act 1974* (Cth). Section 148 provides that a party to proceedings in the VCAT may appeal, on a ground of law, from an order of the VCAT to the Court of Appeal, if the Tribunal was constituted by the President or Vice President of VCAT or, to the Supreme Court Trial Division in any other case. French CJ, Gummow and Bell JJ said in *Osland* at [18] that:

“Section 148 confers ‘judicial power to examine for legal error what has been done in an administrative tribunal’. Despite the description of proceedings under the section as an ‘appeal’, it confers original not appellate jurisdiction; the proceedings are ‘in the nature of judicial review’.”

As I have noted, these statutory appeal provisions take various forms, some more restrictive than others. In *HIA Insurance Service Pty Ltd v Kostas* [2009] NSWCA 292, Basten JA at [84]-[86] identified three broad categories of statutory appeal provisions by reference to the different forms of statutory language used. The first and broadest category arises where the right of appeal is given from a decision that “involves a question of law”, being language which permits the whole case and not merely the question of law to be the subject of the appeal. The second category permits an appeal “on a question of law from a decision of” a tribunal. In such cases, it is the appeal which must be on a question of law, that question being not merely a qualifying condition to ground an appeal but the sole subject matter of the appeal to which the ambit of the appeal is confined. The third and narrowest category is one restricted to “a decision of a tribunal on a question of law”, in which case it is not sufficient to identify some legal error attending the judgment or order of the tribunal; rather it is necessary to identify a decision by the tribunal on a question of law, that decision constituting the subject matter of the appeal.

The High Court has granted special leave but it is unlikely that Basten JA’s categorisation of the different types of statutory appeal provisions will be affected by any appeal.

What is the consequence of the different formulations of statutory appeal provisions?

One is that the jurisdiction of the court undertaking the judicial review of the decisions of the tribunal or court exercising the merits review function would vary depending upon the form of statutory language used in the statutory appeal provision. Does *Kirk* have any implications in this regard?

Take the third and narrowest category. This category includes appeals from decisions and orders of the Land and Environment Court in its merits review functions: see ss 56A and 57 of the LEC Act. This third and narrowest category would not permit the reviewing court to review decisions for all jurisdictional errors but rather restricts review only to decisions on questions of law. Hence, there is derogation from the supervisory jurisdiction of the court to which the appeal lies.

Now if the jurisdiction on such an appeal is in fact original, and not appellate, and the proceedings are in the nature of judicial review, as *Osland's* case holds, then the statutory appeal provision seeks to restrict the State Supreme Court's power to grant relief on account of all types of jurisdictional error. Does such a restrictive statutory appeal provision infringe the entrenched minimum provision of judicial review identified in *Kirk*? Does it also mean that a disaffected party could, notwithstanding the purported restriction in the statutory appeal provision, nevertheless also bring judicial review proceedings challenging the decision or order of the tribunal, such as under s 69 of the *Supreme Court Act 1970*?

Another issue that arises with respect to these statutory provisions for appeal from merits review decisions of tribunals or courts concerns the identity of the court which exercises the jurisdiction to hear and determine such an appeal. In the case of s 148 of the VCAT Act, the supervisory jurisdiction is exercised by the Victorian Supreme Court, although this is distributed between the Court of Appeal and the Trial Division, depending upon the member who constituted the VCAT for the purpose of making the order from which the appeal is brought.

There is also a distribution of the supervisory jurisdiction with respect of decisions of the Land and Environment Court when exercising merits review functions. If a decision appealed against was made by a judge of the court, the appeal is to the Court of Appeal (s 57 of the LEC Act) but if the decision was made by a lay commissioner the appeal is now to a judge of the Land and Environment Court (s 56A of the LEC Act). I say "now" because originally when the Land and Environment Court was established all appeals from decisions of judges and commissioners alike were to the Court of Appeal but the Court legislation was later amended so as to vest in the judges of the Land and Environment Court jurisdiction to hear and determine appeals from decisions of commissioners of the Court. The nature of the appeal, and its restriction to only decisions on a question of law remains, but the identity of the court exercising the jurisdiction to hear and determine the appeal has changed.

Again, this raises the question of whether it is compatible with the principle in *Kirk* that the supervisory jurisdiction of a Supreme Court of a State can be distributed between superior courts of Supreme Court status. There is not, when the courts' jurisdictions are viewed collectively, a derogation from the supervisory jurisdiction but rather a distribution between the courts.

My comments so far will suffice for derogations from the supervisory jurisdictions of the Supreme Courts of the States. Let me now turn, although very briefly, to inappropriate additions to the jurisdictions of the courts.

The High Court's decisions in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 510 and *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 84 ALJR 31 established that it is not constitutionally possible to confer on a State court capable of exercising federal jurisdiction a jurisdiction which is "repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia" (*International Finance Trust* at [98]). Examples of such a repugnant jurisdiction were found in *Kable* and *International Finance Trust*. The plaintiffs in the recent challenges to bikie gang legislation in South Australia point to other examples: see the *State of South Australia v Totani* [2010] HCA Trans 157 (17 June 2010). I understand similar challenges might be made in respect of the bikie gang legislation in NSW.

But is there more potential in this ground of inappropriate additions than these more extreme cases evidence? Will there be not one dog barking once, but a pack of dogs barking in chorus?

There is a discernable trend for State legislatures to vest statutory courts and tribunals with more jurisdiction, not only judicial but also non-judicial powers. The Land and Environment Court, for example, exercises judicial powers in its civil and criminal jurisdictions but also exercises the merits review function of the executive arm of government.

In *Trust Co of Australia v Skiwing Pty Ltd* (2006) 66 NSWLR 77 at [87], Spigelman CJ noted that "it is well established that a 'court of a State' within s 77(iii) [of the Commonwealth Constitution] can exercise non-judicial powers of a kind that could not be exercised by a federal court."

Groves also notes in his paper that legislation which blurs the court/tribunal distinction at the State level has proliferated in recent years. He suggests that such legislation will remain unaffected by the High Court's decisions in *Kable*, *International Finance Trust* and *Kirk* (p 19).

But there are questions of fact and degree: what types of non-judicial powers and how many non-judicial powers can be given to a court of a State before there will be repugnancy in a fundamental degree to the judicial process? State legislatures may need to pause and reflect on these questions before seeking to add non-judicial powers and functions to a court of a State.
