KIRK'S NEW MISSION: UPHOLDING THE RULE OF LAW AT THE STATE LEVEL

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Abstract

In *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, the High Court held that the supervisory review jurisdiction of State Supreme Courts is constitutionally entrenched. Although this decision was widely lauded, the High Court's reasoning has been criticised. This article engages with these two differing reactions to the decision. Firstly, it explains that *Kirk* is laudable because it upholds the rule of law at the State level. Secondly, it argues that *Kirk* can be re-positioned to fit within the *Kable* doctrine—a manifestation of the rule of law—thus providing a more coherent reasoning basis for its ultimate conclusion.

I INTRODUCTION

The jurisdiction of a superior court to engage in supervisory review[1] is considered an essential feature of a common law legal system. However, in Australia the role of the courts in supervising the exercise of power by the executive and legislature has attracted heightened attention and controversy. At the State level, the number of challenges to administrative

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1 Hereafter, when I refer to 'supervisory review', 'supervisory jurisdiction' or 'judicial review', I will be referring to review by superior courts of the decisions and actions of executive decision-makers and inferior courts, not review of the constitutionality of legislation.

decisions continues to grow, particularly in areas concerned with planning, the environment and industrial relations. In response, State Parliaments have sought to limit or confine judicial review of these decisions. The High Court's decision in *Kirk v Industrial Court of NSW*[2] has placed a constitutional handbrake on these efforts.

In *Kirk*, the High Court held that the supervisory jurisdiction of State Supreme Courts—one of their 'defining characteristics'—are constitutionally entrenched by s 73(ii) of the *Commonwealth Constitution*.[3] [4] That is, the result of *Kirk* is that there is now a minimum provision of judicial review at the State level[5] with respect to a decision of an inferior court or tribunal,[6] or 'the executive government of the State, its Ministers or authorities'.[7] this sense, a parallel may now be drawn with s 75(v) of the *Constitution*, which entrenches the High Court's jurisdiction

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2 (2010) 239 CLR 531. The name of the Industrial Relations Commission in Court Session was changed to the Industrial Court of NSW in 2005: *Industrial Relations Act 1996* (NSW) s 151A. In conformity with the High Court's judgment, I will refer to the relevant adjudicative body as the Industrial Court.

3 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 and 64 Vict, c 12, s 9. Hereafter, when I refer to the '*Constitution*' I will be referring to this instrument.

4 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 578–81 [91]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 [113] (Heydon J).

5 See also Wendy Lacey, '*Kirk v Industrial Court of NSW*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641**,** 667; Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law" by Leighton McDonald' (2010) 21 *Public Law Review* 35, 39; J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77, 81.

6 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

7 *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ).

where a writ of mandamus or prohibition, or an injunction, is sought against an 'officer of the Commonwealth'.[8]

A Kirk*: Proceedings*

The appellants in *Kirk* were Mr Kirk and the company of which he was a director, Kirk Group Holdings Pty Ltd. Following the death of an employee of Kirk Group Holdings, Mr Kirk[9] and his company were charged with offences under ss 15(1)[10] and 16(1)[11] of the *Occupational Health and Safety Act 1983* (NSW). They were convicted in the Industrial Court of NSW[12] and financial penalties were imposed.[13] Following a series of unsuccessful appeals and judicial review applications,[14] the case reached the High Court.

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8 See generally *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

9 Section 50(1) of the *Occupational Health and Safety Act 1983* (NSW)) provides that where a corporation contravenes any provision of the Act, each director or manager is deemed to have contravened the same provision unless he/she satisfies the Industrial Court that he/she was not in a position to influence the conduct of the corporation in relation to the contravention, or satisfies the Court that he/she used all due diligence to prevent the contravention.

10 'Every employer shall ensure the health, safety and welfare at work of all the employer's employees.'

11 'Every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.'

12 *WorkCover Authority of NSW v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166.

13 *WorkCover Authority of NSW v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462. Mr Kirk was fined a total of $11,000 and the Kirk company a total of $110,000.

14 *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 66 NSWLR 151 (appeal and judicial review application in the NSW Court of Appeal); Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW (Inspector Childs) (2006) 158 IR 281 (successful application for leave to appeal the convictions to the Full Bench of the Industrial Court); Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW (2006) 164 IR 146 (appeal to the Full Bench of the Industrial Court); Kirk v Industrial Relations Commission of NSW (2008)

The High Court[15] held that Mr Kirk's and Kirk Group Holdings' convictions were invalid, and that orders in the nature of certiorari quashing their convictions should have been issued. The joint judgment held that the convictions in the Industrial Court were invalid for two reasons. Firstly, the Industrial Court had convicted Mr Kirk and his company without giving proper particulars of the breach of the *Occupational Health and Safety Act 1983* (NSW). Secondly, Mr Kirk had, contrary to a fundamental rule of evidence, been called as a witness in his own prosecution.[16] These errors by the Industrial Court were held to be jurisdictional errors and also errors of law on the face of the record.[17]

However, s 179(1) of the *Industrial Relations Act 1996* (NSW) provides that a decision of the Industrial Court 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'.[18] Therefore, prima facie it appeared as though this privative clause prevented the issue of orders in the nature of certiorari. Yet it had been held in a previous case,[19] and was accepted by both parties, that s 179

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173 IR 465 (application to the Court of Appeal seeking an order in the nature of certiorari). Mr Kirk and Kirk Group Holdings Pty Ltd also sought an inquiry into their convictions pursuant to s 474D of the *Crimes Act 1900* (NSW) (since repealed).

15 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ delivered a joint judgment. Heydon J delivered a dissent on the issue of costs, but essentially agreed on all other points.

16 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 566 [54] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

17 Ibid 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

18 However, it does not apply to the exercise of a right of appeal to a Full Bench of the Industrial Court: *Industrial Relations Act 1996* (NSW) s 179(6).

19 *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 66 NSWLR 151, 158 [31], 160 [36] (Spigelman CJ), 162 [52] (Beazley JA), 169–70 [83] (Basten JA), cited in Kirk v Industrial Relations Commission of NSW (2008) 173 IR 465, 471 [21] (Spigelman CJ; Hodgson Handley JJA agreeing).

does not protect decisions of the Industrial Court from review for jurisdictional error. As such, it was unnecessary for the High Court to address the issue of whether State legislatures can preclude judicial review via privative clauses. (Indeed, it is arguable that the Court should have declined to answer this unnecessary constitutional question.[20]) Notwithstanding, the joint judgment picked up on submissions advanced by the Commonwealth and addressed the issue of whether a statute could exclude the supervisory review jurisdiction of a State Supreme Court.

B *High Court's Reasoning*

The joint judgment began by noting that Chapter III of the *Constitution* requires that there be a body fitting the description of 'the Supreme Court of a State'.[21] Their Honours also noted 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'.[22] The joint judgment then held that the supervisory jurisdiction of the Supreme Courts was (at Federation) and remains a 'defining characteristic' of these Courts.[23] Furthermore, as s 73(ii) of the *Constitution* gives the High Court appellate jurisdiction to hear appeals from the Supreme Court, the exercise of this supervisory jurisdiction is

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20 See, eg, *Wurridjal v Commonwealth* (2009) 237 CLR 309, 437 [355] (Crennan J) (and the authorities cited therein); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ) (and the authorities cited therein).

21 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

22 Ibid, quoting *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

23 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

ultimately subject to the superintendence of the High Court.[24] This being the case, '[t]o deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power … would be to create islands of power immune from supervision and restraint', as well as to 'remove … one of its defining characteristics.'[25] (It has been contended that these arguments are alternative bases for the ultimate decision.[26]) The joint judgment viewed the distinction between jurisdictional and non-jurisdictional error—an important distinction in the Australian constitutional context—as marking the relevant limit on State legislative power.[27] Therefore, while legislation which removes the power of a Supreme Court to grant relief on account of non-jurisdictional error is prima facie constitutionally valid, legislation which removes the power to grant relief on account of jurisdictional error is not.[28]

C *Significance of the Decision*

Kirk overturns over 100 years of generally accepted legal thought. For example, in *Darling Casino Ltd v NSW Casino Control Authority*,[29] Gaudron and Gummow JJ observed that the *Constitution* does not provide for an equivalent to s 75(v) in the State context. This omission, their Honours argued, suggests that it was not intended that State Parliaments be

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24 Ibid.

25 Ibid 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

26 Joshua P Knackstredt, 'Judicial review after Kirk v Industrial Court (NSW)' (2011) 18 *Australian Journal of Administrative Law* 203, 206.

27 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

28 Ibid.

29 (1997) 191 CLR 602.

prevented from legislating to restrict the right to judicial review.[30] Moreover, in *Mitchforce Pty Ltd v Industrial Relations Commission of NSW*,[31] Handley JA explicitly stated that 's 179 [of the *Industrial Relations Act 1996* (NSW)] is not invalid in so far as it restricts the inherent jurisdiction of [the Supreme Court] to judicially review decisions of the [Industrial Relations] Commission.'[32] As such, prior to *Kirk*, it was accepted that provided the statutory intention is clear, and subject to various presumptions[33] and statutory interpretation rules[34] (including the '*Hickman* principles'[35]), State legislatures could validly preclude judicial review for errors of any kind.[36]

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30 Ibid 633–4 (Gaudron and Gummow JJ).

31 (2003) 57 NSWLR 212.

32 Ibid 255 [220] (Handley JA).

33 For example, the presumption that legislatures do 'not intend to deprive the citizen of access to the courts, other than to the extent expressly Stated or necessary to be implied': *Public Service Association of SA v Federated Clerks' Union* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ) (citations omitted). Further, in *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180, 194 [33], Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ raised as a presumption 'that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts.'

34 See, eg, Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; the authorities discussed in R v Young (1999) 46 NSWLR 681, 688–90 (Spigelman CJ).

35 *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 617 (Dixon J). Cases subsequent to *Kirk* have assumed that the '*Hickman* principles' no longer apply when interpreting a privative clause: see, eg, *Director General, NSW Department of Health v Industrial Relations Commission of NSW* (2010) 77 NSWLR 159, 163 [15] (Spigelman CJ); *Carnley v Grafton Ngerrie Local Aboriginal Land Council* [2010] NSWSC 837 (30 July 2010) [15] (Garling J); *Valerie Clegg v Gandangara Local Aboriginal Land Council* [2011] NSWSC 28 (9 February 2011) [18] (Hoeben J).

36 See, eg, Clancy v Butchers' Shop Employees Union (1904) 1 CLR 181, 204 (O'Connor J); *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 140 (Barton J), 146 (O'Connor J), cf 131–2 (Griffith CJ); *Mitchforce Pty Ltd*

That said, it is debatable whether the prerogative writs (or orders in the nature of) had been successfully abolished in jurisdictions purporting to have done so.[37] In *Tasman Quest Pty Ltd v Evans*,[38] the Supreme Court of Tasmania held that its power to issue orders in the nature of the prerogative writs had survived its purported removal. This was because the Court's power to grant relief was conferred by ss 3 and 11 of the *Australian Courts Act 1828* (Imp), and this Act had not been repealed.[39]

Nonetheless, *Kirk* is considered a landmark case due to the *constitutional* recognition it gave to the supervisory jurisdiction of the Supreme Courts. It has been noted that the emergence of a constitutional dimension (or indeed, foundation) for administrative law is one of the most important developments of the past decade.[40] This has occurred at both the federal and State levels, with the *Constitution* exerting what has been termed a 'gravitational pull' on the common law (and statutory) systems of judicial review.[41] In simple terms this means that the common law cannot develop

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v Industrial Relations Commission of NSW (2003) 57 NSWLR 212, 233 [92] (Spigelman CJ) (a case which considered the IR Act s 179). But see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 114 (McHugh J); *Woolworths Ltd v Hawke* (1998) 45 NSWLR 13, 18 (Priestly JA).

37 *Judiciary Act 2000* (Tas) s 43; *Judicial Review Act 1991* (Qld) s 41.

38 *Tasman Quest Pty Ltd v Evans* (2003) 13 Tas R 16.

39 Ibid 19–21 [8]–[9] (Blow J).

40 J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77, 77.

41 James J Spigelman, 'Jurisdiction and Integrity' (Speech delivered at the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004) 13. An example of this phenomenon can be evidenced in 'the constrained bases for judicial review of administrative action ... within the State constitutional system': *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 393 [104] (Basten JA). See also Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 51.

in too divergent a manner from the s 75(v) jurisprudence. For example, this phenomenon necessitates the distinction between jurisdictional and non-jurisdictional error of law in Australia,[42] a distinction which is strictly only constitutionally required at the federal level. According to the Honourable James Spigelman, the decision in *Kirk* means that the 'gravitational [pull] has now done its work.'[43] That is, the *Constitution* has now become the focal point of judicial review,[44] and State judicial review now has a constitutional foundation within Chapter III.

D *Reaction to the Decision*

At least in legal circles, the decision in *Kirk* has been widely lauded.[45] However, the joint judgment's method of reasoning has been criticised. Essentially, this is due to the joint judgment's reliance on only one case, *The Colonial Bank of Australasia v Willan*,[46] in support of the proposition that supervisory jurisdiction was a 'defining characteristic' of a Supreme

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42 See, eg, James J Spigelman, 'Jurisdiction and Integrity' (Speech delivered at the 2004 National Lecture Series for the Australian Institute of Administrative Law, Adelaide, 5 August 2004) 23–4; *Bros Bins Systems Pty Ltd v Industrial Relations Commission of NSW* (2008) 74 NSWLR 257, 264 [30] (Spigelman CJ). Cf the position in England: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

43 J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77, 77, 91.

44 Matthew Groves, 'Reforming judicial review at the state level' 64 *Australian Institute of Administrative Law Forum* 30, 31.

45 The Honourable James Spigelman describes *Kirk* as having attracted 'unmitigated admiration': J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77.

46 (1874) LR 5 PC 417.

Court in 1900.[47] Moreover, critics contend that the proper interpretation of *Willan* does not even support this proposition.[48] That is, it is argued that in cases before *Kirk* '*Willan* was seen as concerned with the *interpretation* of a privative clause, rather than about the limits of colonial and, later, State legislative power'.[49] For example, in *In re Biel*[50] (which came after *Willan*) the Supreme Court of Victoria held that the impugned privative clause *did* prevent the issue of certiorari for jurisdictional error. This was because the privative clause was a 'strong one' and referred explicitly to 'want or alleged want of jurisdiction'[51] (ie jurisdictional error).[52] The general argument being made is succinctly put by Professor Goldsworthy:

> [i]n *Kirk*, the High Court asks us to believe that all [the privative clauses enacted in or around 1900 and subsequently] were inconsistent with a concept central to the constitutional thought of legislators, lawyers and judges in the year 1900, even though none of them noticed it. The Court is

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47 See, eg, Leslie Zines, 'Kirk v Industrial Court (NSW)' (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 6.

48 See, eg, John Basten, 'The supervisory jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 284; Ronald Sackville, 'Bills of rights: Chapter III of the Constitution and State charters' (2011) 18 *Australian Journal of Administrative Law* 67, 78. Cf Joshua P Knackstredt, 'Judicial review after Kirk v Industrial Court (NSW)' (2011) 18 *Australian Journal of Administrative Law* 203, 210.

49 Leslie Zines, 'Kirk v Industrial Court (NSW)' (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 8 (emphasis added). See also *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180, 194 [33] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

50 (1892) 18 VLR 456. *In re Biel* was raised in argument before the High Court in *Kirk*.

51 *Licensing Act 1890* (Vic) s 203.

52 *In re Biel* (1892) 18 VLR 456, 458–9 (Higinbotham CJ).

> claiming that, 110 years later, it has arrived at a more accurate understanding of their concepts than they themselves possessed.[53]

Furthermore, it is argued that *Willan* only explicitly referred to the supervisory jurisdiction of colonial Supreme Courts with respect to inferior courts, not administrative tribunals.[54] However, at Federation it was not yet generally accepted that an administrative tribunal was amenable to certiorari, unless it was shown that the tribunal had a duty to act 'judicially'.[55]

In summary, then, the joint judgment's argument that as at 1900 a privative clause did not operate to prevent a Supreme Court from exercising its supervisory jurisdiction is said to be 'perfunctory',[56] or at best 'not convincing'.[57]

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53 Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305, 305–6. Notwithstanding the criticism of the joint judgment's reasoning in *Kirk*, Professor Goldsworthy's general thesis is that a one-off violation of the rule of law is sometimes necessary in order to strengthen the rule of law in other respects or overall. Thus, although in his view the reasoning in *Kirk* violates the rule of law (as it involves 'a deliberate change to the Constitution'), this 'means' can be rationalised due to the 'ends' that the *Kirk* decision effects. Cf Ronald Sackville, 'Bills of rights: Chapter III of the Constitution and State charters' (2011) 18 *Australian Journal of Administrative Law* 67, 73, who argues that '[t]he framers of the *Constitution* would have been surprised to learn that a century or so from Federation, s 75(v) has been construed to entrench the supremacy of the judicial branch of government over the elected branch'.

54 *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 440–2 (Sir James Colvile).

55 See, eg, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 272 ALR 750, 753–5 [6]–[19] (Spigelman CJ), 768 [82]–[84] (Basten JA), 798–800 [252]–[260] (McDougall J).

56 Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305, 305.

57 Leslie Zines, 'Kirk v Industrial Court (NSW)' (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 9.

This article attempts to engage with the two differing reactions to *Kirk*. Firstly, it explains exactly why the decision in *Kirk* is such a laudable one. Essentially, this is because it upholds the rule of law.[58] Secondly, by working backwards from this justifying principle this article attempts to engage with the criticisms of the joint judgment's reasoning in *Kirk* by offering a slightly re-positioned argument for the ultimate conclusion.[59] In summary, this argument is that *Kirk* can be reasoned as a logical extension of the '*Kable* doctrine'.[60]

II *KIRK*: UPHOLDING THE RULE OF LAW

A *The Rule of Law in Australian Public Law*

As a democratic state the rule of law—the pre-eminent legitimating political ideal in the world today[61]—holds a central place in the Australian politico-legal system. Indeed, in *Australian Communist Party v Commonwealth*,[62] Dixon J stated that the rule of law is an 'assumption' upon which the *Constitution* should be interpreted.[63] This proposition has been cited numerous times with approval.[64] Moreover, as cl 5 of the

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58 See also Suri Ratnapala, 'Rule of Law Ruling Widens Separation of Powers', *The Australian* (12 February 2010).

59 See also Joshua P Knackstredt, 'Judicial review after Kirk v Industrial Court (NSW)' (2011) 18 *Australian Journal of Administrative Law* 203, 210.

60 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

61 Brian Z Tamanaha, *On The Rule of Law History, Politics, Theory* (Cambridge University Press, 2004) 4.

62 (1951) 83 CLR 1.

63 Ibid 193 (Dixon J).

64 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 540; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 [89] (Gummow and Hayne JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103]

Constitution states that the *Constitution* is 'binding on the courts, judges, and people of every State and of every part of the Commonwealth', this assumption applies throughout the different Australian jurisdictions.[65]

However, in Australia the rule of law is not given a direct normative operation.[66] That is, the rule of law is an 'assumption' or 'constitutional posture' in Australian law rather than a 'hard-edged legal principle'.[67] As such, the test for the validity of an Australian law remains to be determined according to whether the law in question is in conflict with the *Constitution*[68] or is otherwise contrary to positive law.[69] By contrast, the

(Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 351 [30] (Gleeson CJ and Heydon J), 441 [350] (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 91 [232] (Hayne J), 155 [423] (Crennan and Bell); *Momcilovic v The Queen* (2011) 280 ALR 221, 383 [563] (Crennan and Kiefel JJ).

65 See also *South Australia v Totani* (2010) 242 CLR 1, 42 [61] (French CJ), 91 [233] (Hayne J); Elizabeth Carroll, 'Woolworths Ltd v Pallas Newco Pty Ltd: a case study in the application of the rule of law in Australia' (2006) 13 *Australian Journal of Administrative Law* 87, 89; J J Spigelman, 'Public law and the executive' (2010) 34 *Australian Bar Review* 10, 22. See generally *Re Buchanan* (1964) 65 SR (NSW) 9, 10; Philip A Joseph, 'The demise of ultra vires—judicial review in the New Zealand courts' [2001] *Public Law* 354, 358.

66 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23 [72], 24–5 [76] (McHugh and Gummow JJ); *Western Australia v Ward* (2002) 213 CLR 1, 392 [963] n 1091 (Callinan J). Cf, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 73 ALD 1, 38 [161] (Kirby J); Michael Kirby, 'The rule of law beyond the law of rules' (2010) 33 *Australian Bar Review* 195, especially at 204–11.

67 Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 *Macquarie Law Journal* 135, 144.

68 Furthermore, the *Constitution* itself is said to contain 'a delineation of government powers rather than a charter of citizen's rights': Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectations' (2005) 12 Australian Journal of Administrative Law 103, 109.

69 David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 2nd ed, 2007) 84. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10 [10]–[14]

rule of law holds a more directly significant constitutional position in a number of other common law countries. That is, the rule of law incorporates procedural requirements, but also requirements about the content of the law. For example, in England it has been held that '[t]he rule of law enforces minimum standards of fairness, both substantive and procedural'.[70]

So if the rule of law does not have substantive content in Australia, the focus must then turn to a 'formal'[71] theory of the rule of law—a theory which focuses on certain abstract characteristics of a politico-legal system said to be necessary in order to establish that the rule of law exists.[72] In the context of a formal, 'vertical'[73] conception of the rule of law, it is submitted that the principle has a generally accepted core of meaning in

(Gaudron, McHugh, Gummow and Hayne JJ). For example, an Australian law will not be invalidated by the courts merely because it is in conflict with international human rights standards or other 'fundamental' rights: David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 2nd ed, 2007) 83–4; George Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 232.

70 *R v Secretary of State of the Home Department; Ex parte Pierson* [1998] AC 539, 591 (Lord Steyn).

71 Cheryl Saunders and Katherine Le Roy use the metaphor of 'thin' and 'thick' versions of the rule of law in order to describe the distinction between a more 'rule-based' and a more 'rights based' conception of the rule of law: Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 5–6.

72 David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 2003) [3.24].

73 A 'vertical' conception in the sense that the concern is with the law as a means of regulating the relationship between citizens and the state: Martin Krygier, 'Rule of Law' in Neal J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social and Behavioural Sciences* (Cambridge University Press, 2001) 13 403, 13 406.

Australia.[74] Specifically, the rule of law can be defined as encompassing two key limbs: the principle of legality[75] and the notion of formal equality before the law.[76]

The principle of legality is based on the idea that executive decision-makers (indeed, arguably all decision-makers) need legal authority for any action that they undertake.[77] In this sense, a contrast between private and

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74 Although beyond this narrow formal conception, the rule of law has been termed an 'essentially contested concept': see, eg, Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137; Leslie Green, 'The Political Content of Legal Theory' (1987) 17 *Philosophy of the Social Sciences* 1, 18. The rule of law in current politico-legal theory has also been heavily criticised, for example by Marxist, feminist and critical legal studies scholars. For a useful summary of these criticisms see, eg, Cameron Stewart, 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' (2004) 4 *Macquarie Law Journal* 135, 147–60.

75 I distinguish this principle from the 'principle of legality' from English jurisprudence, see, eg, *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman), which reflects the idea that 'Parliament must [when limiting the courts' role in securing fundamental common law rights] squarely confront what it is doing and accept the political cost'. This understanding has gained salience in Australian courts: see, eg (recently), *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28–9 [31] (French CJ); *Hogan v Hinch* (2011) 243 CLR 506, 535–6 [29] (French CJ); *Momcilovic v The Queen* (2011) 280 ALR 221, especially at 241–5 [42]–[51] (French CJ), 349 [441] (Heydon J), 370 [512] (Crennan and Kiefel JJ).

76 This conception of the rule of law has broad support from a range of notable scholars in the field of politico-legal philosophy: see, eg, A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 188, 193; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 11 (the 'rule book' conception of the rule of law); Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 69; Joseph Raz, 'The Rule of Law and Its Virtue' in Robert L Cunningham (ed), *Liberty and the Rule of Law* (Texas A&M University Press, 1979) 3; Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, 1976); Paul P Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' [1997] *Public Law* 467; Brian Z Tamanaha, *On The Rule of Law History, Politics, Theory* (Cambridge University Press, 2004); H W R Wade and C F Forsyth, *Administrative Law* (Clarendon Press, 10th ed, 2009) 17–19.

77 See, eg, H W R Wade and C F Forsyth, *Administrative Law* (Clarendon Press, 10th ed, 2009) 17; Jeremy Kirk, 'The entrenched minimum provision of judicial

public law may be drawn. Generally speaking, in private law any action which is not unauthorised is legal. By contrast, in public law any action which is not authorised is illegal. The principle of legality requires that every act of governmental power must be done according to law; there must be rule *by* law. The origins of this philosophy are in the notion of restraint of government tyranny. In Anglo-Australian jurisprudence this can be traced back to the signing of the Magna Carta in 1215, and the attempt to subordinate the sovereign to law. If government in all its actions is bound by rules fixed and announced beforehand, it makes it possible for the citizen to foresee with fair certainty how the government will use its coercive powers in given circumstances.[78] Unfettered, discretionary power is absent.[79] Chief Justice French (writing extra-judicially) has termed the principle of legality the 'dominant requirement of the rule of law in Australia'.[80]

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review' (2004) 12 *Australian Journal of Administrative Law* 64, 69. Cf the use of the constitutional principle of legality in South African administrative law: see generally Cora Hoexter, 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165, 181–5.

78 F A Hayek, *The Road to Serfdom* (George Routledge & Sons, 1944) 54. Cf Friederich A Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960) 205–6.

79 See generally A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 188, 202; F A Hayek, *The Road to Serfdom* (George Routledge & Sons, 1944) 72; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 11; Justice Robert French, 'Administrative law in Australia: Themes and values' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 18; Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 72–3.

80 Justice Robert French, 'Administrative law in Australia: Themes and values' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 18.

The notion of formal equality before the law (in the public law context) means that the law must apply equally to all actors within the state, including both government and citizens. If this proposition is accepted, it then follows that the law must be enforced by the same, impartial courts who hear both governmental and non-governmental matters. For example, as a matter of practical application, it is for the ordinary courts to ensure that decision-makers act within the confines of their jurisdiction; not, say, a wholly separate system of administrative tribunals.[81]

B Kirk*: Upholding the Rule of Law in Australian Public Law*

The rule of law is considered to be at the root of the notion of supervisory review.[82] As Brennan J articulated this proposition:

> [j]udicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[83]

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81 See also Naomi Sidebotham, 'Shaking the foundations: Dicey, fig leaves and judicial review' (2001) 8 *Australian Journal of Administrative Law* 89, 92.

82 See generally, Enfield City Corporation v Development Assessment Commission (2000) 199 CLR 135, 157 [56] (Gaudron J); Duncan Kerr and George Williams, 'Review of executive action and the rule of law under the Australian Constitution' (2003) 14 *Public Law Review* 219, 228; Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 178, 185; Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 38; David S Tatel, 'The Administrative Process and the Rule of Environmental Law' (2010) 34 *Harvard Environmental Law Review* 1, 3.

83 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

The favourable response to the *Kirk* decision from the legal community results from the fact that the decision upholds the rule of law.[84] That is, the effect of the decision is to defend both limbs of the rule of law outlined in the previous sub-section.

Pursuant to the first limb of the rule of law, all exercises of official power, whether legislative, executive or judicial, must be supported by constitutional authority or a law made under such authority.[85] That is, the rule of law requires that decisions made by the executive, inferior courts and superior courts of limited jurisdiction be within the boundaries of jurisdiction conferred. As Chief Justice French has affirmed: 'no decision-maker has *carte blanche* ... [u]nlimited power would be unconstitutional power.'[86] In the federal context '[s 75(v)] is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.'[87] Similarly, at the State level, if executive decision-makers, inferior courts or superior courts of limited jurisdiction either neglect or exceed the jurisdiction bestowed upon them, their decisions must be amenable to

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84 See, eg, Chris Finn, 'Constitutionalising supervisory review at State level: The end of *Hickman*?' (2010) 21 *Public Law Review* 92, 108; Wendy Lacey, '*Kirk v Industrial Court of NSW*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641**,** 666; Justice J Gilmour, '*Kirk*: Newton's apple fell' (2011) 34 *Australian Bar Review* 155, 156; Ronald Sackville, 'The constitutionalisation of State administrative law' (2012) 19 *Australian Journal of Administrative Law* 127, 130. Cf John Basten, 'The supervisory jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 280.

85 Justice Robert French, 'Administrative law in Australia: Themes and values' in Matthew Groves and H P Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 15, 18.

86 Robert S French, 'The Executive Power' (2010) 12 *Constitutional Law and Policy Review* 5, 7.

87 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

supervisory review if the rule of law is to prevail. Following this line of reasoning, the 'unifying principle'[88] of jurisdictional error provides a suitable means of ensuring the legality of such decisions.[89]

Pursuant to the second limb of the rule of law, the executive (through its control over the legislature) must be unable to insulate its decisions from judicial supervision. Furthermore, common law legal systems arguably require a unified system of courts which hear both private and public law matters. In this sense, a contrast may be drawn with many civil law jurisdictions, where a separate system of '*droit administratif*' (or equivalent) exists. *Droit administratif* is a system of rules and principles developed and applied in the administrative courts.[90] This system is separate and distinct from the rules and principles which are developed and applied by the ordinary courts.[91] However, in Anglo-Australian politico-legal theory, leaving redress of administrative illegality entirely to the administrative or political processes contradicts our conception of the rule of law.[92] That is, pursuant to our conception of the rule of law, the

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88 J J Spigelman, 'Public law and the executive' (2010) 34 *Australian Bar Review* 10, 16.

89 It is arguable that jurisdictional error is now the central (and unifying) element in the constitutionally entrenched systems of State and federal judicial review: see also J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77, 83; Joshua P Knackstredt, 'Judicial review after Kirk v Industrial Court (NSW)' (2011) 18 *Australian Journal of Administrative Law* 203, 214; Ronald Sackville, 'The constitutionalisation of State administrative law' (2012) 19 *Australian Journal of Administrative Law* 127, 131.

90 Walter Cairns and Robert McKeon, *Introduction to French Law* (Cavendish Publishing, 1995) 121. See generally L Neville Brown and John S Bell, *French Administrative Law* (Clarendon Press, 4th ed, 1993).

91 Walter Cairns and Robert McKeon, *Introduction to French Law* (Cavendish Publishing, 1995) 121.

92 Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law" by Leighton McDonald' (2010) 21 *Public Law Review*

executive must be as equally subject to the 'ordinary law'—administered by 'ordinary courts'—as private persons. If this proposition is true, there must then be an ultimate, 'superior' court with the ability to ensure that executive decision-makers are kept within the boundaries of their jurisdiction. At the State level in Australia this court is the Supreme Court. If the necessity of the existence of a 'superior' court at the State level is recognised, this also means that, being in a federal system with an integrated judiciary,[93] there must be a federal superior court. Therefore, pursuant to the second limb of the rule of law, the superintendence of the High Court as the 'Federal Supreme Court' must not be impermissibly hindered.[94]

If the Supreme Courts are at the apex of the hierarchy of 'ordinary courts' at the State level, this requires that their supervisory review jurisdiction over inferior courts of *general* jurisdiction be preserved. (Indeed, it is arguable that the existence of a 'superior' court with supervisory jurisdiction is even more important at the State level due to looser boundaries regarding the separation of judicial power that exist.[95])

35, 37. See also *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 447, 451–2 (Kirby P).

93 See, eg, s 73(ii) of the *Constitution*.

94 Cf *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

95 There is no strict separation of judicial power at the State level, under either the Commonwealth: see, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 614 [86] (Gummow J); or State Constitutions: see, eg, *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ), 400 (Kirby P), 407, 419 (Glass JA); *S (a child) v The Queen* (1995) 12 WAR 392, 394 (Kennedy J), 401–2 (Steytler J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 93–4 (Toohey J); *Wainohu v NSW* (2011) 243 CLR 181, 197 [22] (French CJ and Kiefel J). Although note that provisions such as s 73(6) of the *Constitution Act 1889* (WA) and s 88(5) of the

Furthermore, a Supreme Court's jurisdiction to supervise superior courts of limited jurisdiction (for example, courts such as the NSW Land and Environment Court[96]) must be maintained.[97] That is, the second limb of the rule of law requires that specialised courts not become 'islands of power'.[98] According to the joint judgment in *Kirk*, this is required as a matter of 'public policy'.[99] Similarly, in his separate judgment, Heydon J reasoned that when specialist courts are set up to hear specific matters there is a tendency for such courts 'to lose touch with the traditions, standards and mores of the wider profession and judiciary.'[100] That is, '[c]ourts which are "preoccupied with special problems" ... are likely to develop distorted positions."'[101] Specialist courts undoubtedly have a role in hearing matters requiring specialist expertise. However, their decisions in respect of

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Constitution Act 1934 (SA) do entrench the Supreme Court's jurisdiction to hear some State constitutional suits.

96 *Land and Environment Court Act 1979* (NSW) s 5(1).

97 But see Chief Justice Brian J Preston, 'Commentary on paper by Dr M Groves, "Federal Constitutional Influences on State Judicial Review"' (Speech delivered at the Australian Association of Constitutional Law Seminar, Sydney, 26 August 2010) 2, who questions whether provisions such as the *Land and Environment Court Act 1979* (NSW) s 20(1)(e) (which gives the NSW Land and Environment Court the same supervisory jurisdiction as the Supreme Court to review administrative decisions and subordinate legislation made under specified planning or environmental legislation) and s 71(1) (which provides that proceedings of the kinds referred to in s 20(1)(e) may not be commenced or entertained in the Supreme Court) infringe *Kirk*. His Honour argues that they may not, if the courts' supervisory jurisdiction is viewed collectively. That is, the entrenched minimum provision of judicial review at the State level does not have to be solely exercised by the original Supreme Court of a State. Rather, it can be distributed between the original Supreme Court and other superior courts.

98 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

99 Ibid 567–8 [57], 569–70 [62] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

100 Ibid 590 [122] (Heydon J).

101 Ibid, citing Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 962–3.

questions of general law and principles of interpretation should not be shielded from supervisory review as this would contravene the rule of law.[102] Instead, these bodies 'should be subject to the control of the courts of more general jurisdiction.'[103] At the State level this court is the Supreme Court.

III RE-POSITIONING THE *KIRK* DECISION

In a number of common law countries the rule of law is invoked to *directly* rationalise a guaranteed entitlement to judicial review. This position can be contrasted with the position at the federal level in Australia, where the existence of an explicit provision of judicial review through s 75(v) of the *Constitution* has meant that rule of law principles have never gained much foreground, apart from simply to justify the existence of this jurisdiction.[104] For example, in England courts have held that the rule of law obliges them to disregard privative clauses.[105] Indeed, more broadly it is argued that a

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102 See also Ernest Barker, 'The "Rule of Law"' [1914] *Political Quarterly* 116, 118; Justice P W Young, 'Current issues' (2011) 85 *Australia Law Journal* 7, 8–9.

103 Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963, cited in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 570 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

104 See, eg, *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145, 147 [3] (Kirby J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 498 [321] (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482 [5] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 73 [113] (Kirby J); *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, 45 [17]–[19] (Spender J).

105 See, eg, *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 586 (Lord Denning); *Ansiminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 208 (Lord Wilberforce). See Sir Anthony Mason, 'Australian Administrative Law Compared with Overseas Models of Administrative Law' (2001) 31 *Australian Institute of Administrative Law Forum* 45, 53–4, for the difference in the fundamental doctrines influencing judicial review in Australia compared to England.

theory of 'higher-order laws' or a 'framework of fundamental principles' derived from the common law constrains the exercise of executive and legislative power.[106] Similarly, in New Zealand the Court of Appeal has held that 'the judicial review powers of the High Court are based on the central constitutional role of the court to rule on questions of law ... The essential purpose of judicial review is to ensure that public bodies comply with the law.'[107] Lastly, in Canada the Supreme Court has held that limits on the exercise of executive power come from (inter alia) the common law, the rule of law principle and societal values.[108] Interestingly, Canada (unlike England and New Zealand) has a written constitution[109] and a rigid separation of judicial power more akin to the Australian federal judicial system provided for in Chapter III of the *Constitution*.

In the State context, commentators and judges have periodically sought to invoke rule of law values in attempting to rationalise a guaranteed entitlement to judicial review. For example, in *Fish v Solution 6 Holdings Ltd*,[110] Kirby J argued that '[t]he rule of law, which is an acknowledged implication of the ... *Constitution*, imposes ultimate limits on the power of any legislature to render governmental action, federal, State or Territory, immune from conformity to the law and scrutiny by the courts against that

106 John Laws, 'Law and Democracy' [1995] *Public Law* 72, 92.

107 *Peters v Davison* [1999] 2 NZLR 164, 192 (Richardson P, Henry and Keith JJ).

108 See, eg, *Baker v Canada (Minister for Citizenship and Immigration)* [1999] 2 SCR 817, 817, 853, 855, 859–62 (L'Heureux-Dubé J).

109 In the sense that England and New Zealand do not have a single core constitutional document: Hilarie Barnett, *Constitutional & Administrative Law* (Cavendish, 5th ed, 2004) 9.

110 (2006) 225 CLR 180.

basal standard.'[111] Such arguments have received very little judicial support (or even consideration). However, notwithstanding the judicial reluctance to adopt this reasoning, it is submitted that the rule of law *can* be invoked to explain the existence of a minimum provision of judicial review at the State level. That is, it is submitted that one can work backwards from the rule of law principle in order to reposition and, with respect, more persuasively reason *Kirk's* conclusion. To begin with, though, it is important to expand on the propositions drawn in Section II and understand exactly how the rule of law is manifested in Australian public law.

A *An Institutional Approach to the Rule of Law*

In Section II it was argued that the concept of jurisdictional error substantiates and helps to uphold the principle of legality. While this is certainly true, it is important to recognise that a label of jurisdictional error is merely 'conclusory'[112] (ie the label is applied after a court arrives at the conclusion that an error is one going to jurisdiction). Furthermore, as was accepted in *Kirk*, the label of jurisdictional error is given largely on the basis of policy, rather than conceptual analysis.[113] Indeed, the Honourable James Spigelman has described jurisdictional error as 'of undefined,

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111 Ibid 224 [146] (Kirby J). See also *Mitchforce Pty Ltd v Industrial Relations Commission of NSW* (2003) 57 NSWLR 212, 237–8 [124] (Spigelman CJ). Both cases considered s 179 of the *Industrial Relations Act 1996* (NSW).

112 Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law" by Leighton McDonald' (2010) 21 *Public Law Review* 35, 37 n 10.

113 See, eg, *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 570–1 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Leslie Zines, 'Kirk v Industrial Court (NSW)' (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 13.

probably undefinable, content.'[114] At a higher level, the principle of legality substantiated through the notion of jurisdictional error certainly underlies State (and federal) judicial review. Ultimately, though, it is for the superior courts (the Supreme Courts and the High Court) to police the boundaries of legality.[115] Therefore, it is submitted that a practical theory of the rule of law in Australia must focus on the 'integrity' of these institutions whose role it is to enforce the principle of legality and provide review for jurisdictional error. Following this line of reasoning, it is submitted that the rule of law in the Australian public law context is best understood as a system of institutional arrangements. Specifically, this is a system of independent courts with the capacity, inter alia, to supervise inferior courts, superior courts of limited jurisdiction and executive decision-makers.[116]

In Australia a system of independent courts is established by Chapter III of the *Constitution*; in this sense it is said that Chapter III gives practical effect to the rule of law.[117] Specifically, Chapter III establishes the High Court and makes provision for other federal courts, and also impliedly

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114 J J Spigelman, 'Public law and the executive' (2010) 34 *Australian Bar Review* 10, 17.

115 Cf *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 122 ALD 237, 241 [2] (French CJ).

116 Cf J M Bennett (ed), *Some Papers of Sir Francis Forbes* (Parliament of New South Wales, 1998) 143.

117 See, eg, *South Australia v Totani* (2010) 242 CLR 1, 156 [423] (Crennan and Bell JJ), quoting *Thomas v Mowbray* (2007) 233 CLR 307, 342 [61] (Gummow and Crennan JJ), citing *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322, 351–2 [30] (Gleeson CJ and Heydon J). As one of the drafters of the *Constitution* contended, '[t]he supremacy of the judiciary ... finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power': A Inglis Clark, 'The Supremacy of the Judiciary under the Constitution of the United States, and under the Constitution of the Commonwealth of Australia' (1903) 17 *Harvard Law Review* 1, 18.

entrenches the existence and 'defining characteristics' of State Supreme Courts[118] and envisages that other State courts will be vested with federal jurisdiction.[119] Therefore, State courts have a status and a role that extends beyond their status and role as part of the State judicial system;[120] they are part of the integrated judiciary set up by Chapter III. The constitutional status of State courts means that State legislative power is not immune from restrictions derived from Chapter III.[121] That is, a State cannot legislate with respect to its courts in such a way as would contravene the principles in Chapter III.[122] The primary Chapter III restriction on State legislative power is the *Kable* doctrine, a doctrine which mandates the preservation of the 'institutional integrity' of all State courts capable of being vested with federal jurisdiction.[123] Therefore, if Chapter III gives effect to the rule of law, and the *Kable* doctrine is the primary means of

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118 *Constitution* s 73(ii). See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 141 (Gummow J); *Forge v Australia Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ), quoted in *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

119 *Constitution* ss 71, 77(iii).

120 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 114 (McHugh J); *Momcilovic v The Queen* (2011) 280 ALR 221, 391 [595] (Crennan and Kiefel JJ).

121 See, eg, *Commonwealth v Queensland* (1975) 134 CLR 298, 314–15 (Gibbs J); *Gould v Brown* (1998) 193 CLR 346, 446 [194]–[195] (Gummow J). Cf *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 60–2 (Mason J).

122 However, the separation of judicial power doctrine itself does apply at the State level: see, eg, *South Australia v Totani* (2010) 242 CLR 1, 86 [221] (Hayne J); *Wainohu v New South Wales* (2011) 243 CLR 181, 5 [7] (French CJ and Kiefel J). Cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 118 (McHugh J), quoted in *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 354 [53] (French CJ).

123 Note that the *Kable* doctrine does not have its source in the doctrine of the separation of powers: *Wainohu v New South Wales* (2011) 243 CLR 181, 209 [45] (French CJ and Kiefel J).

giving effect to the principles in Chapter III for State courts, it is submitted that at the State level the rule of law is maintained via the preservation of the 'institutional integrity' of courts.[124] In the remainder of this section this line of reasoning will be followed through in making the argument that *Kirk* can (and should) be reasoned as an extension of the *Kable* doctrine.[125]

B *The* Kable *Doctrine*

As alluded to, the seminal case on the Chapter III limitations on State legislative power is *Kable v Director of Public Prosecutions (NSW)*.[126] *Kable* concerned legislation enacted by the NSW Parliament, the *Community Protection Act 1994* (NSW), which was specifically targeted at a particular prisoner, Gregory Wayne Kable.[127] Mr Kable was serving a prison sentence for manslaughter, and had written threatening letters to the relatives of his victim (his deceased wife) and other persons. In response (and in the context of an impending election), the NSW Parliament enacted the *Community Protection Act 1994* (NSW). Section 8 of this Act allowed the Director of Public Prosecutions to apply for a preventive detention order against Mr Kable. Following this application, s 5 of the *Community*

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124 See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 123 [197] (Kirby J).

125 I am not the first person who has suggested a link between these two doctrines: see, eg, J J Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77, 80; Wendy Lacey, '*Kirk v Industrial Court of NSW*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641**,** 649; but see Alexander Vial, 'The Minimum Entrenched Supervisory Review Jurisdiction of State Supreme Courts: *Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531' (2011) 32 *Adelaide Law Review* 145, 158–60. In fact, in *Momcilovic v The Queen* (2011) 280 ALR 221, 349 [438] even Heydon J seemed to imply that *Kable* and *Kirk* are linked.

126 (1996) 189 CLR 51.

127 *Community Protection Act 1994* (NSW) s 3.

Protection Act 1994 (NSW) authorised the Supreme Court of NSW to make an order requiring that Mr Kable be detained if it was satisfied on reasonable grounds that he posed a significant danger to the public.

Mr Kable challenged the *Community Protection Act 1994* (NSW) in the High Court. A majority[128] of the Court found in his favour, declaring that the non-judicial functions which the Act conferred on the Supreme Court were incompatible with Chapter III of the *Constitution* and hence were invalid. In their broadly similar judgments, Gaudron, McHugh and Gummow JJ each noted that the *Constitution* contemplates a system where the functions of State and federal courts are integrated with each other.[129] This integration is twofold. Firstly, ss 71 and 77(iii) of the *Constitution* expressly allows the federal Parliament to invest State courts with federal judicial power.[130] Secondly, the 'constitutional scheme' provided for in s 73 places the High Court as the final court of appeal in both federal and non-federal matters.[131] In the view of Gaudron, McHugh and Gummow JJ, the *Community Protection Act 1994* (NSW) was invalid as it undermined the Supreme Court's independence from the NSW government and required the Court to act inconsistently with its traditional functions. This,

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128 Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting.

129 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 102 (Gaudron J), 111–15 (McHugh J), 137–9 (Gummow J).

130 The 'autochthonous expedient': *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

131 Cf *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

it was reasoned, was incompatible with the Court's role under the *Constitution* as a constituent body of the national integrated judiciary.[132]

The separate majority judgments in *Kable* made it difficult to distil the principles that would apply to this new Chapter III limitation on State courts. As such, clarification of the character of the *Kable* doctrine[133] came only in later cases where the criterion for its operation was narrowed to one of 'institutional integrity'.[134] For example, a clear enunciation of the (revised) doctrine comes from Gleeson CJ in *Baker v The Queen*:[135]

> since the *Constitution* established an integrated Australian court system, and contemplates the exercise of federal jurisdiction by [State courts], State legislation which purports to *confer upon a [State] court a function which substantially impairs its institutional integrity*, and which is therefore incompatible with its role as a potential repository of federal jurisdiction, is invalid.[136]

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132 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 116 (McHugh J), 143 (Gummow J); cf 96–9 (Toohey J).

133 Cf Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411, 426, where the author argues that it is 'inappropriate, post-*Forge*, to continue to refer to the *Kable* principle by that title.'

134 Arguably, this was first commonly accepted in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

135 (2004) 223 CLR 513.

136 Ibid 519 [5] (Gleeson CJ). This quote has been amended slightly to take into account the fact that the *Kable* doctrine extends to *all* State courts capable of exercising federal jurisdiction: see, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81] (Gaudron J), quoted in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 162 [27] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. Further, the *Kable* doctrine arguably extends to all State/Territory courts that might in the future exercise federal judicial power, whether or not they are doing so currently: see, eg, *Baker v The Queen* (2004) 223 CLR 513, 534 [51] (McHugh, Gummow, Hayne and Heydon JJ), citing *North Australian Aboriginal Legal Aid Service Inc*

The *Kable* doctrine was unsuccessfully invoked a number of times in the High Court over the next 13 years[137] (although in 2004 it was successfully invoked in the Queensland Court of Appeal[138]), and for a time was described as 'a constitutional guard-dog that [barked] but once.'[139] One such unsuccessful case was *Forge v Australian Securities and Investments Commission*.[140] In *Forge*, a challenge was made to the appointment of an acting judge to the Supreme Court of NSW. This was on the basis that the practice of appointing acting judges had become so extensive that the institutional integrity of the court had become impaired.[141] A 6:1 majority of the High Court rejected the challenge, yet all the judges (bar Heydon J who did not engage with the *Kable* doctrine) noted that there are limits to a State Parliament's power to reconstitute its Supreme Court.[142] Specifically, a Parliament cannot change the composition of its Supreme Court in such a manner as would distort its institutional integrity as a 'court'. Importantly, it is arguable that the judgments in *Forge* (except Heydon J's) were

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v Bradley (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

137 See, eg, *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181; *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

138 *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2004] 1 Qd R 40 (special leave to appeal from this decision was not sought).

139 *Baker v The Queen* (2004) 223 CLR 513, 535 [54] (Kirby J).

140 (2006) 228 CLR 45.

141 A potential challenge which was foreshadowed in *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 164 [32] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

142 See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 69 [46] (Gleeson CJ, Callinan J agreeing), 79 [73] (Gummow, Hayne and Crennan JJ).

concerned with tying the requirements of institutional integrity back to the term 'court' as it appears in the *Constitution*, rather than an implied integrated system of courts provided for by Chapter III.[143] That is, *Forge* represented a refocusing on the text of the *Constitution* and a shift from indirect, systematic implications derived from its secondary, structural elements. (Arguably this reasoning first appeared in the judgments of Dawson, McHugh and Gummow JJ in *Kable*.[144]) High Court judgments subsequent to *Forge* have adopted this slightly revised approach to the doctrine.[145] Therefore, post-*Forge*, it is arguable that the relevant question when applying the *Kable* doctrine became: is a function conferred, or the structure or composition, of a State court capable of being vested with federal jurisdiction consistent with the character of a 'court', as constitutionally-defined?

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143 See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67–8 [41] (Gleeson CJ), 76 [63] (Gummow, Hayne and Crennan JJ), 121 [192] (Kirby J); Anna Dziedzic, '*Forge v Australian Securities and Investments Commission*: The *Kable* Principle and the Constitutional Validity of Acting Judges' (2007) 35 *Federal Law Review* 129, 140; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hanks' Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 8th ed, 2009) 1155 [9.5.32].

144 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 83 (Dawson J), 117 (McHugh J), 141 (Gummow J).

145 See, eg, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 576–7 [102]–[103] (Kirby J), 591 [161] (Crennan J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 530 [89] (French CJ), 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 571 [253] (Kirby J); *South Australia v Totani* (2010) 242 CLR 1, 21 [4], 48 [70] (French CJ), 67 [149] (Gummow J), 88–9 [226] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J), 228 [105] (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 280 ALR 221, 258 [92]–[93] (French CJ), 281 [175] (Gummow J), 390 [593] (Crennan and Kiefel JJ). See also State Supreme Courts: eg, *P J B v Melbourne Health* [2011] VSC 327 (19 July 2011) [313] (Bell J); *Campbell v Employers Mutual Ltd* (2011) 110 SASR 57, 83 [110] (Gray and Sullan JJ).

However, one slightly anomalous case is *International Finance Trust Co Ltd v NSW Crime Commission*.[146] In *International Finance Trust Co Ltd* a constitutional challenge was made to s 10 of the *Criminal Assets Recovery Act 1990* (NSW). Section 10(2)(b) of this Act provided that the NSW Crime Commission could make an ex parte application to the Supreme Court of NSW for a restraining order preventing dealings with property which was suspected to have been derived from serious criminal activity. This application had to be supported by an affidavit deposing to the grounds upon which the deponent suspected the property to have been derived from serious criminal activity.[147] The Supreme Court had to make the restraining order if, having regard to the matters raised in the affidavit, it considered there were reasonable grounds for the suspicion.[148] The party whose property interest was affected by the order could apply under s 25 of the *Criminal Assets Recovery Act 1990* (NSW) for orders excluding those interests from the operation of the restraining order. However, the party had to prove that it is more probable than not that the property was not acquired fraudulently or illegally.

When the case reached the High Court the *Kable* doctrine was successfully invoked for only the second time in that court. However, the doctrine was applied in a slightly different way. In the joint judgment of Gummow and Bell JJ,[149] the judgment of Heydon J[150] and the judgment of the minority,[151] the constitutional validity of s 10 of the *Criminal Assets Recovery Act 1990*

146 (2009) 240 CLR 319.

147 *Criminal Assets Recovery Act 1990* (NSW) s 10(3).

148 Ibid.

149 Ibid 367 [98] (Gummow and Bell JJ).

150 Ibid 379 [140], 385–6 [155]–[160] (Heydon J).

151 Ibid 378 [136] (Hayne, Crennan and Kiefel JJ).

(NSW) was determined with reference to the notion of 'repugnance to the judicial process'.[152] (This notion has its origins in Gummow J's judgment in *Kable*.[153]) That is, Gummow, Bell and Heydon JJ concluded that the procedures achieved by s 10 were repugnant to the judicial process. Only French CJ (who also formed part of the majority) focussed on the 'judicial function' which s 10 impaired in such a way as to distort the Supreme Court's institutional integrity.[154]

In later cases which have invoked the *Kable* doctrine courts have reverted back to the notion of institutional integrity of a court in assessing whether legislation impermissibly infringes the doctrine.[155] However, in assessing whether a court's institutional integrity has been impaired it will be at least

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152 See also *South Australia v Totani* (2010) 242 CLR 1, 157 [426] (Crennan and Bell JJ). McCunn argues that 'repugnance to the judicial process' should be the (sole) controlling standard when determining whether State legislation offends the *Kable* doctrine: Ayowande McCunn, 'The search for a single standard for the Kable principle' (2012) 19 *Australian Journal of Administrative Law* 93.

153 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 132, 134 (Gummow J); see also 107 (Gaudron J), 122 (McHugh J). But see *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, where McHugh J argued that '[t]he pejorative phrase—"repugnant to the judicial process"—is not the constitutional criterion': at 601 [42] (McHugh J).

154 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 355 [56] (French CJ). Interestingly, the phrase 'institutional integrity' was not mentioned in any of the other judgments.

155 See, eg, *South Australia v Totani* (2010) 242 CLR 1, 21 [4], 48 [70] (French CJ), 67 [149] (Gummow J), 88–9 [226] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J), 228 [105] (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic v The Queen* (2011) 280 ALR 221, 258 [92]–[93] (French CJ), 281 [175] (Gummow J), 390 [593] (Crennan and Kiefel JJ). See also State Supreme Courts: eg, *P J B v Melbourne Health* [2011] VSC 327 (19 July 2011) [313] (Bell J); *Campbell v Employers Mutual Ltd* (2011) 110 SASR 57, 83 [110] (Gray and Sullan JJ).

a material factor to consider whether a function conferred on the court is antithetical to the judicial process.[156]

C Kirk*: An Extension of the* Kable *Doctrine*

What is curious about the joint judgment's reasoning in *Kirk* is the similarity to *Kable*-style reasoning and yet *Kable* is never cited (although it was raised in argument before the High Court). In this sub-section I will slightly re-position the joint judgment's reasoning in order to frame *Kirk* to fit within the *Kable* doctrine. Hopefully, this will engage with some of the criticisms that have been raised regarding the joint judgment's reasoning and will instead, with respect, define a more convincing basis for the decision.

As is evident from the overview above, the *Kable* doctrine has so far been held to potentially apply in two types of situations. The first is legislation which unconstitutionally *confers certain functions* on a Supreme Court (or other State court).[157] The second is legislation which unconstitutionally *changes the structure or composition* of a Supreme Court (or, presumably,

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156 See, eg, *Fardon v Attorney General (Qld)* (2004) 223 CLR 575, 620–11 [113]–[115] (Gummow J), 628 [141], 630–31 [144] (Kirby J), 655–6 [219] (Callinan and Heydon JJ); *Gypsy Jokers Motorcycle Club v Commissioner for Police* (2008) 234 CLR 532, 563 [50] (Kirby J), citing *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 134 (Gummow J); *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319, 353 [52] (French CJ), quoting *Thomas v Mowbray* (2007) 233 CLR 307, 55 [111] (Gummow and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 162 [443] (Kiefel J).

157 See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1.

other State courts which are capable of being vested with federal jurisdiction).[158] It is submitted that *Kirk* can be reasoned as an extension of the *Kable* doctrine as the decision reinforces the two important facets of the *Kable* doctrine. Firstly, this is the constitutional significance of the integrated national judicial system defined by s 73 of the *Constitution* (the 'unifying element in our judicial system'[159]) with the High Court as the final court of appeal. Secondly, and more importantly, this is the constitutional imperative of preserving the institutional integrity of Chapter III courts. That is, to rationalise the conclusion in *Kirk* via *Kable* reasoning, there are now constitutional restrictions, derived from Chapter III, which prevent a State Parliament from *removing certain functions* from its Supreme Court.[160]

In *Kable*, McHugh and Gummow JJ placed heavy reliance on s 73 of the *Constitution* in concluding that there was an integrated judicial system in Australia with the High Court at its apex.[161] (Although strictly speaking this only occurred in 1986 with the passing of the *Australia Acts*;[162] prior to this there were two final courts of appeal from State Supreme Courts: the Privy Council and the High Court.[163]) According to McHugh and Gummow JJ, as the *Constitution* establishes an integrated judicial system,

158 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

159 Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) 182.

160 See also W B Lane and Simon Young, *Administrative Law in Australia* (Lawbook Co, 2007) 34–5.

161 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 111–16 (McHugh J), 137–43 (Gummow J).

162 *Australia Act 1986* (Cth) s 11; *Australia Act 1986* (UK) s 11.

163 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 113–14 (McHugh J), 138 (Gummow J).

it followed that State Parliaments cannot undermine this constitutional scheme. Indeed, continuing this line of reasoning McHugh J (in obiter) envisaged a constraint on a State law purporting to restrict a Supreme Court's supervisory jurisdiction, as this would be 'inconsistent with the principles expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.'[164]

In *Kirk*, the joint judgment made a similar argument to McHugh J's, questioning 'the extent to which [a privative] provision [could] be given an operation that immunises the decisions of an inferior court or tribunal from judicial review, yet *remain consistent with the constitutional framework for the Australian judicial system*.'[165] That is, as Professor Zines argues: '[i]nsofar as [the] supervisory ... jurisdiction of State Supreme Courts can be reduced, the position of the High Court at the apex of the State's judicial system is also reduced.'[166] In other words, the national integrated judicial system becomes impaired. In this sense, the effective preservation of the supervisory role of the State Supreme Courts can be characterised as necessary in order to satisfy the constitutional judicial system set-up by Chapter III and reinforced by the *Kable* doctrine.[167]

More importantly, *Kirk* upholds the institutional integrity of Supreme Courts. That is, a common thread that runs through *Kable* and *Kirk* is the constitutional requirement of a standard of integrity which preserves the identity and essential functions of State Supreme Courts. In *Kable*,

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164 Ibid 114 (McHugh J).

165 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 579 [93] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added).

166 Leslie Zines, 'Kirk v Industrial Court (NSW)' (Speech delivered at the Australian Association of Constitutional Law Annual General Meeting, Sydney, 26 November 2010) 12–13.

167 Cf *South Australia v Totani* (2010) 242 CLR 1, 42–3 [61] (French CJ).

Gummow J stated that the term 'Supreme Court' in s 73 is a 'constitutional expression' whose meaning 'is to be determined in the process of construction of the *Constitution*'.[168] Furthermore, it was explained in the previous sub-section that the notion of the institutional integrity of a court (the 'touchstone' of the *Kable* doctrine[169]) has come to encapsulate the maintenance of the 'defining characteristics' of a Chapter III court. As enunciated by Gummow, Hayne and Crennan JJ in *Forge*:

> [the *Kable* doctrine] is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.'[170]

In *Kirk*, the joint judgment viewed the supervisory jurisdiction of a Supreme Court as one its defining characteristics, both in 1900 and as at the present.[171] However, as argued in Section I, it is debatable whether, as a matter of the common law in 1900, a colonial Supreme Court always had the jurisdiction to issue the prerogative writs in order to correct jurisdictional errors. What's more, it is arguable that the joint judgment in *Kirk* did not need to tie itself to a historical point-in-time definition of a

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168 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 141 (Gummow J); see also 83 (Dawson J), 117 (McHugh J).

169 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 [102] (Gummow J).

170 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) (emphasis added). Interestingly, an earlier section of this paragraph was quoted in *Kirk*: *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

171 *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, 581 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

'Supreme Court' in order to ascertain its defining characteristics. That is, according to previous authority it was not necessary to frame the defining characteristics of a Supreme Court to those it held at Federation.

As mentioned above, in *Forge* the focus of the *Kable* doctrine shifted to a consideration of whether the defining characteristics of a 'court' were infringed by the impugned legislation. However, in *Forge*, there was some disagreement among the various judgments as to where the defining characteristics of a court were to be found. For example, Gleeson CJ looked at (inter alia) details of comparative law,[172] Kirby J looked at (inter alia) international human rights law and the interpretation of Art 14(1) of the *International Covenant on Civil and Political Rights*[173],[174] and all the judgments looked at Australian history.[175] However, only Heydon J

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172 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 62–3 [27]–[30] (Gleeson CJ); cf 81–2 [80] (Gummow, Hayne and Crennan JJ), 120 [187]–[189] (Kirby J), 139–40 [250] (Heydon J).

173 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976). Art 14(1) provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

174 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 125–9 [204]–[214] (Kirby J).

175 Ibid 60 [17]–[18] (Gleeson CJ), 82–3 [83]–[85], 84–5 [88]–[89] (Gummow, Hayne and Crennan JJ), 95–7 [127]–[133] (Kirby J), 141–6 [256]–[267] (Heydon J).

applied an originalist interpretation to give a *fixed* meaning to the term 'court' by looking to what the term meant in 1900.[176] By way of contrast, Kirby J took a broader view, stating that 'matters of judgment and basic constitutional values' inform this assessment, although these in turn are influenced by considerations of history.[177] In a similar vein, it has been argued that sociological or jurisprudential analyses could be used to arrive at the conclusion of what the defining characteristics of a court (or, more specifically, a Supreme Court) are.[178]

Thus, it is submitted that the joint judgment in *Kirk* unnecessarily restricted itself in its argument that a defining characteristic of a Supreme Court is its supervisory jurisdiction. The point is not that the capacity to engage in supervisory review is not a defining characteristic of a Supreme Court; it is that the joint judgment in *Kirk* did not have to tie itself to a 1900 definition of a colonial Supreme Court in order to arrive at this conclusion.[179] Instead, if a 'basic constitutional value' is invoked, it can more persuasively be argued that a defining characteristic of a Supreme Court, being a superior court of unlimited (State) jurisdiction, is its supervisory jurisdiction. That is, if the rule of law—an 'assumption' upon which the *Constitution* is interpreted[180]—is invoked, it can be argued that the supervisory jurisdiction of a Supreme Court should be viewed as one of its defining characteristics. This proposition is forwarded on the basis of

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176 Ibid 141–6 [256]–[267] (Heydon J). Cf *Momcilovic v The Queen* (2011) 280 ALR 221, 349 [437] (Heydon J).

177 Ibid 122–3 [195] (Kirby J).

178 Anna Dziedzic, '*Forge v Australian Securities and Investments Commission*: The *Kable* Principle and the Constitutional Validity of Acting Judges' (2007) 35 *Federal Law Review* 129, 143.

179 Cf *South Australia v Totani* (2010) 242 CLR 1, 38 [50] (French CJ).

180 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

exactly the same arguments that were made in Section II, pertaining to how the supervisory jurisdiction of a Supreme Court upholds the rule of law.

Therefore, it is submitted that legislation which would remove from a Supreme Court its supervisory jurisdiction can be characterised as distorting its institutional integrity.[181] That is, such legislation will infringe the *Kable* doctrine and consequently the rule of law.

IV CONCLUSION

The *Kirk* decision is potentially wide-reaching and has left many areas open to be explored. For example, what other 'defining characteristics' does a Supreme Court have that are constitutionally protected by s 73(ii)?[182] What is the applicability of *Kirk* in the Territories?[183] These questions will help clarify the exact nature and content of the *Kirk* ratio and its place in wider Chapter III jurisprudence. However, what *Kirk* has affirmed is that the High Court sees judicial review as a constitutional necessity in Australia. This article explained how judicial review and the rule of law are necessarily linked, and thus the significance of *Kirk* in

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181 *Contra* Cameron Ford, 'The Territories and Kirk v Industrial Relations Commission (NSW)' (2011) *Northern Territory Law Journal* 28, 36.

182 In *South Australia v Totani* (2010) 242 CLR 1, 45 [66] French CJ suggested that 'independence, impartiality, fairness and openness' are 'essential characteristics of the courts of the States.' Other 'defining characteristics' are noted in obiter in *Wainohu v New South Wales* (2011) 243 CLR 181, 19 [44] (French CJ and Kiefel J) as including the application of procedural fairness, adherence as a general rule to the open court principles, and the giving of reasons for a decision. See also Chris Finn, 'Constitutionalising supervisory review at State level: The end of *Hickman*?' (2010) 21 *Public Law Review* 92, 107–8.

183 See generally *K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* (2011) 163 NTR 17, 52 [136] n 98 (Kelly J); Cameron Ford, 'The Territories and Kirk v Industrial Relations Commission (NSW)' (2011) *Northern Territory Law Journal* 28. The *Kable* doctrine does apply in the Territories: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

upholding the rule of law at the State level. Furthermore, this article argued that in Australia the rule of law is manifested through the constitutional arrangement which preserves the integrity of courts and judicial power. That is, at the State level, the rule of law is effectively preserved via the *Kable* doctrine. On this basis, this article argued that *Kirk* should be repositioned as a logical extension of the *Kable* doctrine. This, it was submitted, would outline a more logical basis for the decision and also create greater doctrinal cohesion in Chapter III jurisprudence.