IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **NO A7 OF 2011**

BETWEEN

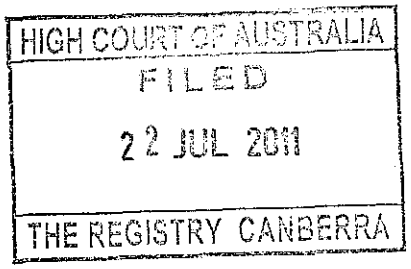
PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED
Applicant

INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA
First Respondent

CHIEF EXECUTIVE, DEPARTMENT FOR PREMIER AND CABINET
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

(INTERVENING)



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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes in the special leave application and in any appeal that may result from the special leave application pursuant to s 78A of the *Judiciary Act 1903* (Cth). If leave to intervene in the special leave application is necessary, the Commonwealth seeks that leave. The intervention is in support of the Applicant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. If leave is necessary, it should be granted. The Commonwealth has an undoubted statutory right to intervene in any appeal that may result from the special leave application and hearing the Commonwealth on that application is the most efficient course.

PART IV: RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The Commonwealth adopts the Applicant's list of legislative provisions.

PART V: ARGUMENT

A. Introduction

5. The Commonwealth advances the following propositions:

   (a) The principle recognised in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (***Kirk***) operates so as to invalidate a State privative clause which purports to render a decision of an administrative tribunal that is vitiated by jurisdictional error immune from the supervisory jurisdiction of the Supreme Court of the State.

   (b) Not to exercise jurisdiction where there is a duty to exercise it (that is, a failure to exercise jurisdiction) is a jurisdictional error.

   (c) The Full Court of the Supreme Court of South Australia was not prevented from adopting the above propositions by the decision of this Court in *Public Service Association v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 (***PSA v FCU***).

B. *Kirk* renders invalid State privative clauses that purport to protect decisions of administrative tribunals that are vitiated by jurisdictional error

6. The reasoning in *Kirk* is not limited to privative clauses that apply to decisions of inferior courts. It proceeds from the requirement in Chapter III of the Constitution that there be a body fitting the description "the Supreme Court of a State",[1] and the recognition of a supervisory jurisdiction as an essential characteristic of such a body as understood at the time of federation and now.[2] That jurisdiction was, and is, "the mechanism for the determination and the enforcement of the limits on the exercise of

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1 (2010) 239 CLR 531 at 580 [96].

2 (2010) 239 CLR 531 at 580-581 [97]-[98].

State *executive and judicial power* by *persons and bodies* other than the Supreme Court".[3] Noting the superintendent role of this Court, the majority observed that:

> To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint.[4]

7. The character of such impermissible "islands of power", precluded by the Supreme Court's entrenched supervisory jurisdiction, may be executive or judicial in nature and may involve powers exercised by a court or an administrative body. These distinctions do not lead to any difference in the applicability of the principle identified. Any attempt to draw distinctions along these lines would be especially problematic in the context of State constitutions which do not embody any rigid separation of powers.[5] Accordingly, while the facts in *Kirk* concerned an exercise of judicial power by a court, the principle is not so limited.

8. In *State of South Australia v Totani* (2010) 242 CLR 1, the High Court observed that:[6]

> State legislative power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the *executive government of the state, its ministers or authorities.*

9. Decisions of the Industrial Relations Commission of South Australia (**Commission**), including the decision in the present case, are subject to the entrenched supervisory jurisdiction of the State Supreme Court. Section 206 of the *Fair Work Act 1994* (SA) is invalid to the extent that it would prevent the Supreme Court granting appropriate relief if satisfied that a decision made by the Commission infringed "the limits on the exercise" of the powers conferred on it.[7]

C. The entrenched jurisdiction of the Supreme Courts includes review for failure to exercise jurisdiction

10. The "limits on the exercise of power", referred to in *Kirk*, include the duty to exercise jurisdiction when such a duty arises. It cannot be correct to say that the essential minimum characteristics of a State Supreme Court include the power to engage in review on the ground of excess or want of jurisdiction but not on the ground of failure to exercise jurisdiction. To accept that position would be to permit "islands of power" of the kind which the entrenched supervisory jurisdiction of the Supreme Courts prohibits.

11. A mistaken denial of jurisdiction is a jurisdictional error, as is a mistaken assertion of jurisdiction. This is so when the error is committed by a court;[8] and it has never been doubted that the same proposition applies to an administrative decision-maker.

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3 (2010) 239 CLR 531 at 580 [98] (emphasis added).

4 (2010) 239 CLR 531 at [99].

5 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51 at 67, 94, 109, 103-104.

6 (2010) 242 CLR 1 at [26] (French CJ) (emphasis added); see further [193] (Hayne J); [268] (Heydon J); see further *Wainohu v New South Wales* [2010] HCA 24 at [15] (French CJ and Kiefel J); [89] (Gummow, Hayne, Crennan and Bell JJ). *Totani* concerned a decision made by the South Australian Attorney-General under statute and *Wainohu* concerned a decision made by a NSW Supreme Court judge acting persona designata.

7 The phrase "jurisdictional error" was used to describe the scope of the entrenched supervisory jurisdiction in *Totani* (2010) 242 CLR 1 at [26] per French CJ and Kiefel J and at [268] per Heydon J.

8 *Craig v The State of South Australia* (1995) 184 CLR 163 at 177 per Brennan, Deane, Toohey, Gaudron and McHugh JJ. See also *Kirk* (2010) 239 CLR 531 at 573-574 [72]; *Edwards v Santos* [2011] HCA 8 at [46].

Failure or refusal to exercise jurisdiction is the paradigm case for a grant of mandamus – an order which, like prohibition, is understood to lie for the correction of jurisdictional error.[9]

12. The proposition that the supervisory jurisdiction of the State Supreme Courts extends to granting mandamus in cases of failure to exercise jurisdiction is supported by the jurisprudence underlying *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 and the jurisprudence of the Supreme Courts following that case.

(a) In *Willan* the jurisdiction of the Supreme Court of Victoria was equated with that of the Court of Queen's Bench.[10] Mandamus issued out of that Court had been, since at least the eighteenth century, the principal means by which the carrying out of ministerial duties incumbent upon administrative and judicial bodies could be secured.[11]

(b) At least since the time of *Willan*, the Supreme Courts have assumed jurisdiction to hear claims for mandamus. For example, in 1878 mandamus was issued out of the Supreme Court of New South Wales to compel justices to receive certain evidence that they had rejected.[12] In 1880, mandamus was issued out of the Supreme Court of South Australia to compel a magistrate to enquire into a complaint under the *Destitute Persons Relief Act, No.26 of 1872*.[13] In the same year, mandamus was issued to the Adelaide Licensing Bench to compel it to hold an adjourned meeting to hear an application for a hotel licence.[14]

(c) *Willan* has been applied and otherwise followed in State courts in claims for prohibition,[15] certiorari[16] and mandamus. In *Sankey v Whitlam* [1977] 1 NSWLR 333, the New South Wales Court of Appeal considered the availability of mandamus in a case where a magistrate had declined to exercise his jurisdiction further on the ground of apprehended bias. Citing *Willan*, the Court rejected a submission that the correctness of the magistrate's decision not to continue to sit was not examinable by mandamus.[17] The Court correctly recognised that the logic of *Willan* extended to situations where there had been a failure to exercise jurisdiction. The availability of mandamus to correct a failure to exercise jurisdiction was simply the corollary of the availability of prohibition to prevent an inferior court

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9 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633 (Gaudron and Gummow JJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2008) 228 CLR 651 at [70] 675 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

10 (1874) LR 5 PC 417, 440, 442.

11 See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed 1995), 631; Wade and Forsyth, *Administrative Law* (10th ed 2009), 521.

12 *Ex parte Himmelhoch* (1878) SCR NS (NSW) 247. Two cases are reported from 1876 in which mandamus was refused, without any doubt being cast upon the Court's power to grant the writ in an appropriate case: *Ex parte Cox* (1876) 14 SCR (NSW) 287 and *Ex parte Krefft* (1876) 14 SCR (NSW) 446.

13 *Gilbey v Stanton* (1880) 14 SALR 64.

14 *In re Linley Hurst Lamb* (1880) 14 SALR 128.

15 *Amalgamated Society of Carpenters and Joiners, Australian District v Haberfield Pty Ltd* (1907) 5 CLR 33 at 49 (O'Connor J).

16 *See, e.g., R v Visiting Justice at HM Prison, Pentridge, Ex parte Walker* [1975] VR 883; *R v The President of Industrial Commission; Ex parte Australian Theatrical and Amusement Employees Association (SA Branch)* (1986) 43 SASR 434 at 439 (Olsson J).

17 [1977] 1 NSWLR 333 at 344-345 (Moffitt P; Reynolds JA agreeing).

from proceeding where it has purported to exercise a jurisdiction that it does not have, noted in *Willan*.[18]

13. Accordingly, if the alleged error which the Applicant seeks to agitate in the Supreme Court is characterised as a failure to exercise jurisdiction (as the Full Court apparently characterised it)[19], the case is one which the Supreme Court cannot be precluded from determining. This is so whether or not the Commission is a court, and whether or not that otherwise bears on the classes of error that would or would not go to its jurisdiction.[20]

14. The alleged error which the Applicant seeks to agitate in the Supreme Court is properly characterised as a failure to exercise jurisdiction. The complaint the Applicant seeks to pursue is properly understood as one of failure to exercise, or wrongful denial of, jurisdiction. This is despite the fact that the Full Commission heard and refused the appeal to it and might thus be said to have exercised the jurisdiction conferred on it by s 207 of the *Fair Work Act*. In dismissing that appeal the Full Commission "upheld" – ie, affirmed – "the Commissioner's decision that the Commission does not have jurisdiction to intervene".[21] The effect of that affirmation was that the Commission (however constituted) would not exercise the jurisdiction which the Applicant asserts it had under s 26(c) of the Act to resolve a "dispute". The position is analogous to one where a review tribunal affirms an administrative decision, leaving the original decision as the operative one.[22]

15. Section 206 of the Fair Work Act is therefore invalid to the extent that it purports to preclude a challenge in the Supreme Court to a determination of the Commission on the ground of a failure to exercise jurisdiction. The result is that s 206 does not preclude the challenge to the Commission's decision which the Applicant seeks to pursue in the Supreme Court. That conclusion is inconsistent with statements in *PSA v FCU* (insofar as s 206 was construed as precluding such a challenge, with no argument having been raised as to its validity), but there is no need to reconsider that decision, because the Commissioner's approach was in that case held to be open to challenge.

16. The present case does not require consideration of the distinction drawn in *Craig v The State of South Australia* (1995) 184 CLR 163 (***Craig***) between the jurisdiction of courts of law on the one hand, and administrative tribunals on the other. As this Court recognised in *Kirk*, that distinction is informed by an assumption that a distinction can readily be made between a court and an administrative tribunal.[23] If that issue did arise, the Commonwealth would submit that the jurisdiction of a decision-making body, whether a court or an administrative tribunal, is in every case to be determined by the proper construction of the statute that defines that jurisdiction.[24] The characterisation (express or implicit) of the body as a court or tribunal and the conferral of judicial or non-judicial powers may heavily influence the

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18 (1874) LR 5 PC 417 at 444-445.

19 [2011] SASCFC 14 at [16]-[17] per Doyle CJ.

20 Cf *Kirk* 239 CLR 531, 572-573 [67]-[70].

21 [2010] SAIRComm 11 at [32].

22 *Kim v Minister for Immigration and Citizenship* (2008) 167 FCR 578 at 583 [23].

23 (2010) 239 CLR 531 at 573 [69].

24 *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [5], [23], [55].

question whether or not a particular error of law has the effect of taking a particular decision made by that body beyond its statutorily defined jurisdiction.[25]

D. Application of a general authority to the specific case in the face of a contrary specific authority

17. The Full Court of the Supreme Court of South Australia held that it was not open to it to hold that the High Court's earlier decision in *PSA v FCU* had been "reversed" by *Kirk*, citing several authorities of this Court.[26]

18. Of course, there was no question of the actual decision in *PSA v FCU* having been reversed since, as noted above, the decision of the Commission in that case was held to be amenable to review. Rather, the Full Court evidently considered itself to be bound by the considered *dicta* of all members of the Court in *PSA v FCU* to the effect that s 95 (the direct predecessor of s 206) did not on its proper construction permit review for failure to exercise jurisdiction.[27] Apart from the effect of the later decision in *Kirk*, that was clearly an appropriate position for the Full Court to take.[28] The issue that caused difficulty was whether *Kirk* required a different approach.

19. As to the authorities upon which the Full Court relied:

(a) In *Jacob v Utah Construction and Engineering Pty Ltd* (1966) 116 CLR 200, the High Court had previously held the regulation under consideration to be valid. The validity of the regulation was argued to be inconsistent with the reasoning of the Judicial Committee of the Privy Council in a later case. Barwick CJ said:[29]

> It is not, in my opinion, for a Supreme Court of a State to decide that a judicial decision of this Court precisely in point ought now to be decided differently because it appears to the Supreme Court to be inconsistent with reasoning of the Judicial Committee in a subsequent case. If the decision of this Court is to be overruled, it must be by the Judicial Committee, or by this Court itself. It cannot be treated by a Supreme Court as if it were overruled. The matter is, of course, different where this Court's decision is not precisely in point and comparison has to be made merely between two lines of reasoning..."

It was held that the reasoning of the Privy Council had not in fact overruled the previous High Court decision.

(b) In *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at [17], this Court criticised a statement by the Supreme Court of New South Wales that it was not bound to follow *Yerkey v Jones* (1939) 63 CLR 649, on account of doubts expressed in more recent cases about the assumption on which the principle in *Yerkey v Jones* was founded, and that the principle had only been adhered to by one judge in any event. This Court not only disagreed with that characterisation of the adherence to the principle, but said:[30]

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25 *Parisienne Basket Shoes v Whyte* (1938) 59 CLR 369 at 375-376 (Latham CJ); 384 (Starke J); 389; 392 (Dixon J).

26 [2011] SASCFC 14 at [6] (Doyle CJ; Duggan and Vanstone JJ agreeing).

27 (1991) 173 CLR 132, 142, 148, 160-161, 164-165.

28 Cf e.g. *Haylen v NSW Rugby Union Ltd* [2002] NSWSC 114 at [44].

29 (1966) 116 CLR 200 at 207.

30 Citing *Jacob v Utah Construction and Engineering Pty Ltd* (1966) 116 CLR 200 at 207.

> It should be emphasised that it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled.

(c) Finally, in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, the plurality considered references to certain United Kingdom cases that on one view might be said to take a broader view of the admissible background to a contract than was considered to be the case in *Codelfa*. They considered it unnecessary to consider whether that was the case, and if so, which view should be preferred. They added:[31]

> Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*.

20. Each of these cases is concerned with the question whether reasoning in a later case, expressed at some level of generality and therefore open to some interpretation (or, as in the case of *Royal Botanic Gardens*, where the reasoning is not binding), can be invoked to displace earlier, binding authority that actually disposes of the particular question under consideration. There are good reasons why earlier, binding authority should not be taken to be displaced by such reasoning, including that the scope of the reasoning may not have been fully defined, or its application may be genuinely uncertain.

21. However, a distinction should be drawn between the impermissible practice of relying on reasoning at some level of generality in a subsequent case to extrapolate inconsistency with earlier, binding authority, and the necessary application of a subsequent authority which, while not addressing directly the particular question considered by the earlier authority, is expressed with sufficient authority and clarity to make the correctness of the earlier case impossible to maintain. The Full Court of the Supreme Court should have asked itself whether the application of the principle in *Kirk* was of the latter character. If it decided that it was, it should have then proceeded to determine the matter.

22. In *Kirk*, it was stated unequivocally:[32]

> Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.

23. It was open to the Supreme Court to decide the case on a basis which applied *Kirk* without presuming to treat *PSA v FCU* as overruled. *PSA v FCU* was binding only as to the construction of s 206, no issue of validity having been raised in that case. *Kirk* establishes that, if construed in accordance with *PSA v FCU*, s 206 is invalid. The proper conclusion for the Supreme Court, giving effect to both decisions, was therefore that s 206 did not validly preclude review.

24. Doyle CJ recognised that the validity of the privative clause had not been considered in *PSA V FCU*.[33] However, he approached the question from the premise:

> The decision by the High Court in [*PSA V FCU*] decides that this Court does not have jurisdiction.

25. That is so; but the decision was reached as a matter of construction, not validity. The effect of *Kirk* is that notwithstanding the construction that would deny the Supreme

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31 (2002) 240 CLR 45 at 62-63 [39], citing *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403[17].

32 (2010) 239 CLR 531 at 581 [100].

33 [2011] SASCFC 14 at [5].

Court jurisdiction, the privative clause is invalid and cannot have that effect. The proper course for the Supreme Court to take was to apply that principle.

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