IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A7 of 2011

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

Applicant

AND: **INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA**

First Respondent

AND: **CHIEF EXECUTIVE, DEPARTMENT FOR PREMIER AND CABINET**

Second Respondent

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

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

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

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the Second Respondent and the Attorney-General for South Australia.

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Filed on behalf of: Attorney-General for the State of Queensland

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V. ARGUMENT

5. Queensland adopts the submissions of the Attorney-General for Victoria regarding the principles in *Kirk* v *Industrial Court of New South Wales* ('*Kirk*')[1] and their lack of application to a Supreme Court's ability to supervise tribunals for a failure to exercise jurisdiction.[2]

6. Queensland makes the following further submissions.

7. In *Project Blue Sky Inc v Australian Broadcasting Authority*, this Court decided that describing statutory provisions as mandatory or directory provided no test for determining the consequences of non-compliance with a statutory criterion.[3] Instead, it held that whether non-compliance resulted in invalidity would be answered by discerning the legislative purpose, and a court had to consider language of the relevant provisions and the scope and purpose of the statute.[4]

8. In the same case, this Court also addressed the issue of reconciling statutory provisions that were contradictory or were in tension in this way:[5]

> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

9. Both these principles are applicable to the task of determining the effect of a privative clause on a failure to comply with an express or implied statutory requirement. In *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157/2002*'), Gleeson CJ identified the 'essential problem' posed by privative clauses as the inconsistency between a provision in a statute conferring a limited power or authority and a provision which appeared to mean that excess of power or

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1 (2010) 239 CLR 531.

2 Submissions on behalf of the Attorney-General for Victoria, paras 37-50.

3 (1998) 194 CLR 355 at 374-375 [41] (Brenann CJ), 390-391 [93] (McHugh, Gummow, Kirby and Hayne JJ).

4 (1998) 194 CLR 355 at 391 [93] (McHugh, Gummow, Kirby and Hayne JJ). See also *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 156-157 [23] (Gummow, Hayne, Heydon and Crennan JJ).

5 (1998) 194 CLR 355 at 380-381 [70]-[71] (citations omitted) (McHugh, Gummow, Kirby and Hayne JJ).

authority could not be prohibited.[6] This problem was to be resolved not by reading the privative clause literally—which would have spelt invalidity—but by reconciliation.[7] As his Honour explained: [8]

> Giving effect to the whole of a statute which confers powers or jurisdiction, or imposes duties, or regulates conduct, and which also contains a privative provision, involves a process of statutory construction described as reconciliation. *The outcome of that process may be that an impugned act is to be treated as if it were valid.*

10. The approach of Gaudron, McHugh, Gummow, Kirby and Hayne JJ was similar.[9]

11. *Kirk* did not herald a new approach to the task of reconciliation thus posed. Nothing in that case mandates a literal interpretation of any State privative clause purporting to deny the availability of, say, certiorari and prohibition.[10]

12. It follows that, although a Supreme Court's power to grant relief on the basis of jurisdictional error is constitutionally entrenched, a State privative clause may mean that errors that would otherwise be treated as jurisdictional instead become errors within jurisdiction.[11] That result is consistent with earlier authorities on federal and State privative clauses.[12]

13. Section 206 of the *Fair Work Act 1994* (SA) ('the Fair Work Act') purports to make determinations of the Commission—including refusals to make a decision[13]—final and to prevent their being challenged, appealed against or reviewed by the Supreme Court except on the ground of 'an excess or want of jurisdiction'. In construing the predecessor to s 206, all members of this Court in *Public Service Association (SA) v Federated Clerks' Union* accepted that the

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6 (2003) 211 CLR 476 at [17].
7 (2003) 211 CLR 476 at [17].
8 (2003) 211 CLR 476 at [19] (emphasis added).
9 (2003) 211 CLR 476 at [60], [69]-[70].
10 See (2010) 239 CLR 531 at [94].
11 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194 (Brennan J); *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 630-631 (Gaudron and Gummow JJ); *Plaintiff S157/2002* (2003) 211 CLR 476 at [19] (Gleeson CJ), [69] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
12 *Baxter v NSW Clickers' Association* (1909) 10 CLR 114 at 132 (Griffith CJ), 148-149 (O'Connor J), 162 (Isaacs J); *Morgan and Australia Workers' Union v Ryland Bros (Australia) Ltd* (1927) 39 CLR 517 at 524 (Isaacs ACJ and Powers J); *R v Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598 at 615-617 (Dixon J); *R v Murray; Ex Parte Proctor* (1949) 77 CLR 387 at 398-400 (Dixon J); *Houssein v Under Secretary of Industrial Relations & Technology (NSW)* (1982) 148 CLR 88 at 94-95 (Stephen, Mason, Aickin, Wilson and Brennan JJ). See also *Bank of New South Wales v United Bank Officers' Association and Court of Industrial Arbitration* (1921) SR (NSW) 593 at 615-617 (Pring J), 617 (Wade J).
13 Fair Work Act, s 4 sv 'determination' and 'decision'.

ground of 'excess or want of jurisdiction' did not include a failure or refusal to exercise jurisdiction.[14] Justice McHugh, for example, said:[15]

> [A]n inferior court or tribunal can be said to have acted in excess or want of jurisdiction only when the relevant act was done in breach of the conditions which define the ambit of the powers and authorities of that court or tribunal. That being so, a mere failure to exercise jurisdiction cannot constitute an "excess or want of jurisdiction".

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14. By omitting to include a failure or refusal to make a determination within the category of cases which are subject to review in the Supreme Court, it is submitted that the legislature reinforced the conclusion that there was no duty imposed upon the Commission to exercise its jurisdiction.

15. The powers to call voluntary conferences and compulsory conferences under s 200 and 201 only arise if there is 'an industrial dispute'. That expression is defined by s 4 as 'a dispute, or a threatened, impending or probable dispute, about an industrial matter'. While the existence of a dispute about an industrial
20 matter may be obvious in some cases, in others, particularly where a judgment must be made about the existence or non-existence of an 'impending or probable dispute', the answer might not be so clear.

16. Further, the Fair Work Act not only permits such a fine judgment to be made but it also qualifies the Commission's powers of intervention under ss 82(3), 197, 200(1) and 201(1) by the verb 'may'[16] rather than 'must'; and it expressly provides that the Commission might decline further hearing if it is not, in the opinion of the Commission, 'in the public interest' to continue.[17] In this statutory context, it is not difficult to construe s 206 as giving force to the
30 absence of any duty on the part of the Commission to exercise its jurisdiction. This is particularly so where the Commission may always re-open a decision that it has no jurisdiction[18] and where, in any case, no order of the Supreme Court could compel the Commission to resolve a dispute but only to engage in an attempt. The contrast with the position of an inferior court or tribunal required to determine a matter one way or the other is obvious.

17. It follows that, by excluding a mistaken denial of jurisdiction from the scope of judicial review, s 206 indicates that the Commission has no duty to exercise its

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14 (1991) 173 CLR 132 at 142-143 (Brennan J), 149 (Deane J), 160 (Dawson and Gaudron JJ), 164-165 (McHugh J).

15 *Public Services Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 164-165.

16 Meaning, it is submitted, 'may': see *Acts Interpretation Act 1915* (SA), s 34: 'Where, in any Act passed after the first day of January, 1873, the word "may" is used in conferring a power, it implies that the power may be exercised or not, at discretion'.

17 Fair Work Act, s 168(b).

18 Fair Work Act, s 174.

jurisdiction to resolve industrial disputes or to hear and determine any matter or thing arising from or relating to an industrial matter.[19]

18. The inability of the Supreme Court to review a decision by a body like this one, whether it was legally right or legally wrong, to decline to undertake the task of settling an industrial dispute can hardly have the effect of denying 'a defining characteristic' of a Supreme Court.

Dated: 22 August 2011

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19 Fair Work Act, ss 26(c) and (d).