IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A7 of 2011

BETWEEN:

**PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED**

Appellant

and

**INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA**

First Respondent

and

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

Second Respondent

# APPLICANT'S REPLY TO WRITTEN SUBMISSIONS OF ATTORNEY-GENERALS FOR VICTORIA, WESTERN AUSTRALIA AND QUEENSLAND INTERVENING



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1. The Submissions of Victoria (Queensland adopting) and Western Australia suffer from misconceptions as to the Applicant's case.

Victoria (Queensland adopting)

2. The Victorian Submissions proceed on the basis that the Applicant is asserting a ***mere*** failure or refusal to exercise jurisdiction in circumstances where there is a perceived discretion as to whether or not to exercise jurisdiction: refer Victorian Submissions at paras 6, 7, 8, 17, 20, 39, 42, 47, 48 and 49.[1] The Queensland Submission at para 14 is to a similar effect.

3. The Applicant's case is and has always been that in this instance the Commission ***did not*** accept that it had jurisdiction.[2] The Commission ***wrongly*** determined that a necessary jurisdictional fact was not present (i.e. existence of an industrial dispute), thereby ***wrongly*** determining that it did not have jurisdiction: refer Applicant's Written Submissions, paras 9, 10, 12 (*"mistakenly denied the existence of jurisdiction"*), 13 and 29.

4. The Victorian Submission contends (paras. 17, 48) that upholding privative clauses to the extent that they prevent review of a failure or refusal to exercise jurisdiction does not create the *"islands of immunity"* spoken of by this Court in *Kirk*. The Applicant contends that there is no basis for drawing a distinction between the classes of jurisdictional error in this regard. Put differently, *"islands of immunity"* can just as easily be created by inferior courts and tribunals mistakenly denying the existence of jurisdiction and the affected party having no right of review.

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1 Cf. para. 27. WA appears to make the same error: it refers to a *"failure to exercise jurisdiction"* at paras 5, 27 and 45.

2 The Victorian Submission appears to proceed (para. 20) on the contrary basis that the Commission recognized that it had jurisdiction but declined to exercise it.

5. Further, the Victorian Submission suffers from the same misconception as that of WA in assuming that the Commission has a discretion as to whether or not to exercise the jurisdiction to *"resolve industrial disputes"* (FWA, s.26(c)).[3]

Western Australian Submission

6. The principal basis of WA's Submission is that the Industrial Relations Commission has no duty to exercise jurisdiction; in the event it is said that this was not a case where the writ of mandamus would lie: paras 5(b), 15, 26, 28-38, 40, 41 and 43.

7. WA considers the role of the Commission from paras 44-66. At para 45 WA seeks to use the meaning of the phrase *"excess or want of jurisdiction"* which it advances, as a tool in the construction exercise. In doing so it *"puts the cart before the horse"*.

8. Paras 57-63 purport to consider provisions of the FWA *"pertinent to the question of whether there is a duty upon the Commission to exercise its jurisdiction"*. Sections of the FWA not cited by WA are:

8.1 s.3(1) and particularly objects (g) and (h);

8.2 s.26(b);

8.3 Chapter 5, Part 1

Divisions 3, 4 (particularly s.155), 5, 6 (which includes ss.168 and 174 referred to by WA) and 7 (particularly s.176(2));

8.4 Chapter 5, Part 3

Division 1 (which includes s.192 referred to by WA but also s.193 relating back to s.3 and the objects);

Division 2, and in particular s.196;

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[3] Victoria, paras 17, 47.

Division 3, and in particular ss.201 and 202.

9. The Applicant says that the Act imposes a duty upon the Commission to exercise its powers to achieve settlement of an industrial dispute. The Act contemplates that in the particular case the Commission may, having undertaken the tasks of mediation, conciliation and/or arbitration decline to make any orders. In that sense a residual discretion may arise. The Act contemplates however that when jurisdiction is accepted, the Commission will act. That was not the situation in the case before the Commission the subject of the judicial review application.

Queensland Submission

10. Queensland's Submission at para. 12, taken at face value, denies this Court's approach in *Kirk*. None of the cases relied upon by Queensland in footnote 11 consider the constitutional validity of the subject privative clause. In the context of the case at bar, a wrongful determination as to the existence of a constitutional fact (here, the existence of an industrial dispute) could never be characterized as other than a jurisdictional error.

11. The Queensland Submissions at paras. 14-16 are not inconsistent with the Applicant's position as stated in para. 8 supra.

12. The Applicant rejects the suggestion in para 17 of the Queensland Submission that it *"follows....."*. For the first time Queensland introduces the notion of a "mistaken" denial of jurisdiction. Hitherto it has spoken of a *"mere denial"* (para 13) or a *"failure or refusal"*(paras 13, 14).

Concluding Submission of Applicant

13. The Applicant asserts that this Court in *Kirk* recognised the jurisdiction of the States' Supreme Courts at Federation to control by the prerogative writs jurisdictional error in lower courts and tribunals.[4]

14. This Court in *Kirk* was not attempting to freeze in time, i.e. 1901, what were the limits of jurisdictional error. As with all branches of the law there will be development of the law over time. The notion of jurisdictional error, and what is encompassed by that term, will and has been refined.

15. The phrase *"excess or want of jurisdiction"* entered the statute books in South Australia via *Industrial Conciliation and Arbitration Act* 1972, s.95. No similar provision existed in either the Industrial Codes of 1920 or 1967. The Second Reading Speech for the 1972 Act sheds no light on the provenance of the term or its intended meaning. There is no basis for a submission that at Federation the supervisory jurisdiction of the State Supreme Courts was in some way confined so as to exclude correction of a failure to exercise jurisdiction consequent upon a wrongful determination of the existence of a jurisdictional fact.[5] Furthermore, any attempt by the South Australian Parliament in 1972 to limit that State's Supreme Court's role in correcting jurisdictional error is exactly what this Court in *Kirk* ruled was not open to a State's legislature.[6]

Dated the 29th day of August 2011

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**PA Heywood-Smith QC**
**(Senior Counsel for the Applicant)**

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4 See (2010) 239 CLR 531 at [97].

5 *Willan* speaks of a "*manifest defect in jurisdiction*" without limiting the class to an '*excess or want of jurisdiction*".

6 (2010) 239 CLR 531 at [96].