HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S106/2009

GRAEME JOSEPH KIRK & ANOR	APPELLANTS
AND	
INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES & ANOR	RESPONDENTS

Matter Nos S347/2008 & S348/2008

KIRK GROUP HOLDINGS PTY LTD & ANOR	APPLICANTS
AND	
WORKCOVER AUTHORITY OF NEW SOUTH WALES (INSPECTOR CHILDS)	RESPONDENT

Kirk v Industrial Relations Commission of New South Wales
Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)
[2010] HCA 1
3 February 2010
S106/2009, S347/2008 & S348/2008

ORDER

Matter No S106/2009

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 3 July 2008 and in their place order that:*

    (a) *the orders of the Industrial Court of New South Wales made on 9 August 2004, and on 24 January 2005 and the orders of the Full*

Bench of the Industrial Court of New South Wales made on 15 November 2006, and on 8 May 2007 be quashed; and

(b) the second defendant, the WorkCover Authority of New South Wales, pay the plaintiffs' costs.

3. Second respondent to pay the appellants' costs in this Court.

4. Amend the title of the proceedings in this Court by deleting "Industrial Relations Commission of New South Wales" and substituting "Industrial Court of New South Wales".

Matter No S347/2008

Application for special leave to appeal dismissed.

Matter No S348/2008

Application for special leave to appeal dismissed.

On appeal from the Supreme Court of New South Wales and the Industrial Court of New South Wales

Representation

G J Hatcher SC with C S Ward for the appellants in S106/2009 and the applicants in S347/2008 and S348/2008 (instructed by David Lardner Lawyers)

Submitting appearance for the first respondent in S106/2009

M G Sexton SC, Solicitor-General for the State of New South Wales and J V Agius SC with P M Skinner and A M Mitchelmore for the second respondent in S106/2009, for the respondent in S347/2008 and S348/2008 and intervening in each matter on behalf of the Attorney-General for the State of New South Wales (instructed by WorkCover Authority and Crown Solicitor (NSW))

S J Gageler SC, Solicitor-General of the Commonwealth with S J Free intervening in each matter on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with S A McDonald intervening in each matter on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

S G E McLeish SC with C O H Parkinson intervening in each matter on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Kirk v Industrial Relations Commission of New South Wales
Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)

Occupational health and safety – Statutory duty – *Occupational Health and Safety Act* 1983 (NSW), ss 15 and 16 provided duties of employer to "ensure the health, safety and welfare at work of all the employer's employees" and 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" – Section 53(a) provided a defence where it was "not reasonably practicable ... to comply with the provision of this Act" – Breach of duty criminal offence – Statement of offences as particularised did not identify what measures defendant could have taken but did not take to fulfil duty – Whether statement of offence must identify act or omission said to constitute contravention of s 15 or s 16 – Whether failure to charge act or omission an error of law – Whether error on the face of the record – Whether jurisdictional error.

Evidence – Competence and compellability of accused persons – Joint trial – *Industrial Relations Act* 1996 (NSW), s 163(2) required hearing to be conducted in accordance with the rules of evidence – *Evidence Act* 1995 (NSW), s 17(2) provided that a defendant is not competent to give evidence as witness for prosecution – No power of Industrial Court of New South Wales to dispense with s 17(2) – Defendant called as witness for prosecution – Whether jurisdictional error – Whether error on the face of the record.

Administrative law – Jurisdictional error – Error of law on the face of the record – Whether orders in nature of certiorari available.

Statutes – Privative clause – Industrial Court of New South Wales – Construction of privative clause – Whether privative provision effective to prevent review for jurisdictional error – Whether effective to prevent review for error of law on the face of the record – Relevance of exclusion of right to appeal to Supreme Court of New South Wales and to High Court of Australia.

Constitutional law (Cth) – Chapter III – State Supreme Courts – Power of State Parliament to alter defining characteristic of Supreme Court of a State – Supervisory jurisdiction – Whether a defining characteristic is power to confine inferior courts and tribunals within limit of their authority to decide.

Procedure – Costs – Appellate court exercising supervisory not appellate jurisdiction – Appellate court makes orders in nature of certiorari – Whether appellate court has power to make orders in place of orders quashed.

Words and phrases – "act or omission", "certiorari", "description of offence", "error of law on the face of the record", "jurisdictional error", "privative provisions", "reasonably practicable", "superior court of record", "Supreme Court of a State", "the record".

Constitution, Ch III, ss 71, 73, 75(v).
Criminal Procedure Act 1986 (NSW), s 11.
Evidence Act 1995 (NSW), ss 17(2), 190.
Industrial Relations Act 1996 (NSW), ss 179, 163(2).
Occupational Health and Safety Act 1983 (NSW), ss 15, 16, 53.
Supreme Court Act 1970 (NSW), s 69.
Supreme Court (Summary Jurisdiction) Act 1967 (NSW), ss 4, 6.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. The Court heard together three related proceedings. The first (No S106 of 2009) is an appeal from the Court of Appeal of the Supreme Court of New South Wales. The ultimate question in the appeal is whether the Court of Appeal erred in refusing orders in the nature of certiorari to quash the orders for the convictions of the appellants in what is now the Industrial Court of New South Wales ("the Industrial Court")[1] for offences against the *Occupational Health and Safety Act* 1983 (NSW) ("the OH&S Act")[2].

2 The other two proceedings (Nos S347 and S348 of 2008) are applications for special leave to appeal against, respectively, a decision of the Full Bench of the Industrial Court given on 15 November 2006 and a subsequent decision of the Full Bench given on 8 May 2007.

3 If the appeal succeeds and the convictions of the appellants are quashed by order of this Court, the occasion for detailed consideration of the special leave applications will be removed and they should be dismissed. In the reasons which follow attention is given first to the disposition of the appeal and the conclusion reached is that the appeal should be allowed and the convictions quashed.

4 The appellants contend that in ordering their convictions the Industrial Court fell into jurisdictional error in several respects and that the Court of Appeal accordingly should have made an order to quash. They further contend that upon the proper construction of the relevant legislation there was no "privative provision" effective to exclude the exercise of that jurisdiction by the Court of Appeal. In construing such a privative provision the appellants point to the jurisdiction of the Supreme Court at federation as superintendent of tribunals and other courts of New South Wales, and to the avenue for appeal to this Court from

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1 The name of the Industrial Relations Commission in Court Session was changed to the Industrial Court of New South Wales in 2005: *Industrial Relations Act* 1996 (NSW) ("the IR Act"), s 151A as inserted by the *Industrial Relations Amendment Act* 2005 (NSW), s 3 and Sched 1, cl 4. Although the relevant prosecutions were commenced before the change of name, it will be convenient to adopt the abbreviation "Industrial Court" throughout these reasons.

2 The *Occupational Health and Safety Act* 1983 (NSW) ("the OH&S Act") was repealed by the *Occupational Health and Safety Act* 2000 (NSW), s 139, Sched 1 with effect from 1 September 2001.

decisions of the Supreme Court which is mandated by s 73(ii) of the Constitution[3].

The facts

5 The appellant company, Kirk Group Holdings Pty Ltd ("the Kirk company"), was the owner of a farm near Picton, New South Wales. Mr Kirk was a director of that company, but did not take an active part in the running of the farm. He had no farming experience and was not in good health. He left the day to day operation of the farm to Mr Graham Palmer, who was employed by the Kirk company as a farm manager. Mr Palmer had run a large property of his own and Mr Kirk considered him to be a very competent person.

6 An All Terrain Vehicle ("the ATV") was purchased by the Kirk company in June 1998 on Mr Palmer's recommendation. On 28 March 2001, the date the subject of the offences, Mr Palmer used the ATV to deliver three lengths of steel to fencing contractors who were working in the far back paddock of the farm. He secured the steel to carry racks at the rear of the ATV. A formed road led to the area where the contractors were working. Mr Palmer left that road and proceeded on the ATV down the side of a hill. There was no formed track on the slope and it was steep. It was unnecessary for Mr Palmer to take this route given the existence of the road. At first instance, in the Industrial Court, Walton J observed that nobody knew why Mr Palmer had elected to drive the ATV down the side of the hill. The ATV overturned and Mr Palmer was killed.

The OH&S Act

7 Part 3 of the OH&S Act contained provisions relating to the health, safety and welfare of employees and other persons at a workplace. Division 1 of Pt 3 concerned the general duties of employers and employees in that regard. The offences in question on this appeal involve contraventions of the duties imposed upon employers by ss 15 and 16, which appeared in Div 1[4]. An offence against

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3 *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at 433 [55]; [2004] HCA 61.

4 The current provisions appear in the *Occupational Health and Safety Act* 2000, s 8.

the sections was punishable upon conviction by a penalty[5]. The maximum penalty under the Act was two years imprisonment[6].

8 Part 6 of the OH&S Act concerned offences against the Act. Proceedings for an offence were to be dealt with summarily and could be brought before the Industrial Court[7]. Section 50 in Pt 6 dealt with the liability of directors and persons concerned with the management of corporations for offences by corporations. Section 53 provided for defences to proceedings for offences against the Act.

9 Section 15 commenced with the following general statement of an employer's duty:

> "(1) Every employer shall ensure the health, safety and welfare at work of all the employer's employees."

Sub-section (2) provided examples of what may amount to a contravention of that obligation:

> "(2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if the employer fails:
>
> (a) to provide or maintain plant and systems of work that are safe and without risks to health,
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> (b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances,

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5 There is no general offence provision in the OH&S Act. The penalty specified at the end of ss 15 and 16 has this effect: see *Crimes (Sentencing Procedure) Act* 1999 (NSW), s 18.

6 As an additional penalty for a second offence: see OH&S Act, ss 47(2) and 51A.

7 OH&S Act, s 47(1); and see IR Act, s 153(1)(a). The Industrial Court was to be constituted by a judicial member: IR Act, s 151(1).

(c) to provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of the employer's employees,

(d) as regards any place of work under the employer's control:

(i) to maintain it in a condition that is safe and without risks to health, or

(ii) to provide or maintain means of access to and egress from it that are safe and without any such risks,

(e) to provide or maintain a working environment for the employer's employees that is safe and without risks to health and adequate as regards facilities for their welfare at work, or

(f) to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information:

(i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health, or

(ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used."

Section 16(1) referred to the obligations of an employer to persons present at the workplace:

"(1) 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."

10 A few observations may be made at this point. The obligation upon the employer is expressed in terms personal to that employer. It is the employer who

must ensure the health, safety and welfare of employees at work. The obligation is the kind of non-delegable duty spoken of in *Kondis v State Transport Authority*[8]. It is not expressed in terms of the standard recognised by the common law, to take reasonable care. It is higher. So much is evident from the requirement "to ensure" the health, safety and welfare of employees or that persons are not exposed to risks to their health and safety at the place of work. The exclusion of the common law standard is confirmed by the terms of the defences provided by s 53, to which reference will shortly be made.

11 Section 15(2) identified, in general terms, some types of measures which an employer may need to take in order to ensure the health, safety and welfare of employees. The list is not exhaustive. What measures are necessary to be taken will depend upon the particular circumstances prevailing at the workplace, what activities are there conducted, what machinery, plant or substances are involved, the tasks undertaken by the employees and the skills of the employees in question, to mention but a few factors. What the terms of sub-s (2) make plain is that an employer must identify risks to the health, safety and welfare of employees at the workplace and take steps to obviate those risks. Thus where plant and machinery are used at a workplace, an employer must keep them in good order, where to do otherwise would pose a risk to employees' health and safety, and must implement systems concerning their use so as to obviate any such risk[9]. An employer is required to identify risks to employees which might be overcome by the provision of information, instruction, training or supervision and then to take such action in that regard "as may be necessary"[10]. An employer is to "take such steps as are necessary" to make available information concerning the use for which plant is designed and conditions necessary for its safe use[11]. Section 16 required similar considerations and measures to be undertaken with respect to non-employees present at the workplace.

12 Sections 15 and 16 comprehend that the generally stated duty is contravened when a measure should have been taken by an employer to obviate an identifiable risk. That those provisions are contravened where there has been

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8 (1984) 154 CLR 672; [1984] HCA 61.

9 s 15(2)(a).

10 s 15(2)(c).

11 s 15(2)(f)(i).

a failure, on the part of an employer, to take a particular measure, is confirmed by references in ss 15 and 16 to what constitutes an offence. Sections 15(4) and 16(3) referred to "the act or omission concerned" which "constituted a contravention" of s 16 or s 15 respectively[12]. Section 49 in Pt 6, which concerned the time for instituting proceedings for offences, provided that they must be instituted within two years "after the act or omission alleged to constitute the offence".

13 To this point reference has been made to the identification of what should have been done by an employer, which will arise in a case such as this, where an employee has been harmed. It is not necessary that harm has already befallen an employee for an offence to have been committed. Where an inspector authorised under the OH&S Act identifies a risk to the health, safety or welfare of employees present at a workplace, which an employer has not addressed, s 15 may be contravened. An obvious example would be the failure to guard dangerous machinery. Upon conviction of such an offence the Industrial Court may order the employer "to take such steps as may be specified in the order for remedying that matter" within a prescribed period, where it is "within the person's power to remedy", in addition to imposing a penalty[13]. It would be necessary for the charge to identify the "matter" to be remedied to enable such an order to be made.

14 A statement of an offence must identify the act or omission said to constitute a contravention of s 15 or s 16. It may be expected that in many instances the specification of the measure which should have been or should be taken will itself identify the risk which is being addressed. The identification of a risk to the health, safety and welfare of employees and other persons in the workplace is a necessary step by an employer in discharging the employer's obligations. And the identification of a risk which has not been addressed by appropriate measures must be undertaken by an inspector authorised to bring prosecutions under the Act[14]. But it is the measures which assume importance to any charges brought. Sections 15 and 16 are contravened where there has been a failure, on the part of the employer, to take particular measures to prevent an

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12 And see the *Occupational Health and Safety Act* 2000, s 12.

13 s 47A.

14 s 48.

identifiable risk eventuating. That is the relevant act or omission which gives rise to the offence.

15 The necessity for a statement of offence to identify the act or omission of the employer said to constitute a contravention of s 15 or s 16 is even more apparent when regard is had to the defences which were available to employers in proceedings for offences against the provisions. Section 53 provided:

> "It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:
>
> (a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, or
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> (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision."[15]

16 The scheme of this legislation stood apart from other legislation of this type in Australia. In other States the employer's obligation, to take measures for the health and safety of employees and others, was limited to the taking of such measures as were practicable[16]. This Court has held that such a provision places the onus upon the prosecution to show that the means which should have been employed to remove or mitigate a risk were practicable[17]. A feature of the legislation here in question is that where an employer is charged with an act or

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15 And see *Occupational Health and Safety Act* 2000, s 28.

16 See *Occupational Health and Safety Act* 1985 (Vic), ss 21, 22; *Occupational Health, Safety and Welfare Act* 1986 (SA), ss 19, 22; *Workplace Health and Safety Act* 1995 (Q), ss 26, 27; *Occupational Safety and Health Act* 1984 (WA), ss 19, 21, 22; *Workplace Health and Safety Act* 1995 (Tas), s 9; *Work Health Act* (NT), s 29; *Occupational Health and Safety Act* 1989 (ACT), ss 27, 28. For current provisions, see *Occupational Health and Safety Act* 2004 (Vic), ss 21, 22, 23; *Workplace Health and Safety Act* (NT), ss 55, 56, 57; *Work Safety Act* 2008 (ACT), ss 14, 15, 21.

17 *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249; [1990] HCA 41, referring to the *Occupational Health and Safety Act* 1985 (Vic).

omission which is a contravention of s 15 or s 16, it will be necessary for the employer to establish one of the defences available under s 53 in order to avoid conviction. Where reliance is placed by the employer on s 53(a), it would be necessary for the employer to satisfy the Industrial Court, to the civil standard of proof, that it was not reasonably practicable to take the measure in question. Such a defence can only address particular measures identified as necessary to have been taken in the statement of offence.

17 Section 53(a), in the context of proceedings for offences against ss 15 and 16, referred to the situation where it is not reasonably practicable for an employer to comply "with the provision of this Act". It is not to be understood as requiring an employer to negative the general provisions of ss 15 and 16 and to establish that every possible risk was obviated. It requires that regard be had to the breach of the provision which it is alleged constituted the offences. A breach or contravention of s 15 or s 16 is the measure not taken, the act or omission of the employer.

18 The duties referred to in ss 15(1) and 16(1) cannot remain absolute when a defence under s 53 is invoked. The defence allows that not all measures which may have guaranteed against the risk in question eventuating have to be taken. The measures which must be taken are those which are reasonably practicable. The term is not defined in the OH&S Act, but it may often involve a common sense assessment[18]. An understanding of the scheme of Pts 3 and 6 precludes acceptance of the appellants' contention that it is necessary to imply the common law standard of care in ss 15(1) and 16(1). The OH&S Act delimits the obligations of employers by the terms of the defences provided in s 53.

19 What was necessary to be done in connection with the health, safety and welfare of employees and others at the workplace depended upon the presence of identifiable risks and measures which could be taken to address them. The question which may follow, as to what was or was not reasonably practicable for the employer to have undertaken, is directed to the measures so alleged. It is the employer's act or omission with respect to those measures which had to be identified in the statement of any offence charged under ss 15 and 16.

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18 *Chugg* (1990) 170 CLR 249 at 260.

The charges

20 Proceedings for an offence against the OH&S Act were to be dealt with summarily by the Industrial Court[19]. Section 168(2) of the *Industrial Relations Act* 1996 (NSW) ("the IR Act") applied the *Supreme Court (Summary Jurisdiction) Act* 1967 (NSW) ("the Summary Jurisdiction Act") to such proceedings and r 217B(1) of the Industrial Relations Commission Rules 1996 (NSW) required proceedings to be commenced by an application for an order under s 4(1) of the Summary Jurisdiction Act. Section 4(1) provided that, upon an application made by a prosecutor in accordance with the rules, an order was to be made:

> "(a) ordering any person alleged in the application to have committed an offence punishable in the Court in its summary jurisdiction to appear at a time and place specified in the order to answer to the offence charged in the order".

Section 168(3)(b) of the IR Act provided that the reference to the rules in s 4 was to be taken as a reference to the rules of the Industrial Court. Those rules required the application to identify the person against whom the proceedings were brought; the Act and section under which the defendant was alleged to have committed the offence; and the nature of the offence that was alleged[20]. The Industrial Court could require the prosecutor to file an affidavit verifying the allegations made in the application[21].

21 In the present case a judicial member of the Industrial Court issued orders to Mr Kirk and the Kirk company to attend to answer the charges referred to in the application.

22 The Kirk company's offence against s 15(1) was stated in the application as:

> "… that the Defendant, on 28 March 2001, at 'Mount Hercules Farm' … a work place operated by the Defendant FAILED TO ensure the health,

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19 OH&S Act, s 47(1); IR Act, s 168(1).

20 Industrial Relations Commission Rules 1996 (NSW), r 217B(2)(c), (d) and (e).

21 Industrial Relations Commission Rules 1996, r 217B(3).

safety and welfare at work of its employees, in particular Graham George Palmer, contrary to s 15(1) …".

The following particulars were given of the offence:

"The particulars of the offence are that the Defendant failed to:

i. provide or maintain systems of work that were safe and without risks to health in relation to the operation of the Polaris All Terrain Vehicle ('ATV');

ii. provide such information, instruction, training and supervision as may be necessary to ensure the health and safety at work of its employees in relation to the operation of the Polaris All Terrain Vehicle ('ATV');

iii. to take such steps as are necessary to make available in connection with the use of any plant (namely the ATV) at the place of work adequate information about the use for which the plant is designed and about any conditions necessary to ensure that, when put to use, the plant is safe and without risks to health;

iv. ensure that the Polaris All Terrain Vehicle ('ATV') was only operated by persons with appropriate training.

v. adequately identify, assess and control risks and hazards in relation to the operation of the ATV on the farm."

The statement of the offences concluded with the allegation that, as a result of the Kirk company's failures, its employees, in particular Mr Palmer, were "placed at risk of injury" and that Mr Palmer had suffered fatal injuries.

23 The second offence, against s 16(1), read:

"… that the Defendant, being an employer, on 28 March 2001, at 'Mount Hercules Farm' … a work place operated by the Defendant FAILED TO ensure that non-employees … were not exposed to risk of injury arising from the conduct of its undertaking while they were at 'Mount Hercules Farm', contrary to Section 16(1) …".

The particulars given of that charge were:

> "The particulars of the charge are that the Defendant failed to:
>
> i. ensure that persons not in the employer's employment were 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 in relation to the operation of the Polaris All Terrain Vehicle ('ATV');
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> ii. ensure that the Polaris All Terrain Vehicle ('ATV') was only operated by persons with appropriate training; and
>
> iii. adequately identify, assess and control risks and hazards in relation to the operation of the ATV on the farm."

It was alleged that the four contractors then engaged by the Kirk company were exposed to risks to their health or safety, as a result of the Kirk company's failures.

24 Mr Kirk was charged with the same offences. Section 50(1) of the OH&S Act provided that where a corporation contravenes any provision of the Act, whether by act or omission, each director of the corporation, and each person concerned in its management, shall be deemed to have contravened the same provision unless he or she satisfies the Industrial Court that he or she was not in a position to influence the conduct of the corporation in relation to its contravention or, being in such a position, used all due diligence to prevent the contravention.

25 The statement of the offence against s 15(1) did little more than follow the words of that sub-section. The first three particulars provided of the offence simply combined the words of s 15(2)(a), (c) and (f) with a reference to the ATV. Likewise the first particular relating to the s 16(1) offence repeated the words of that sub-section and merely connected them to the operation of the ATV. Of the other two particulars provided to each charge, only that which alleged a failure to ensure that the ATV was operated by persons with appropriate training came close to any measure of specificity.

26 The common law requires that a defendant is entitled to be told not only of the legal nature of the offence with which he or she is charged, but also of the

particular act, matter or thing alleged as the foundation of the charge[22]. In *John L Pty Ltd v Attorney-General (NSW)*[23], it was explained that the older cases established that an information could be quashed as insufficient in law if it failed to inform the justices of both the nature of the offence and the manner in which it had been committed[24]. In more recent times the rationale of that requirement has been seen as lying in the necessity of informing the court of the identity of the offence with which it is required to deal and in providing the accused with the substance of the charge which he or she is called upon to meet[25]. The common law requirement is that an information, or an application containing a statement of offences, "must at the least condescend to identifying the essential factual ingredients of the actual offence"[26]. These facts need not be as extensive as those which a defendant might obtain on an application for particulars[27]. In *Johnson v Miller*, Dixon J considered that an information must specify "the time, place and manner of the defendant's acts or omissions"[28]. McTiernan J referred to the requirements of "fair information and reasonable particularity as to the nature of the offence charged"[29].

27 The acts or omissions the subject of the charges here in question had to be identified if Mr Kirk and the Kirk company were to be able to rely upon a defence under s 53. The defendant in *Johnson v Miller* was placed in a similar position. The statute in question provided that a licensee of licensed premises would be liable to a penalty if a person was present on the premises during certain prohibited hours, unless the licensee could establish one of the

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22 *Johnson v Miller* (1937) 59 CLR 467 at 489 per Dixon J; [1937] HCA 77.

23 (1987) 163 CLR 508; [1987] HCA 42.

24 *John L Pty Ltd v Attorney-General (NSW)* (1987) 163 CLR 508 at 519.

25 *John L Pty Ltd* (1987) 163 CLR 508 at 519.

26 *John L Pty Ltd* (1987) 163 CLR 508 at 520.

27 *De Romanis v Sibraa* [1977] 2 NSWLR 264 at 291-292, referred to in *John L Pty Ltd* (1987) 163 CLR 508 at 520.

28 (1937) 59 CLR 467 at 486.

29 (1937) 59 CLR 467 at 501; and see *Smith v Moody* [1903] 1 KB 56 at 60.

justifications or excuses relating to that person's presence provided for in the statute. Dixon J observed that each of the justifications depended upon some feature pertaining to the person found in, or seen leaving, the premises and that no licensee could succeed in bringing the case within any of the grounds of excuse unless the person or persons were identified and their presence on a distinct occasion alleged[30].

28 The statements of the offences as particularised do not identify what measures the Kirk company could have taken but did not take. They do not identify an act or omission which constitutes a contravention of ss 15(1) and 16(1). The first particular of the s 15(1) offence suggests that the Kirk company had some systems relating to the operation of the ATV in place, but that they were not sufficient. It does not identify the deficiency in the system or the measures which should have been taken to address it. The second particular does not identify what information, instruction or training was necessary to be given to Mr Palmer or the other employee of the Kirk company. The particulars of the s 16(1) offence say nothing about what should have been done to avoid exposing the contractors to risk to their health and safety from the use of the ATV. Needless to say, the appellants could not have known what measures they were required to prove were not reasonably practicable.

29 Section 11 of the *Criminal Procedure Act* 1986 (NSW) provided[31] that the description of any offence in the words of an Act creating the offence "is sufficient in law". In *Smith v Moody*[32], it was held that such a provision did not

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30 *Johnson v Miller* (1937) 59 CLR 467 at 483-484.

31 The text of the section to which reference is made was inserted in the *Criminal Procedure Act* 1986 (NSW) by Sched 1, Item 17 of the *Criminal Procedure Amendment (Justices and Local Courts) Act* 2001 (NSW). That provision came into operation on 19 April 2002. It is convenient to assume that s 11 of the *Criminal Procedure Act*, as thus amended, applied in the present proceedings. Whether it did apply may depend upon the effect to be given to transitional provisions of the 2001 *Criminal Procedure Amendment (Justices and Local Courts) Act* which did not come into force until 7 July 2003 (after commencement of the relevant proceedings in the Industrial Court). It is not necessary to decide these questions.

32 [1903] 1 KB 56.

dispense with the common law rule[33]. In *Ex parte Lovell; Re Buckley*[34], Jordan CJ doubted that earlier authorities such as *Smith v Moody* should be regarded as binding and that the object of the rule could be secured only by the requirement of particulars on the face of the information[35]. Nevertheless, in *Johnson v Miller*, Dixon J appears to have applied the common law rule[36] and to have held that a statutory provision like that made by s 11 of the *Criminal Procedure Act* 1986 "relates only to the nature of the offence and does not dispense with the necessity of specifying the time, place and manner of the defendant's acts or omissions"[37].

30 No application was made to the Court of Appeal for an order in the nature of certiorari quashing the orders made by the Industrial Court that required Mr Kirk and the Kirk company to appear to answer the offences charged. Those orders of the Industrial Court were expressed as being made pursuant to s 4(1) of the Summary Jurisdiction Act as applied by s 168 of the IR Act. Section 4(1) of the Summary Jurisdiction Act permitted the making of an order "[u]pon an application being made … in accordance with the rules" and the relevant rules required that the nature of the offence be stated. Section 6(1) of the Summary Jurisdiction Act provided, in effect, that no objection was to be taken or allowed to any order made under s 4 by reason of any alleged defect in it in substance or in form. Because no application was made to quash the orders requiring appearance to answer the charges, it is neither necessary nor appropriate to examine whether those orders were made upon an application made "in accordance with the rules", or to consider whether or how s 6 of the Summary Jurisdiction Act might affect the availability of an order in the nature of certiorari. However, it may be said that the matter should not have proceeded without further particularisation of the acts and omissions said to found the charges. Without that particularisation, the Industrial Court would be placed in

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33 *Smith v Moody* [1903] 1 KB 56 at 60 per Lord Alverstone CJ; and see at 61 per Wills J, 63 per Channell J.

34 (1938) 38 SR (NSW) 153.

35 *Ex parte Lovell; Re Buckley* (1938) 38 SR (NSW) 153 at 169-170.

36 But see *John L Pty Ltd* (1987) 163 CLR 508 at 529.

37 (1937) 59 CLR 467 at 486.

the position to which Evatt J referred in *Johnson v Miller*[38] where it would act as "an administrative commission of inquiry" rather than undertake a judicial function. Proceeding without further particularisation of the acts and omissions said to found the charges reflected views as to the nature and extent of the duty cast upon an employer by ss 15 and 16 and the limited operation to be given to the s 53 defences.

The Industrial Court's approach to offences against ss 15 and 16

31 It may be inferred from the concluding statements to the charges that it was considered sufficient to allege that, as a consequence of a series of unspecified failures on the part of the employer, there remained present general risks to the health and safety of employees and others. This mirrors the approach to the requirements of ss 15 and 16 which appears to have been taken in a series of previous cases in the Industrial Court and which was followed in the present case.

32 Under the heading "Legal Principles" Walton J referred to a series of propositions arising from cases in the Industrial Court which have been concerned to identify the extent of the duty imposed by s 15[39]. The list included the following propositions: that the duty imposed upon an employer, to ensure the health, safety and welfare of employees at work, is absolute; that that duty is to be construed as meaning "to guarantee, secure or make certain"; and that the duty is directed at "obviating 'risks'" to safety at the workplace. A further proposition, said to arise from the cases, was that it was necessary to establish a causal connection between a failure on the part of the employer and the risk to the health, safety and welfare of employees. This causal connection, between a general class of risk and something which the employer could have done, was treated as a matter of central importance in his Honour's reasons. The step which was not undertaken was to identify the measure which the employer should have taken as relevant to the offence. To the contrary, the cases are said to establish the proposition that a prosecutor is not required to demonstrate that particular measures should have been taken.

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38 (1937) 59 CLR 467 at 495.

39 As summarised in *WorkCover Authority (NSW) v State Police (NSW) (No 2)* (2001) 104 IR 268 at 288-289 [20].

33 The propositions listed by his Honour appear to assume that the employer's obligation, to guarantee against risks in the workplace, remains in existence at all times and that the question of an employer's liability is to be determined by reference to it. There is no discussion of how the defences under s 53 can co-exist with that obligation. The only reference to the defences in the authorities referred to by his Honour is to the terms of s 53 and an acknowledgement that measures which may have been taken may be relevant to them. Since it was considered unnecessary for the prosecutor to identify those measures, it would appear to follow that the employer would be required to establish that there were no reasonably practicable measures, of any kind, which could have been addressed to the type of risk. If there was something further that could be done, the causal connection with the risk would remain and the employer would be guilty of an offence. The provisions of the OH&S Act relating to offence and defence were not intended to operate in this way.

34 Walton J referred to earlier case law that the duty imposed upon an employer "is to be construed as meaning to guarantee, secure or make certain" and that the duty is directed at obviating "risks" to safety at the workplace. References to guarantees, and emphasis upon general classes of risks which are to be eliminated, tend to distract attention from the requirements of an offence against ss 15 and 16. The approach taken by the Industrial Court fails to distinguish between the content of the employer's duty, which is generally stated, and the fact of a contravention in a particular case. It is that fact, the act or omission of the employer, which constitutes the offence. Of course it is necessary for an employer to identify risks present in the workplace and to address them, in order to fulfil the obligations imposed by ss 15 and 16. It is also necessary for the prosecutor to identify the measures which should have been taken. If a risk was or is present, the question is – what action on the part of the employer was or is required to address it? The answer to that question is the matter properly the subject of the charge.

35 His Honour approached the question, as to whether contraventions were proved, in a manner consistent with the views stated in the cases to which he referred. His Honour identified the risks relevant to the offences in question as relating to the use of the ATV off-road and to its use for the purpose of towing and held that the Kirk company's duty was to eliminate those risks. His Honour found that the risks remained. The causal connection of which the cases spoke was present. His Honour concluded, with respect to the defence under s 53(a), that it could not be said that it was not reasonably practicable to have taken precautions against the risks. His Honour did not consider whether particular

measures which should have been taken by the Kirk company needed to be identified in the charges for the defences to operate.

36 The risks to which his Honour referred were described in some detail in the Owner's Safety Manual, which had been provided with the ATV at the time it was purchased. His Honour was prepared to accept that Mr Palmer had read the Manual and there was evidence that the other employee had done so. In argument on the appeal to this Court it was suggested by counsel that, nevertheless, there were further steps Mr Kirk and the Kirk company could have taken. They could be seen in the findings of his Honour: that Mr Palmer and the other employee could have been expressly instructed to comply with the Manual and that there should have been further instruction relating the warnings in the Manual to the terrain of the farm, although the employees were familiar with it. His Honour also found, in connection with the defence and in general terms, that the employees and the fencing contractors could have been given training.

37 It is not necessary to further consider the correctness of these findings. For present purposes it is sufficient to observe that his Honour's reasons disclose a wrong understanding of what constituted an offence against ss 15 and 16 and how the defence under s 53(a) was to be applied in proceedings for such an offence. His Honour did not appreciate that no act or omission on the part of the Kirk company had been charged. To the contrary, his Honour accepted the proposition that the prosecutor is not required to demonstrate that particular measures should have been taken to prevent the risk identified.

38 A consequence of the matter proceeding to conviction on the charges as stated, absent the identification of measures the Kirk company should have taken, was that it was denied the opportunity to properly put a defence under s 53(a). Instead, the Kirk company was required to show why it was not reasonably practicable to eliminate possible risks associated with the use, or possible use, of the ATV. The guarantee against risk, seen as provided by s 15, was treated as continuing, despite a defence under s 53(a) being raised. The operation of that defence was treated as largely confined to an issue of reasonable foreseeability.

39 The errors disclosed in the reasons of the Industrial Court raise the question whether the Court of Appeal should have made orders for certiorari quashing the convictions. The resolution of that question will require consideration of a privative provision[40] and the legal nature of the errors. The

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40 IR Act, s 179(1).

construction of the privative provision will also direct attention to the position of the Supreme Court of New South Wales in the hierarchy of courts in New South Wales and as a court from which an appeal lies to this Court.

40 Before consideration is given to whether orders of certiorari should have been made, it is necessary to say something more about the curial history of the matter and how the errors relied on as warranting orders for certiorari were dealt with in the Supreme Court of New South Wales.

The history of the proceedings

41 Following conviction[41] financial penalties were imposed upon Mr Kirk and the Kirk company[42]. They instituted appeals against conviction and sentence in the Court of Criminal Appeal of the Supreme Court of New South Wales and brought proceedings in the Court of Appeal of that Court seeking orders in the nature of certiorari and prohibition. In their written submissions with respect to that application they also sought an inquiry into their convictions[43]. The appeal and the application were heard together and dismissed[44].

42 Section 179(1) of the IR Act 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". The provision extends to proceedings for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, injunctions, declaration or otherwise[45]. It does not apply to the exercise of a right of appeal to a Full Bench of the Industrial Court[46]. Section 187(a) of the IR Act provides to a party to the proceedings a right of

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41 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166.

42 *WorkCover Authority (NSW) v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462.

43 Pursuant to s 474D of the *Crimes Act* 1900 (NSW).

44 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151.

45 s 179(5).

46 s 179(6).

appeal to the Full Bench against a decision of the Industrial Court. The appeal is by leave of the Full Bench[47].

43 Section 196(3) of the IR Act provides that a reference in the *Criminal Appeal Act* 1912 (NSW) to the Court of Criminal Appeal is to be taken to refer to the Full Bench of the Industrial Court. Sub-section (2) of that section applies the *Criminal Appeal Act* to an appeal to the Full Bench in the same way as it applies to an appeal to the Court of Criminal Appeal.

44 In the Court of Appeal, Basten JA noted that there was a large question raised, in the application for orders in the nature of certiorari and prohibition, as to the limits on the powers of State parliaments to legislate with respect to the jurisdiction of their own courts, where the results may affect the constitutional jurisdiction of the High Court. However, it was not the subject of detailed submissions and his Honour considered that the matters could be determined on a non-constitutional basis[48]. The Court resolved the matters before it on the basis that the Full Bench of the Industrial Court had jurisdiction to hear an appeal but that the Court of Appeal retained its supervisory jurisdiction over that Court[49]. The Court of Appeal held that it should not intervene until the Full Bench had decided the issue of jurisdiction or refused leave to appeal from the decision in question[50].

45 Mr Kirk and the Kirk company required an order from the Full Bench of the Industrial Court granting leave to appeal out of time. The grant of leave made by that Court limited the question to be heard on appeal to whether Walton J had addressed the submission that the Kirk company had fulfilled its duty through Mr Palmer who, rather than Mr Kirk, had been chosen by the Kirk

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47 s 188.

48 (2006) 66 NSWLR 151 at 171 [91].

49 (2006) 66 NSWLR 151 at 158 [31] and 159 [33] per Spigelman CJ, with Beazley JA agreeing at 162 [52] and Basten JA agreeing at 169-170 [83].

50 (2006) 66 NSWLR 151 at 159 [34] and 162 [46] per Spigelman CJ, with Beazley JA agreeing at 162 [51] and Basten JA agreeing at 169-170 [83] and 185 [156]; and see at 184 [151] per Basten JA.

company to fulfil its duty[51]. It was the view of the Full Bench, with respect to the balance of the grounds of appeal, that the delay in prosecuting the appeal before it was brought about by the choice made by Mr Kirk and the Kirk company to pursue the questions of jurisdictional error in the Court of Appeal, because they considered their prospects of success in that Court were better[52]. The Full Bench did not consider that they should be permitted to re-run their argument, which, in any event, had been reformulated by the Court of Appeal[53]. Further, the argument challenged a body of jurisprudence which had been settled in the Industrial Court over some years[54]. The Full Bench considered that the WorkCover Authority had a vested right to retain the fruits of judgments[55], although it referred to civil, not criminal, cases as supporting this proposition.

46 The Full Bench heard the limited appeal from conviction and dismissed it[56]. In its opinion Mr Kirk was to be taken as the controlling mind of the Kirk company through whom its actions were to be judged[57]. It held that there could be no effective delegation to Mr Palmer because no steps had been taken by Mr Kirk to satisfy himself as to Mr Palmer's skill, experience or knowledge with respect to matters concerning occupational health and safety[58].

47 Mr Kirk and the Kirk company applied to the Court of Appeal for orders in the nature of certiorari quashing the decisions of the Industrial Court at first instance and orders in the nature of certiorari quashing the two decisions of the Full Bench. They also sought an order pursuant to s 474D of the *Crimes Act*

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51 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW) (Inspector Childs)* (2006) 158 IR 281 at 297 [57].

52 (2006) 158 IR 281 at 293 [40].

53 (2006) 158 IR 281 at 293 [41] and 295 [47].

54 (2006) 158 IR 281 at 295 [48].

55 (2006) 158 IR 281 at 293-294 [42].

56 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2007) 164 IR 146.

57 (2007) 164 IR 146 at 165-166 [57].

58 (2007) 164 IR 146 at 167 [63].

1900 for an inquiry into the convictions. The application for an order for inquiry is not in issue in the appeal to this Court.

48 The Court of Appeal noted that all parties accepted that it could exercise its supervisory jurisdiction, on the basis of jurisdictional error[59]. The Court identified from the submissions for Mr Kirk and the Kirk company three errors which were said to qualify as jurisdictional errors: that the Industrial Court had failed properly to interpret s 15, treating the duty referred to in it as strict liability and discounting any possibility of reasonable foresight, so as to make compliance impossible; that the Court applied the defence restrictively so that it was ineffective as a defence; and that the Court confused questions concerning corporate responsibility[60]. The substance of the first two submissions, the Court of Appeal observed, was that Walton J had stretched the concept of risk to such an extent that the only exceptions which it recognised, "unduly remote or speculative" risks and the defence, were deprived of practical content and the concept of what was "reasonably practicable" was also unreasonably extended[61]. The other way in which Mr Kirk and the Kirk company put their argument was that Walton J had approached the question of contravention and the application of the defences with the benefit of hindsight. On that approach it was always possible to think of something that would have avoided a risk that materialised. The Court of Appeal held that any such errors were based on findings of fact and did not qualify as jurisdictional errors[62].

49 Mr Kirk and the Kirk company appeal to this Court from that decision by the grant of special leave. They also seek special leave to appeal from the judgments of the Full Bench of the Industrial Court. The jurisdiction of this Court to hear the lastmentioned appeals is said to arise from s 73(ii) of the Constitution, which provides for appeals "from all judgments … of the Supreme Court … or of any other court … from which at the establishment of the Commonwealth an appeal lies to the Queen in Council"; and because the Full Bench was exercising the jurisdiction of the Supreme Court. As indicated at the

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59 *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465 at 471 [21] per Spigelman CJ, Hodgson JA and Handley AJA agreeing.

60 (2008) 173 IR 465 at 471 [24].

61 (2008) 173 IR 465 at 474 [38].

62 (2008) 173 IR 465 at 474 [38]-[39].

outset, it will not be necessary to examine any of the issues raised by the applications for special leave.

A further error?

50 In the course of the hearing of the appeal, this Court directed the parties' attention to the fact that the reasons of Walton J recorded that the prosecution had called Mr Kirk as a witness. This Court was told that Mr Kirk's giving evidence for the prosecution was a course agreed upon by both sides.

51 Section 163(2) of the IR Act provides that the rules of evidence applied to the Industrial Court. Section 17(2) of the *Evidence Act* 1995 (NSW) ("the Evidence Act") was thus engaged. That sub-section provides that a defendant is not competent to give evidence as a witness for the prosecution. The provision made by s 17(2) could not be waived. Section 190 of the Evidence Act permits a court, if the parties consent, to dispense with some of the provisions of the Act, but the provisions made by Div 1 of Pt 2.1 of the Act (ss 12-20) concerning the competence and compellability of witnesses may not be waived.

52 Although reference was not made in the proceedings in the Court of Appeal to this departure from the rules of evidence, it was not submitted that Mr Kirk and the Kirk company could not rely upon it in this Court. It was submitted by the second respondent that some distinction could and should be made about the competence of Mr Kirk to give evidence against the Kirk company and his competence to give evidence as a witness for the prosecution at his own trial. It is enough to say that where, as was the case here, Mr Kirk and the Kirk company were tried jointly, a distinction of the kind asserted by the second respondent cannot be drawn.

53 It may be that some departures from the rules of evidence would not warrant the grant of relief in the nature of certiorari. That issue need not be explored. The departure from the rules of evidence in this case was substantial. It was not submitted that either the nature of the departure, or the circumstances in which it occurred, were such as to warrant discretionary refusal of relief[63].

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63 See, for example, *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [2002] HCA 16.

Entitlement to relief

54 The errors of construction of s 15 of the OH&S Act and the failure to comply with the rules of evidence (by permitting a person accused of crime to give evidence on behalf of the prosecution) warranted, and in this case required, the grant of relief in the nature of certiorari to quash the conviction and sentence of each appellant. This conclusion directs attention to several points, of which some will require separate examination. It is desirable, however, to begin by setting them out in summary form.

55 The points are:

(a) Both errors of law appear in the reasons of Walton J.

(b) Both errors therefore appear "on the face of the record" as that expression must be understood in the light of s 69(3) and (4) of the *Supreme Court Act* 1970 (NSW)[64].

(c) Both errors are jurisdictional errors.

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64 Section 69(3) and (4) of that Act provide:

> "(3) It is declared that the jurisdiction of the [Supreme Court of New South Wales] to grant any relief or remedy in the nature of a writ of certiorari includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings.
>
> (4) For the purposes of subsection (3), the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination."

(d) Chapter III of the Constitution[65] requires that there be a body fitting the description "the Supreme Court of a State"[66].

(e) 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[67].

(f) A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition and mandamus, and, as explained further in these reasons, also certiorari, directed to inferior courts and tribunals on grounds of jurisdictional error.

(g) If a court has limited powers and authority to decide issues of an identified kind, a privative provision does not negate those limits on that court's authority.

(h) A privative provision in State legislation, which purports to strip the Supreme Court of the State of its authority to confine inferior courts within the limits of their jurisdiction by granting relief on the ground of jurisdictional error, is beyond the powers of the State legislature. It is beyond power because it purports to remove a defining characteristic of the Supreme Court of the State.

(i) Construed against this constitutional background, s 179 of the IR Act[68] does not (and could not validly) exclude the jurisdiction of the Supreme

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65 Section 73 provides that "The High Court shall have jurisdiction ... to hear and determine appeals from all judgments, decrees, orders, and sentences ... (ii) ... of the Supreme Court of any State".

66 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63]; [2006] HCA 44.

67 *Forge* (2006) 228 CLR 45 at 76 [63].

68 "**Finality of decisions**

(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.

(Footnote continues on next page)

Court of New South Wales to grant relief in the nature of prohibition, certiorari or mandamus directed to the Industrial Court for the purposes of enforcing the limits on that Court's statutory authority. In particular, the privative provisions of s 179 do not, on their proper construction, exclude certiorari for jurisdictional error.

(j) In determining whether the errors of law that were made by Walton J permitted the grant of relief in the nature of certiorari, statutory identification of the Industrial Court as a "superior court of record" is irrelevant.

Grounds for certiorari

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(2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.

(3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.

(4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:

(a) the Full Bench of the Commission in Court Session, or

(b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

(5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

(6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.

(7) In this section:

decision includes any award or order."

56 The two principal grounds for grant of relief in the nature of certiorari are usually described as "error of law on the face of the record" and "jurisdictional error". Other grounds, such as fraud, may be left aside from consideration[69]. References to "error of law on the face of the record" and "jurisdictional error" suggest a degree of certainty about what is the relevant "record" and what is meant by "jurisdictional error" that examination of the decided cases reveals to be unwarranted. The decided cases reveal a degree of uncertainty about both what is the "record" on the face of which error must appear, and what is meant by "jurisdictional error". Moreover, allowing the one remedy on two different bases may suggest the existence of some singular unifying principle underpinning both grounds. But no principle can readily be identified that would unify or explain both grounds.

57 In part, perhaps in large part, these difficulties stem from the existence of unresolved competition between two opposing purposes for the grant of certiorari. As Professor Sawer wrote, more than 50 years ago, the English common law courts sought to control inferior courts by "keeping the inferior tribunal within its 'jurisdiction' [which] may be equated with compelling the inferior tribunal to observe 'the law', ie, what the superior tribunal considers the law to be"[70]. Yet at the same time "it [was] usually desired, for reasons of expediency, to give the inferior decision some degree of finality, or, as is often said, some jurisdiction to go wrong"[71]. Those two purposes pull in opposite directions. There being this tension between them, it is unsurprising that the course of judicial decision-making in this area has not yielded principles that are always easily applied. As Sawer wrote, "it is plain enough that the question is at bottom one of policy, not of logic"[72].

58 To understand the present state of the law with respect to certiorari it is necessary to notice some of the history of the development of that law.

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69 See *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189; [2007] HCA 35.

70 Sawer, "Error of Law on the Face of an Administrative Record", (1956) 3 *University of Western Australia Annual Law Review* 24 at 34-35 ("Sawer").

71 Sawer at 35.

72 Sawer at 34.

59 Consistent with the notion that the Court of King's Bench had "original or inherent jurisdiction ... to examine and correct *all* errors in inferior Courts"[73], certiorari came to be used, by the 18th century, as an important means for controlling courts of record (as well also as some other decision-makers[74]). The other form of control was by collateral action (for example, for trespass) in which the validity of the decision of the inferior court was impugned[75]. Because justices were required to set out the evidence on the record of the conviction as nearly as might be in the terms in which it was given[76], error in what had been done below could readily be discerned within the four corners of the record removed on certiorari. When, however, the *Summary Jurisdiction Act* 1848 (UK) (11 & 12 Vict c 43) provided, as the sufficient record of all summary convictions, a common form which did not include any statement of the evidence for the conviction, "[t]he face of the record 'spoke' no longer: it was the inscrutable face of a sphinx"[77]. Inevitably, then, attention shifted to focus upon what could legitimately be demonstrated to have gone wrong in the court below without embarking upon a rehearing of the matter, either on the evidence adduced below, or on that evidence as supplemented by additional material. In particular, the focus fell upon demonstration of errors that could be classed as "jurisdictional".

Jurisdictional error – some matters of history

60 In *R v Bolton*[78], Lord Denman CJ sought to identify jurisdictional error on what Professor Sawer later called "a basis of pure logic"[79], holding that "[t]he

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73 *Darlow v Shuttleworth* [1902] 1 KB 721 at 726 (emphasis added).

74 The history of the use of certiorari in the 17th, 18th and 19th centuries is considered in Sawer at 26-33 and in Gordon, "Quashing on Certiorari for Error in Law", (1951) 67 *Law Quarterly Review* 452.

75 See *A v New South Wales* (2007) 230 CLR 500 at 532 [94]; [2007] HCA 10.

76 *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 150, citing *R v Warnford* (1825) 5 Dow & Ry 489 at 490.

77 *Nat Bell Liquors* [1922] 2 AC 128 at 159.

78 (1841) 1 QB 66 [113 ER 1054].

question of jurisdiction does not depend on the truth or falsehood of the charge [laid before the justices], but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry"[80]. Yet as later decisions show, there are some forms of jurisdictional error (such, for example, as a failure to accord procedural fairness during the hearing[81]) that cannot be determined "on the commencement, not at the conclusion, of the inquiry".

61 The view of "jurisdiction" stated in *R v Bolton* (which Sir William Wade later called the "'original jurisdiction' fallacy"[82]) encouraged attempts to distinguish between errors within jurisdiction and those that were not. Thus, in *R v Nat Bell Liquors Ltd*[83], Lord Sumner said, of a magistrate:

> "if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not".

And, many years later, in *R v Governor of Brixton Prison; Ex parte Armah*[84], Lord Reid said:

> "If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, *he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong.* Neither an error in fact nor an error in law will destroy his jurisdiction." (emphasis added)

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79 Sawer at 34.

80 (1841) 1 QB 66 at 74 [113 ER 1054 at 1057].

81 See, for example, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5], 91-101 [17]-[42], 143 [170]; [2000] HCA 57.

82 Wade, *Administrative Law*, 6th ed (1988) at 293.

83 [1922] 2 AC 128 at 151-152.

84 [1968] AC 192 at 234.

62 The "theory" or "concept"[85] of jurisdiction as sufficiently identified as "authority to decide" is often traced to the judgment of Lord Denman CJ in *R v Bolton*. It is a view that has attracted much academic debate. Its chief proponent[86] pointed to the logical coherence of principles that confined jurisdictional errors to those which went to the decision-maker's authority to decide a question. Other authors, notably Sawer, in the article quoted earlier in these reasons, Sir William Wade and de Smith in Britain, and Jaffe in the United States[87], have contended that the logical coherence of such a theory or concept of jurisdiction takes insufficient account of the public policy necessity to compel inferior tribunals to observe the law, a public policy that has informed both the development and the application of the law relating to judicial review by the remedies of certiorari, prohibition and mandamus.

63 The work of each of Wade, de Smith and Jaffe would support the observation of Diplock LJ that "'[j]urisdiction' is an expression which is used in a variety of senses and takes its colour from its context"[88]. It is a "generic" term[89] or, as Frankfurter J wrote in *United States v L A Tucker Truck Lines Inc*[90] in the

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85 Both words are used in the discussion of jurisdictional error in Evans (ed), *de Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 110; see also Woolf, Jowell and Le Sueur (eds), *de Smith's Judicial Review*, 6th ed (2007) at 179-181.

86 Gordon, "Certiorari and the Revival of Error in Fact", (1926) 42 *Law Quarterly Review* 521; Gordon, "The Relation of Facts to Jurisdiction", (1929) 45 *Law Quarterly Review* 459; Gordon, "*Tithe Redemption Commission v Gwynne*", (1944) 60 *Law Quarterly Review* 250; Gordon, "Conditional or Contingent Jurisdiction of Tribunals", (1960) 1 *University of British Columbia Law Review* 185; Gordon, "Jurisdictional Fact: An Answer", (1966) 82 *Law Quarterly Review* 515.

87 See, for example, "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953.

88 *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862 at 889.

89 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; [1907] HCA 76. See also *Ah Yick v Lehmert* (1905) 2 CLR 593 at 601-602; [1905] HCA 22; *Gould v Brown* (1998) 193 CLR 346 at 379 [15], 440 [178]; [1998] HCA 6; *Lipohar v The Queen* (1999) 200 CLR 485 at 516 [78]; [1999] HCA 65.

90 344 US 33 at 39 (1952).

Supreme Court of the United States, "'jurisdiction' ... is a verbal coat of too many colors".

64 As Jaffe rightly pointed out[91], it is important to recognise the use to which the principles expressed in terms of "jurisdictional error" and its related concept of "jurisdictional fact" are put. The principles are used in connection with the control of tribunals of limited jurisdiction on the basis that a "tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction". Jaffe expressed the danger, against which the principles guarded, as being that "a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned"[92]. It is not useful to examine whether Jaffe's explanation of why distorted positions may develop is right. What is important is that the development of distorted positions is to be avoided. And because that is so, it followed[93], in that author's opinion, that denominating some questions as "jurisdictional"

> "is almost entirely functional: it is used to validate review when review is felt to be necessary ... If it is understood that the word 'jurisdiction' is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified."

65 In England, the difficulties presented by classification of some errors as jurisdictional and others as not were ultimately understood as requiring the conclusion that *any* error of law by a decision-maker (whether an inferior court

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91 "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953 at 962-963.

92 (1957) 70 *Harvard Law Review* 953 at 963.

93 (1957) 70 *Harvard Law Review* 953 at 963 (footnote omitted).

or a tribunal) rendered the decision ultra vires[94]. But that is a step which this Court has not taken[95].

Jurisdictional error in Australia

66 In *Craig v South Australia*, this Court recognised[96] the difficulty of distinguishing between jurisdictional and non-jurisdictional errors, but maintained the distinction. As was pointed out in *Re Refugee Review Tribunal; Ex parte Aala*[97]:

> "The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is

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94 *R v Hull University Visitor; Ex parte Page* [1993] AC 682 at 696, 702; Lord Diplock, "Administrative Law: Judicial Review Reviewed", (1974) 33 *Cambridge Law Journal* 233 at 242-243.

95 *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 92-95; [1982] HCA 2; *Hockey v Yelland* (1984) 157 CLR 124 at 130; [1984] HCA 72; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372, 377; [1985] HCA 67; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 141, 149, 165; [1991] HCA 33; *Craig v South Australia* (1995) 184 CLR 163 at 178-179; [1995] HCA 58; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208-209 [29]-[32], 226 [78]; [2000] HCA 47; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 439-440 [173], 462-463 [253]-[254]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 507 [79]-[81]; [2003] HCA 2; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 675 [70]; [2007] HCA 14.

96 (1995) 184 CLR 163 at 177-180. See also *Aala* (2000) 204 CLR 82 at 141 [163]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 81-82 [80]-[81]; [2001] HCA 22.

97 (2000) 204 CLR 82 at 141 [163].

> authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not."

As was also pointed out in *Aala*[98], there can be no automatic transposition to Australia of the principles that developed in England in relation to the availability of certiorari and prohibition. The constitutional context is too different to permit such a transposition. At the federal level, allowance must be made for the evident constitutional purposes of s 75(v) of the Constitution; at a State level, other constitutional considerations are engaged. As was pointed out by Gummow J in *Gould v Brown*[99], "[w]hen viewed against the Constitution in its entirety, Ch III presents a distinct appearance. Upon what had been the judicial structures of the Australian colonies and, upon federation, became the judicial structures of the States, the Constitution by its own force imposed significant changes."

67 The drawing of a distinction between errors within jurisdiction and errors outside jurisdiction was held, in *Craig*, to require different application as between "on the one hand, the inferior courts which are amenable to certiorari and, on the other, those other tribunals exercising governmental powers which are also amenable to the writ"[100]. The Court said[101] that:

> "If ... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

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98 (2000) 204 CLR 82 at 141 [162].

99 (1998) 193 CLR 346 at 444 [186].

100 *Craig* (1995) 184 CLR 163 at 176.

101 (1995) 184 CLR 163 at 179.

By contrast, demonstrable error on the part of an inferior court "entrusted with authority to identify, formulate and determine" relevant issues, relevant questions, and what is and what is not relevant evidence was held[102], in *Craig*, not ordinarily to constitute jurisdictional error. The Court held[103] that:

> "a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error".

68 The basis for the distinction thus drawn between courts and administrative tribunals was identified[104] in the lack of authority of an administrative tribunal (at least in the absence of contrary intent in the statute or other instrument establishing it) "either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law". By contrast, it was said[105] that "the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine".

69 Behind these conclusions lies an assumption that a distinction can readily be made between a court and an administrative tribunal. At a State level that distinction may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution. No less importantly, behind the conclusions expressed in *Craig* lie premises about what is meant by jurisdictional error. Unexpressed premises about what is meant by jurisdictional error give content to the notion of "authoritative" when it is said, as it was in *Craig*, that tribunals cannot "authoritatively" determine questions of law, but that courts can.

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102 (1995) 184 CLR 163 at 179-180.

103 (1995) 184 CLR 163 at 180.

104 (1995) 184 CLR 163 at 179.

105 (1995) 184 CLR 163 at 179.

70 When certiorari is sought, there is often an issue about whether the decision is open to review. If "authoritative" is used in the sense of "final", a decision could be described as "authoritative" only if certiorari will not lie to correct error in the decision. To observe that inferior courts generally have authority to decide questions of law "authoritatively" is not to conclude that the determination of any particular question is not open to review by a superior court. Whether a particular decision reached is open to review is a question that remains unanswered. The "authoritative" decisions of inferior courts are those decisions which are not attended by jurisdictional error. That directs attention to what is meant in this context by "jurisdiction" and "jurisdictional". It suggests that the observation that inferior courts have authority to decide questions of law "authoritatively" is at least unhelpful.

Jurisdictional error – this case

71 It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error. Professor Aronson has collected authorities recognising some eight categories of jurisdictional error[106]. It is necessary, however, to make good the proposition stated earlier in these reasons that the two errors that have been identified as made by the Industrial Court at first instance (and not corrected on appeal to the Full Bench) were jurisdictional errors. The Court in *Craig* explained the ambit of jurisdictional error in the case of an inferior court in reasoning that it is convenient to summarise as follows.

72 First, the Court stated[107], as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist" (emphasis added). Secondly, the Court pointed out[108] that jurisdictional error "is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its

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106 Aronson, "Jurisdictional Error without the Tears", in Groves and Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines*, (2007) 330 at 335-336.

107 (1995) 184 CLR 163 at 177.

108 (1995) 184 CLR 163 at 177.

jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*" (emphasis added). (The reference to "*theoretical* limits" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) Thirdly, the Court amplified[109] what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:

(a) the absence of a jurisdictional fact;

(b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and

(c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

The Court said[110] of this last example that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern" and gave as examples of such difficulties *R v Dunphy; Ex parte Maynes*[111], *R v Gray; Ex parte Marsh*[112] and *Public Service Association (SA) v Federated Clerks' Union*[113].

73 As this case demonstrates, it is important to recognise that the reasoning in *Craig* that has just been summarised is not to be seen as providing a rigid taxonomy of jurisdictional error. The three examples given in further explanation of the ambit of jurisdictional error by an inferior court are just that –

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109 (1995) 184 CLR 163 at 177-178.

110 (1995) 184 CLR 163 at 178.

111 (1978) 139 CLR 482; [1978] HCA 19.

112 (1985) 157 CLR 351 at 371.

113 (1991) 173 CLR 132.

examples. They are not to be taken as marking the boundaries of the relevant field. So much is apparent from the reference in *Craig* to the difficulties that are encountered in cases of the kind described in the third example.

74 The first of the errors in question in this case – the errors of construction of s 15 of the OH&S Act – can be identified as a jurisdictional error of the third kind identified in *Craig*. That is, it can be identified as the Industrial Court misapprehending the limits of its functions and powers. Misconstruction of s 15 of the OH&S Act led the Industrial Court to make orders convicting and sentencing Mr Kirk and the Kirk company where it had no power to do so. It had no power to do that because no particular act or omission, or set of acts or omissions, was identified at *any* point in the proceedings, up to and including the passing of sentence, as constituting the offences of which Mr Kirk and the Kirk company were convicted and for which they were sentenced. And the failure to identify the particular act or omission, or set of acts or omissions, alleged to constitute the contravening conduct followed from the misconstruction of s 15. By misconstruing s 15 of the OH&S Act, the Industrial Court convicted Mr Kirk and the Kirk company of offences when what was alleged and what was established did not identify offending conduct.

75 The explanation just offered also demonstrates that the error made by the Industrial Court was not only an error about the limits of its functions or powers. It was an error which led to it making orders convicting Mr Kirk and the Kirk company where it had no power to do so. The Industrial Court had no power to do that because an offence against the OH&S Act had not been proved. It follows that the Industrial Court made orders beyond its powers to make.

76 In addition to the error just considered, the Industrial Court misapprehended a limit on its powers by permitting the prosecution to call Mr Kirk at the trial. The Industrial Court's power to try charges of criminal offences was limited to trying the charges applying the laws of evidence. The laws of evidence permit many forms of departure from the rules that are stated. Many, perhaps most, departures from the strict rules of evidence can be seen as agreed to by parties at least implicitly. But calling the accused as a witness for the prosecution is not permitted, even if the accused consents to that course. The joint trial of Mr Kirk and the Kirk company was not a trial conducted in accordance with the laws of evidence. The Industrial Court thus conducted the trial of Mr Kirk and the Kirk company in breach of the limits on its power to try charges of a criminal offence.

77 For these reasons, putting aside consideration of the privative provisions of s 179 of the IR Act, certiorari would lie in this case for jurisdictional error in both of the respects identified. It is necessary, however, before dealing directly with the construction and application of those privative provisions to say something further about error of law on the face of the record.

Error of law on the face of the record

78 Ordinarily, the conclusion that jurisdictional error is shown makes consideration of whether there is an error of law on the face of the record superfluous. But in order to understand the extent to which privative provisions may validly deprive a State Supreme Court of the supervisory jurisdiction exercised by the grant of relief in the nature of prohibition and certiorari, something more must be said here about error of law on the face of the record.

79 The continued vitality of the principle that certiorari will lie for error of law on the face of the record may seem incongruous. Why should the availability of the remedy turn to any extent upon a question of form, if the motive for allowing the remedy is the marking and maintenance of boundaries of power?

80 These reasons will explain that there is continued utility in maintaining the distinction between certiorari for error of law on the face of the record and certiorari for jurisdictional error. The utility of the distinction lies in constitutional considerations. Before identifying those constitutional considerations, it is necessary to say something further about error of law on the face of the record and, in particular, about what constitutes the "record".

81 As noted earlier in these reasons, the *Summary Jurisdiction Act* 1848 (UK) worked a considerable change in the way in which summary convictions were recorded in Britain. It would seem that, thereafter, claims of error on the face of the record were seldom made until, in 1950, a Divisional Court of the King's Bench granted certiorari to quash the decision of an inferior tribunal where the tribunal had embodied the reasons for its decision in its order[114]. No less importantly, however, the *Summary Jurisdiction Act* 1848 appears to have been treated, in the years between its enactment and the revival of the law relating to

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114 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951] 1 KB 711; affd on appeal to the Court of Appeal [1952] 1 KB 338.

error of law on the face of the record, as confining the availability of certiorari more generally. In particular, the Privy Council, in *Nat Bell Liquors*[115], on appeal from the Supreme Court of Alberta, treated the relevant record in that case as confined to the conviction[116]. This conclusion was reached despite provisions said to distinguish the position in Alberta from the position that obtained in Britain after 1848[117]. Rules of the Supreme Court of Alberta dealing with applications for certiorari required transmission by the magistrate not only of the conviction and order made, but also of the originating information and the evidence taken at the hearing in writing. Further, the Act which created the offence of which the applicant for certiorari was convicted (the *Liquor Act* 1916 (Alta)) expressly provided that no conviction was to be held insufficient on application by way of certiorari "if the Court or judge hearing the application ... is satisfied *by a perusal of the depositions* that there is evidence on which the justice might reasonably conclude" that an offence had been committed (emphasis added).

82 Whether the particular conclusion reached in *Nat Bell Liquors* was right is not now important. What is, is that the decision was understood as requiring confinement of the record of an inferior court to the initiating process (including any pleadings)[118] and the certified order.

83 Whether, or when, the reasons given for a decision formed a part of the record remained controversial. As Gibbs J noted in *R v Cook; Ex parte Twigg*[119], the question had been treated[120] in this Court as an open question. However,

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115 [1922] 2 AC 128.

116 [1922] 2 AC 128 at 165.

117 [1922] 2 AC 128 at 162-165.

118 *Yirrell v Yirrell* (1939) 62 CLR 287 at 301, 304, 306-307, 310-311; [1939] HCA 33; *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 28-29; [1980] HCA 36; *Hockey v Yelland* (1984) 157 CLR 124 at 131, 143.

119 (1980) 147 CLR 15 at 27-28.

120 *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 649, 651 per Barwick CJ, 658 per Windeyer J; [1966] HCA 69; *R v The District Court of the Queensland Northern District; Ex parte Thompson* (1968) 118 CLR 488 at 491 per

(Footnote continues on next page)

thereafter in *Public Service Board of NSW v Osmond*[121], Gibbs CJ referred to the "well established" rule that reasons do not form part of the record for the purposes of certiorari unless the tribunal giving them chooses to incorporate its reasons. But in at least some cases the failure to give reasons may constitute a failure to exercise jurisdiction[122].

84 In *Craig*, the Court rejected[123] a more expansive approach to certiorari which would include both the reasons for decision and the complete transcript of proceedings in the "modern record" of an inferior court. To accept that more expansive approach was seen[124] as going "a long way towards transforming certiorari into a discretionary general appeal for error of law upon which the transcript of proceedings and the reasons for decision could be scoured and analysed in a search for some internal error". Because this would represent "a significant increase in the financial hazards to which those involved in even minor litigation in this country are already exposed" it was held[125] to be a step best left to legislation.

85 No application in the present proceedings was made to reconsider the decision in *Craig*. However, the conclusion that the record of a court does not include its reasons certainly confines the availability of certiorari. Some but not all errors of law made by a court will found the grant of relief. And the availability of certiorari is confined for the stated purpose of not providing a "discretionary general appeal for error of law". But the need for and the desirability of effecting that purpose depend first upon there not being any other process for correction of error of law, and secondly, upon the conclusion that

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Barwick CJ, 499 per Kitto J, 501 per Taylor J; cf at 495-496 per McTiernan J, 501-502 per Menzies J; [1968] HCA 48.

121 (1986) 159 CLR 656 at 667; [1986] HCA 7.

122 *Donges v Ratcliffe* [1975] 1 NSWLR 501 at 511; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 277.

123 (1995) 184 CLR 163 at 180-181.

124 (1995) 184 CLR 163 at 181 (footnotes omitted).

125 (1995) 184 CLR 163 at 181.

primacy should be given to finality rather than compelling inferior tribunals to observe the law[126].

86 Whether and when the decision of an inferior court or other decision-maker should be treated as "final" (in the sense of immune from review for error of law) cannot be determined without regard to a wider statutory and constitutional context.

87 The most immediately relevant statutory context is found in the provisions that establish the inferior court, and regulate appeals from, or review of, its decisions. The decisions of many inferior courts are open to appeal or review for error of law. (The availability of appeal or review would ordinarily be a powerful discretionary reason not to grant certiorari even if it were otherwise available.) If appeal or review for error of law is provided by statute, the availability of certiorari would not greatly alter the extent of the financial hazards to which those involved in litigation in the inferior court are exposed. To the extent to which appeal or review for error of law is available, the first of the premises for the conclusion reached in *Craig* is denied.

88 In the present case, a wider statutory context must be considered. In particular, reference must be made to s 69 of the *Supreme Court Act* 1970 (NSW). Section 69(1) of that Act provides (in effect) that, subject to some exceptions, where the Supreme Court formerly had jurisdiction to grant any relief or remedy or do any other thing by way of writ (whether of prohibition, mandamus, certiorari or otherwise) the Court should continue to have jurisdiction to grant that relief or remedy or do that thing, but should grant the relief by judgment or order, not by issuing a writ. The exceptions to this general provision include habeas corpus and writs of execution but it is not necessary to consider those exceptions further.

89 Of most immediate relevance to the present matter are the provisions of s 69(3) and (4), the text of which is set out earlier in these reasons. It will be recalled that s 69(3) declares that the jurisdiction of the Supreme Court to grant relief in the nature of certiorari includes jurisdiction to quash for error of law on the face of the record and that s 69(4) provides that for the purposes of s 69(3) "the face of the record includes the reasons expressed by the court or tribunal for its ultimate determination". It follows from those sub-sections that, in this case,

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126 cf Sawer at 34-35.

the reasons given by the Industrial Court (both at first instance and on appeal to the Full Bench) are a part of the record of the decision of each level of that Court. The decision in *Craig* confining the extent of the record of an inferior court does not apply.

90 The errors made by the Industrial Court in this case were errors of law on the face of the record. But for the privative provisions of s 179 of the IR Act, certiorari would lie on that ground, as well as for jurisdictional error.

State legislative power and privative provisions

91 In *Nat Bell Liquors*, Lord Sumner said[127] that the jurisdiction to grant certiorari could be contracted or expanded by the legislature: contracted by taking away certiorari "explicitly and unmistakably" or limiting its availability; expanded by restoring the remedy "to its pristine rigour by restoring to the record a full statement of the evidence". The provisions of s 69 of the *Supreme Court Act* are a species of the latter kind of legislative step. But legislation restricting the availability of the remedy is more common.

92 As noted earlier in these reasons, s 179(1) of the IR Act provides that a decision of the Industrial Court, however constituted, "is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal". The provisions made by s 179 are expressly extended (by s 179(5)) "to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise".

93 Finality or privative provisions have been a prominent feature in the Australian legal landscape for many years. The existence and operation of provisions of that kind are important in considering whether the decisions of particular inferior courts or tribunals are intended to be final. They thus bear directly upon the second of the premises that underpin the decision in *Craig* (that finality of decision is a virtue). The operation of a privative provision is, however, affected by constitutional considerations. More particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decisions of an inferior court or tribunal from judicial review,

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127 [1922] 2 AC 128 at 162.

yet remain consistent with the constitutional framework for the Australian judicial system.

94 Understanding the law relating to privative provisions must begin from the proposition, stated by Dixon J in *R v Hickman; Ex parte Fox and Clinton*[128], that:

> "if in one provision it is said that certain conditions shall be observed, and in a later provision of the same instrument that, notwithstanding they are not observed, what is done is not to be challenged, there then arises a contradiction, and effect must be given to the whole legislative instrument by a process of reconciliation".

But the question presented by a privative provision is not just a conundrum of contrariety requiring a resolution of competing elements of the one legislative instrument.

95 In considering Commonwealth legislation, account must be taken of the two fundamental constitutional considerations pointed out in *Plaintiff S157/2002 v The Commonwealth*[129]:

> "First, the jurisdiction of this Court to grant relief under s 75(v) of the Constitution cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction."

96 In considering State legislation, it is necessary to take account of the requirement of Ch III of the Constitution that there be a body fitting the description "the Supreme Court of a State", and 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"[130].

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128 (1945) 70 CLR 598 at 617; [1945] HCA 53.

129 (2003) 211 CLR 476 at 512 [98].

130 *Forge* (2006) 228 CLR 45 at 76 [63].

97 At federation, each of the Supreme Courts referred to in s 73 of the Constitution had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England[131]. It followed that each had "a general power to issue the writ [of certiorari] to any inferior Court" in the State[132]. Victoria and South Australia, intervening, pointed out that statutory privative provisions had been enacted by colonial legislatures seeking to cut down the availability of certiorari. But in *The Colonial Bank of Australasia v Willan*, the Privy Council said[133] of such provisions that:

> "It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. *There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it." (emphasis added)

That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.

98 The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised

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131 *Australian Courts Act* 1828 (Imp) (9 Geo 4 c 83), s 3, which conferred jurisdiction on the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land; *Supreme Court Act* 1890 (Vic), s 18; *Supreme Court Act* 1867 (Q), ss 21, 34; *Act No 31 of 1855-56* (SA), s 7; *Supreme Court Act* 1880 (WA), s 5, picking up Supreme Court Ordinance 1861 (WA), s 4.

132 *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 440.

133 (1874) LR 5 PC 417 at 442.

through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, "with such exceptions and subject to such regulations as the Parliament prescribes", s 73 of the Constitution gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the "Federal Supreme Court" in which s 71 of the Constitution vests the judicial power of the Commonwealth.

99 There is but one common law of Australia[134]. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. 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. It would permit what Jaffe described as the development of "distorted positions"[135]. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.

100 This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

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134 *Lipohar* (1999) 200 CLR 485 at 505 [43].

135 (1957) 70 *Harvard Law Review* 953 at 963.

IR Act, s179

101 Section 179 of the IR Act must be read in a manner that takes account of these limits on the relevant legislative power. It will be recalled that s 179(1), read with s 179(5), provides, in effect, 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 (whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise).

102 Orders in the nature of prohibition, certiorari and mandamus may be directed to the Industrial Court. It is a court subject to the supervisory jurisdiction of the Supreme Court of New South Wales. In this regard, reference must be made to s 152(2) of the IR Act, which provides that "[f]or the purposes of Part 9 of the *Constitution Act 1902* [(NSW)], the [Industrial Court] is a court of equivalent status to the Supreme Court". Part 9 of the *Constitution Act* relates to removal and suspension from judicial office, retirement, and abolition of judicial office. Section 152(2) does not affect questions of the kind now under consideration. It may be put aside.

103 Section 179(4) extends the reach of s 179, by extending the section "to proceedings brought in a court or tribunal in respect of a *purported decision* of the [Industrial Court] *on an issue of the jurisdiction of the [Industrial Court]*" (emphasis added). Section 179(4) is not engaged in the present case. The reference to "a purported decision ... on an issue of the jurisdiction of the [Industrial Court]" should be read as referring to a decision made in a proceeding of the kind which was at issue in this Court in *Batterham v QSR Ltd*[136]. There, application had been made by a respondent to proceedings instituted in the Industrial Court for an order dismissing the proceedings for want of jurisdiction. In *Batterham*, this Court concluded that the Industrial Court had not decided the issue of jurisdiction (holding only that the absence of jurisdiction was not sufficiently demonstrated to warrant summary termination of the principal proceeding). But what *Batterham* illustrates is that s 179(4) is directed to a decision of the Industrial Court that it does or does not have jurisdiction in a particular matter. No decision of that kind was at issue in this matter. Section 179(4) not being engaged in this matter, it is not necessary to consider its validity.

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136 (2006) 225 CLR 237; [2006] HCA 23.

104 In its terms, s 179(1), read with s 179(5), could be read in a manner which would speak to the present case. But those provisions could be read as engaged *only* if the expression "[a] decision of the [Industrial Court]" were read as including a decision of the Industrial Court that was attended by jurisdictional error. That is, the provisions could be engaged only if "decision" includes a decision of the Industrial Court made outside the limits on its power. "Decision" should not be read in that way.

105 In the form in which s 179 stood at the times relevant to this matter, the contrast between the references in s 179(1) to a "decision", and in s 179(4) to a "purported decision", would point away from reading the provisions of s 179(1) as engaged with respect to what purports to be a decision of the Industrial Court but is a decision attended by jurisdictional error. Determining the significance to be given to the contrast evident in the form of the Act as it stood at relevant times would require examination of the history of the section, and the successive introduction of the various elements that yielded the section in its relevant form. It is, however, not necessary to undertake that task, because even without any internal indication that "decision" should be read as a decision of the Industrial Court that was made within the limits of the powers given to the Industrial Court to decide questions, that reading of the section follows from the constitutional considerations that have been mentioned. Section 179, on its proper construction, does not preclude the grant of certiorari for jurisdictional error. To grant certiorari on that ground is not to call into question a "decision" of the Industrial Court as that term is used in s 179(1).

106 Designation of the Industrial Court as a "superior court of record" does not alter the conclusions stated about the availability of certiorari. It may well affect whether the orders of the Industrial Court are subject to collateral challenge but that is not an issue that need be examined here[137].

107 As Isaacs J pointed out in *The Tramways Case [No 1]*[138], notions derived from the position of the pre-Judicature common law courts of Queen's Bench, Common Pleas and Exchequer as courts of the widest jurisdiction with respect to

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137 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375, 393-394; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 184-186 [49]-[53], 210-212 [136]-[140], 235-236 [214]-[216], 275 [329]; [2000] HCA 62.

138 (1914) 18 CLR 54 at 75; [1914] HCA 15.

subject-matter and identity of parties (and in that sense "superior courts of record") find no ready application in Australia to federal courts[139]. And at least since federation, the State Supreme Courts have not been courts of unlimited jurisdiction[140]. Just as the amenability of a judge of a federal court to a writ of prohibition does not depend upon the court of which the judge is a member being an "inferior" court, but upon the jurisdiction of the court being limited[141], the amenability of the Industrial Court to the supervisory jurisdiction of the Supreme Court is a corollary of the Industrial Court being a court of limited power and the position which the State Supreme Court has in the constitutional structure.

108 An order in the nature of certiorari could, and in this case should, have been directed to the Industrial Court in respect of its decisions at first instance. That remedy should have been granted for jurisdictional error of the Industrial Court. Because both the order of Walton J finding the offences proved and the order of Walton J passing sentence should have been quashed, the orders subsequently made by the Full Bench of the Industrial Court should also be quashed[142].

Conclusion and orders

109 Because the first respondent to the appeal in this Court is now properly called the Industrial Court of New South Wales, the title of that proceeding should be amended by deleting "Industrial Relations Commission of New South Wales" and substituting "Industrial Court of New South Wales". The appeal to this Court should be allowed. The second respondent should bear the appellants'

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139 See also *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 652-653; [1995] HCA 31.

140 See, for example, *Judiciary Act* 1903 (Cth), s 38, rendering this Court's jurisdiction exclusive of that of other courts with respect to some matters.

141 See, for example, *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 385.

142 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 277; [1979] HCA 27; *Ruddock v Taylor* (2005) 222 CLR 612 at 656 [160]; [2005] HCA 48; Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 4th ed (2009) at 801-802 [12.25]; Grady and Scotland, *The Law and Practice in Proceedings on the Crown Side of the Court of Queen's Bench*, (1844) at 187-188; Halsbury, *The Laws of England*, 1st ed (1909), vol 10 at 186-187 [365].

costs in this Court. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 3 July 2008 should be set aside and in their place there should be orders that:

(a) the orders of the Industrial Court of New South Wales made on 9 August 2004, and on 24 January 2005 and the orders of the Full Bench of the Industrial Court of New South Wales made on 15 November 2006, and on 8 May 2007 be quashed;

(b) the second defendant, the WorkCover Authority of New South Wales, pay the plaintiffs' costs.

110 In addition to orders dealing with the costs of the appeal to this Court and of the proceedings in the Court of Appeal which led to the order of 3 July 2008, the appellants sought orders that the WorkCover Authority of New South Wales pay their costs of "all the proceedings below in the Court of Appeal and the Industrial Court". In the matter which was the subject of the appeal to this Court it would not have been open to the Court of Appeal to make orders dealing with the costs of proceedings in the Industrial Court. The proceedings before the Court of Appeal were in the original jurisdiction of the Supreme Court of New South Wales. The Court of Appeal was not exercising appellate jurisdiction[143]. The Court of Appeal had power to quash the orders made at first instance by Walton J in the Industrial Court (including the order for costs) and to quash the orders made subsequently by the Full Bench of the Industrial Court, including the costs orders made by the Full Bench. But the Court of Appeal did not have power to make any order in place of the orders that had been quashed.

111 On appeal, this Court has power[144] to "give such judgment as ought to have been given in the first instance", which is to say, in this case, given by the Court of Appeal exercising its original jurisdiction. Apart then from the orders already described (providing for the costs of the appeal to this Court and the costs of the proceedings in the Court of Appeal, and quashing the orders,

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143 cf *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338 at 346-347, 357.

144 *Judiciary Act* 1903 (Cth), s 37; *Gurnett v The Macquarie Stevedoring Co Pty Ltd [No 2]* (1956) 95 CLR 106 at 111; [1956] HCA 29; *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]* (1982) 151 CLR 590; [1982] HCA 59.

including costs orders, made in the Industrial Court both at first instance and by the Full Bench) no further order dealing with the costs of proceedings in the Industrial Court can be made.

112 Each of the two applications for special leave should be dismissed. There should be no order as to the costs of those applications.

113 HEYDON J. I dissent from the orders proposed by the majority. I agree with the substance of the reasoning stated in the reasons for judgment of the majority, subject to one question.

Defendant called as witness by the prosecution

114 The law required the hearing to be conducted in accordance with the rules of evidence. That follows from s 163(2) of the *Industrial Relations Act* 1996 (NSW) ("the IR Act"). It also follows from the *Evidence Act* 1995 (NSW) ("the Evidence Act"): see s 4(1) read with the definition in Pt 1 of the Dictionary of "NSW court". In defiance of the prohibition in s 17(2) of the Evidence Act, the prosecution called Mr Kirk as its own witness in a criminal case. It was not open to the Industrial Court to dispense with s 17(2) pursuant to s 190, even with the consent of the parties. That error was not sinister in that it arose by reason of an oversight by the parties and the judge. But it was a jurisdictional error. The trial judge had jurisdiction to decide whether to fine the appellants after a trial conducted in accordance with the rules of evidence. He did not have jurisdiction to decide whether to fine the appellants after a trial which was not conducted in accordance with the rules of evidence. The jurisdictional error appeared on the face of the record, being mentioned at least twice in the trial judge's reasons for judgment. Will every error in applying those of the numerous rules of evidence which cannot be dispensed with pursuant to the fairly strict requirements of s 190 or bypassed by agreeing facts pursuant to s 191 or outflanked by making admissions be a jurisdictional error? That question should be reserved for consideration from case to case. It is possible that there may be instances of failure to comply with the rules of evidence which are of insufficient significance to cause the court making them to move outside jurisdiction. It is also possible, as the majority suggest, that even insignificant failures would be jurisdictional errors, but not jurisdictional errors of a type justifying the exercise of an appellate court's discretion in favour of granting relief[145].

115 But the error involved here in the prosecution calling a personal defendant as its witness to give a substantial quantity of testimony is within neither of these two categories. On any view it was a jurisdictional error, and there was no discretionary reason for refusing relief. For a long time it was controversial whether, and on what conditions, the accused should be made a competent witness[146]. The position adopted by the Imperial and Australian legislatures in the late 19th century was that the accused was not to be a competent or compellable prosecution witness, but was to be a competent witness for the

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145 See [53].

146 See *Cornwell v The Queen* (2007) 231 CLR 260 at 272-282 [32]-[56]; [2007] HCA 12.

defence. That position has been continued in s 17(2) of the Evidence Act. It is an absolutely fundamental rule underpinning the whole accusatorial and adversarial system of criminal trial in New South Wales. A sign, and a cause, of its fundamental character is the provision in s 190(1)(a) that the court cannot make an order dispensing with that rule, even with the consent of the parties.

116 I agree with the reasons of the majority for rejecting the proposition that even if Mr Kirk was not competent to give evidence in the case against him he was competent to give evidence as a witness against the Kirk company[147].

117 It would be wrong to do what the prosecution in this Court did not do – to treat the fact that Mr Kirk was called by the prosecution as a mere technicality of which the appellants have been able to take an adventitious and unmeritorious advantage at a late stage in these proceedings. The credibility of a witness in the position of Mr Kirk in relation to the defence under s 53 of the *Occupational Health and Safety Act* 1983 (NSW) ("the OH&S Act") is capable of being affected by the manner in which the testimony is elicited. The law grants considerable power to a cross-examiner to employ leading questions and otherwise to operate free from some of the constraints on an advocate examining in chief. It does so for particular reasons. In New South Wales at least[148], normally in a criminal case an advocate cross-examining an accused person will have had no contact with the witness being cross-examined before the trial, and will have no instructions about what that witness will say, apart from whatever the witness said to investigating officials acting on behalf of the State or to other persons to be called as witnesses in the prosecution case or in documents to be tendered in that case. But a cross-examiner's ordinary powers are, in a practical sense, much diminished when the witness being cross-examined is the client of the advocate conducting the cross-examination. The cross-examiner who persistently asks leading questions of a witness in total sympathy with the interests of the cross-examiner's client is employing a radically flawed technique. The technique is the more flawed when the witness is not merely in total sympathy with the client, but actually is the client. For an inevitable appearance of collusion between an advocate and a client who had many opportunities for pre-trial conferences is suggested by the persistent use of leading questions in these circumstances. It is an appearance which is likely to be ineradicable, and which is likely to cause the value of the evidence to be severely discounted. This risk is avoided if the client is giving the evidence in chief rather than under cross-examination, for the client's advocate is severely restricted in the capacity to ask leading questions in chief. Judging the credibility of a witness in the box can depend on the trier of fact making an assessment of that witness's whole

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147 See [51]-[52].

148 Cf *Criminal Procedure Act* 2009 (Vic), ss 183, 237(1)(a) and 358.

character. It is a process assisted by knowing as much about the witness's character as possible. The credibility of testimony is often enhanced, and the assessment of credibility is assisted, when the testimony is given in answer to non-leading questions. Testimony given in answer to non-leading questions is the witness's own testimony, resting on the witness's own perceptions, and moulded by the witness's own values. It is not something created by the narrow, specific and carefully crafted leading questions of an advocate concerned to shield the witness's character as much as possible. On some issues in the trial in this case the prosecution bore the legal burden of proof, but on the vital s 53 issue Mr Kirk and the Kirk company bore the legal burden of proof. It would have been asking too much of human nature to have expected counsel for the prosecution to have elicited evidence from Mr Kirk on issues exclusive to the s 53 defence. That task thus lay with counsel for Mr Kirk and the Kirk company. It is a task one would expect to have been more satisfactorily accomplished from the defendants' point of view if it were done by an advocate not able to make extensive use of leading questions. There are many reasons for the legislative choice made in s 17(2) and s 190, but this particular consideration alone indicates that there is nothing irrational about it, and nothing trivial about the failure to comply with s 17(2) in this case.

118 The calling by the prosecution of a defendant as its own witness is not the only curious feature of the present case.

119 Another curious feature is that apart from some concerns which the trial judge, to his credit, revealed about that course, it was adopted by the parties without apparent attention to its legality.

120 Yet another curious feature is found in a section of his reasons for judgment recording various facts which he evidently saw as crucial. The trial judge there concluded that Mr Kirk "did not supervise the daily activities of employees or contractors working on the Farm"[149]. The suggestion that the owners of farms are obliged to conduct daily supervision of employees and contractors – even the owners of relatively small farms like Mr Kirk's – is, with respect, an astonishing one. A great many farms in Australia are owned by natural persons who do not reside on or near them, and a great many other farms are owned by corporations the chief executive officers of which do not reside on or near them. The suggestion reflects a view of the legislation which, if it were correct, would justify many of the criticisms to which counsel for the appellants subjected it as being offensive to a fundamental aspect of the rule of law on the ground that it imposed obligations which were impossible to comply with and burdens which were impossible to bear.

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149 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2004) 135 IR 166 at 192 [105].

121 The next striking aspect of the proceedings relates to some of the reasons why the Full Bench of the Industrial Court only extended the time within which the appellants could appeal in relation to one ground. This was inconsistent with the contemplation of the Court of Appeal, for Spigelman CJ[150] and Basten JA[151] both appeared to assume that the full range of the appellants' jurisdictional arguments would be considered by the Full Bench. One ground which the Full Bench assigned for not making a wider grant of leave was that the appellants' first application to the Court of Appeal, which caused the delay in the application to the Full Bench, was "forum shopping". That is an expression which the Full Bench used several times and which it borrowed from the submissions of counsel for the prosecution. The expression "forum shopping" is commonly used to describe the conduct of litigants who seek to choose among different jurisdictions, whether the courts of different nations (for example, France or New Zealand) or different states or provinces (for example, New South Wales or Victoria) or different law-districts (for example, England or Scotland) or, in a federation, a federal court exercising federal jurisdiction rather than a State court exercising State jurisdiction (for example, the Federal Court of Australia or a State court). It seems inappropriate so to describe the conduct of litigants who, aggrieved by the decision of a court of New South Wales, attempted to remedy their grievance by making an application to the highest courts in New South Wales, the Court of Appeal and the Court of Criminal Appeal. Provided there was not in place any valid legislation precluding that application, the course does not seem to be correctly describable as "forum shopping". To describe it as "forum shopping" is to treat the Court of Appeal as if it were akin to a weak early feudal monarch whose writ does not run to the demesne of a powerful territorial magnate, and to treat the Full Bench as that magnate. It is to treat the Full Bench as if it were the only proper forum, and to treat the Court of Appeal as a court which, if it has jurisdiction at all, is a most unworthy receptacle of it. It approaches an assertion of exclusive dominion over the fields within its jurisdiction. A court below the Court of Appeal in the appellate hierarchy of New South Wales courts is not in a different "forum" from the Court of Appeal. Nor is a court controllable by that Court through orders in the nature of prohibition, mandamus and certiorari on grounds of jurisdictional error. In submissions advanced by the prosecution to the Court of Appeal, which the Full Bench quoted, it was contended that the appellants' conduct would "lead to the risk of the establishment of two separate bodies of jurisprudence, which … is not in the interests of justice". The submission was repeated to the Full Bench. Had

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150 *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* (2006) 66 NSWLR 151 at 162 [48]-[50].

151 *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* (2006) 66 NSWLR 151 at 185 [155].

the Court of Appeal dealt with the matter on the merits in accordance with the approach to the construction of ss 15, 16 and 53 of the OH&S Act adopted by the majority judgment in this Court, there would not have been "two separate bodies of jurisprudence". It would have been the duty of the Industrial Court, both its trial judges and the Full Bench, thereafter to follow the law as stated by the Court of Appeal. The Full Bench thus appears to have operated, or accepted submissions which operated, under a misconception about the structure of the courts which sit in New South Wales. For just as this Court sits at the pinnacle of a single integrated system of courts, the Court of Appeal (or, depending on the subject-matter, the Court of Criminal Appeal) sits at the pinnacle of the system of courts in New South Wales. This misconception in relation to "forum shopping" underlies the expressions that the Full Bench employed when it spoke of the appellants' attack on s 179 of the IR Act as "merely a device to circumvent the likelihood of the Court of Appeal declining to hear the [appellants] from the outset" and when it said the appellants "felt" that "they had a better chance in another forum."[152] The Full Bench also gave as a ground for its refusal to extend time the "settled" nature of the case law in the Industrial Court applied by the trial judge. Whether settled in that Court or not, an attempt to have a court with power to control the Industrial Court examine its merits should not have been the subject of pejorative language. The attempt was not appropriately described as "forum shopping", or as tainted by the use of "devices", or as an appeal to "chances".

122 Our legal system has often had to balance the advantages of creating specialisation over the disadvantages of doing so. It is commonly thought better, for example, that allegations of crimes be tried by judges expert in criminal law and procedure. The same is true, mutatis mutandis, of company work, bankruptcy, personal injury claims, planning law and many other categories of litigation. Sometimes the legislature elects to create separate courts for the particular litigation. Sometimes it creates separate divisions within a court. Sometimes it leaves it to the courts themselves to create appropriate lists, the precise nature of which may readily be changed from time to time. A writer in the late 20th century said[153]:

> "History teaches us to be suspicious of specialist courts and tribunals of all descriptions. They are usually established precisely because proceedings conducted in accordance with normal judicial standards of fairness are not producing the outcomes that the government wants. From the Court of Star Chamber to the multitude of military courts and revolutionary

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152 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 158 IR 281 at 293 [39]-[40].

153 Walker, *The Rule of Law*, (1988) at 35.

> tribunals in our own century, this lesson has been repeated time and time again."

However that may be, the appellants referred in submissions to the danger of conferring jurisdiction to hear criminal proceedings on courts the practitioners in which are unfamiliar with all the relevant rules. There is a related danger in that course in that the courts on which the jurisdiction has been conferred, while in some sense specialist, are not familiar with all the relevant rules. Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary. It thus forgets fundamental matters like the incapacity of the prosecution to call the accused as a witness even if the accused consents. Another difficulty in setting up specialist courts is that they tend to become over-enthusiastic about vindicating the purposes for which they were set up. Medical students usually detect in themselves at a particular time symptoms of the diseases they happen to be studying at that time. Academic lawyers interested in a particular doctrine can too often see it as almost universally operative. So too courts set up for the purpose of dealing with a particular mischief can tend to exalt that purpose above all other considerations, and pursue it in too absolute a way. They tend to feel that they are not fulfilling their duty unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are "preoccupied with special problems", like tribunals or administrative bodies of that kind, are "likely to develop distorted positions."[154] Thus Jaffe said, discussing the factual position illustrated by *R v Bradford*[155]: "[R]oad-maintenance authorities sorely pressed to find gravel within the parish will not place a high value on the amenities of the gentry's parks."[156] It may be that something like this underlay the process by which the Industrial Court adopted the construction of ss 15, 16 and 53 of the OH&S Act which the majority have rejected, and failed to notice the closely related difficulty of the unsatisfactory way the charges were pleaded. To say that is not to negate the importance of increased industrial safety, or the importance of giving full effect to the statutory language, properly construed, which creates methods of increasing it. Nor is it necessarily to question whether creating specialist courts devoted to the fulfilment of that and other vital public goals is the best way of increasing industrial safety. It is merely to raise a caveat about accepting too readily the validity of what specialist courts do – for there are general and

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154 See above at [64].

155 [1908] 1 KB 365.

156 "Judicial Review: Constitutional and Jurisdictional Fact", (1957) 70 *Harvard Law Review* 953 at 963.

fundamental legal principles which it can be even more important to apply than specialist skills.

Orders

123 *Uncontroversial orders.* It is not controversial that the title of the proceeding should be amended, that the appeal should be allowed, that the second respondent should pay the appellants' costs of the appeal, that the orders of the Court of Appeal of 3 July 2008 should be set aside, that the second respondent should pay the appellants' costs of those proceedings in the Court of Appeal, that the orders of the Industrial Court at trial be quashed, that the orders of the Full Bench of the Industrial Court be quashed and that the two special leave applications be dismissed.

124 *Two controversial questions.* There are, however, two controversial questions. One is whether any order should be made in relation to the future of the Industrial Court proceedings. The other concerns the costs of the trial, of the first Court of Appeal and the Court of Criminal Appeal proceedings, of the Full Bench proceedings and of the two special leave applications which are to be dismissed on the ground that it is not necessary to deal with them in view of the appellants' success in the appeal. The starting point of an endeavour to answer them must be that this is a highly unusual case, in which the appellants have been treated very unjustly and in a manner causing them much harm. The substantive outcome in this Court is the quashing of fines totalling $121,000. But if the appellants do not enjoy significant success in obtaining costs orders in their favour in relation to proceedings in the courts below, the financial aspect of their substantive success will be dwarfed by what they will have spent in costs in order to secure that success. That would be a paradoxical result.

125 *Dismissal of applications.* No order for a new trial should be made. Rather, there should be an order that the applications in the Industrial Court be dismissed. That is so for the following reasons. First, the second respondent does not seek an order for a new trial and it is desirable to make it plain that there will be no new trial. Secondly, the proceedings should have never been instituted. That is perhaps a statement the truth of which can be seen more clearly now, in hindsight, than it could be seen before the proceedings were instituted. But it remains a statement which is and was true at all times. It is absurd to have prosecuted the owner of a farm and its principal on the ground that the principal had failed properly to ensure the health, safety and welfare of his manager, who was a man of optimum skill and experience – skill and experience much greater than his own – and a man whose conduct in driving straight down the side of a hill instead of on a formed and safe road was inexplicably reckless. The absurdity is the greater in view of the trial judge's acceptance of the propositions that Mr Kirk was "a 'scrupulous and dedicated professional'", that when "'Mr Kirk is operating something in a business mode we know he will be attending to it or causing others to attend to it with the full

discretion that he can"[157], that for 20 years he had "operated as a good industrial citizen"[158], that he was extremely remorseful because of the death of a good friend[159], and that in various other respects he had "paid a high price"[160]. Thirdly, even if the proceedings were not misconceived from the outset, they were conducted unsatisfactorily: the form of the applications rendered them liable to be struck out, the actual hearing was not conducted within jurisdiction or according to law because the prosecution called Mr Kirk as its own witness, and the reasons for judgment of the trial judge proceeded on an erroneous construction of the legislation. Fourthly, the accident which led to the prosecution took place on 28 March 2001. The prosecution tarried until the end of the limitation period before filing the applications on 27 March 2003. The hearing took place on 10 and 11 February and 5 April 2004. The trial judge's reasons for finding the offences proven were delivered on 9 August 2004. His reasons for imposing fines were delivered on 24 January 2005. There followed proceedings in the Court of Appeal and Court of Criminal Appeal (commenced in 2005, concluded on 30 June 2006), the Full Bench application to extend time to appeal (concluded on 15 November 2006), the Full Bench appeal (concluded on 8 May 2007), proceedings again in the Court of Appeal (concluded on 3 July 2008), the special leave applications to this Court (heard on 1 May 2009) and the hearing in this Court (from 29 September to 1 October 2009). No-one is to be blamed for any of these delays after 27 March 2003, taken in isolation. But the cumulative effect on the appellants is oppressive. It is time for the WorkCover Authority of New South Wales to finish its sport with Mr Kirk. The applications in the Industrial Court should be dismissed.

126 *A wide claim for costs.* The trial judge ordered the appellants to pay the second respondent's costs of the trial. The appellants seek in this Court an order to the effect that the second respondent pay the costs of the proceedings in this Court and of all the proceedings below in the Court of Appeal and the Industrial Court.

127 This raises three questions. First, are the appellants entitled to an order that the second respondent pay their costs of the trial in the Industrial Court?

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157 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462 at 467 [18].

158 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462 at 476 [52].

159 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462 at 475-476 [48] and 476 [52].

160 *WorkCover Authority of New South Wales v Kirk Group Holdings Pty Ltd* (2005) 137 IR 462 at 476 [50].

Secondly, are the appellants entitled to an order that the second respondent pay the costs of the proceedings before the Court of Appeal and the Court of Criminal Appeal which led to the orders of 30 June 2006? Thirdly, are the appellants entitled to an order that the second respondent pay the appellants' costs of the proceedings leading to the Full Bench orders of 15 November 2006 and 8 May 2007?

128 *Costs of the trial.* In relation to the first question, it is common ground that on 9 August 2004, when the trial judge found the allegations proved, s 253(1A) of the *Criminal Procedure Act* 1986 (NSW), which operated by virtue of s 168(2) of the IR Act, gave power to the trial judge to award costs to the appellants had he made an order dismissing the proceedings[161]. There being no application to amend the charges, the order he ought to have made was an order dismissing the proceedings. The orders he actually made were orders that the appellants pay fines totalling $121,000 and that they pay the prosecution's costs. Not only should those orders be quashed, but the second respondent should be ordered to pay the appellants' costs of the proceedings before the trial judge. It is true that, as the second respondent submitted, one point on which the appellants have succeeded in establishing error arose from the fact that the appellants consented to the prosecution calling Mr Kirk as its own witness. The second respondent also submitted that the point was not relied on by the appellants in the court below[162]. Indeed, it was only relied on in this Court after the bench drew it to the attention of counsel for the appellants. However, this does not debar the Court from making the costs order which the appellants seek, because they succeeded on other points unaffected by this difficulty.

129 The appellants applied to the Court of Appeal in the proceedings determined on 3 July 2008 for the costs order they now seek. The second respondent neither urged nor cited any authority for the proposition that even if the appellants had been successful in obtaining from the Court of Appeal an order of certiorari quashing the trial judge's orders, they would not have been entitled to an order that the second respondent pay the costs of those proceedings. It thus in substance consented to the costs order that was sought by the appellants.

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161 There is some doubt as to whether s 253(1A) was applicable to the proceedings. Its applicability would depend upon the interpretation of the relevant transitional provisions. It is not necessary to determine the question to dispose of the proceedings.

162 The second respondent cited *NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273 at 282.

130 The second respondent did not submit that the more appropriate course is for this Court to remit to the Industrial Court the question of what costs order should be made in relation to the trial. In proceedings which took a less oppressive course than these have done, that may be the correct approach. But since the proceedings have been so oppressive that, for reasons given above, they should be dismissed, it is desirable for this Court to bring complete finality by dealing with the appellants' costs of them as well by ordering that the second respondent pay them.

131 *Costs of the Court of Appeal proceedings terminating on 30 June 2006.* In relation to the second question, no argument was put to suggest that any distinction should be drawn between the costs of the proceedings before the Court of Appeal which led to its orders of 30 June 2006 and the costs of the Court of Criminal Appeal proceedings. They were heard with the application to the Court of Appeal in a single day, dealt with in the same judgment and dismissed by an order made on the same day. Those costs should be paid by the second respondent. The Court of Appeal followed its normal approach of "restraint" towards the Industrial Court – an approach by which the Court of Appeal permits the Full Bench to determine jurisdictional questions before examining them for itself. There is no doubt that the course adopted by the Court of Appeal was encouraged by the second respondent. Before the Full Bench it admitted that "we did submit before the Court of Appeal that the [appellants] could still come back to this Court and bring [their] appeal". In the Court of Appeal the view was expressed that it would not be futile to allow the Full Bench to consider an appeal despite the state of the authorities in the Industrial Court[163]. That expectation was dashed when the second respondent opposed the grant by the Full Bench of an extension of time and the Full Bench, before extending time only in relation to one ground of appeal, accepted the submissions of the second respondent in the following words[164]:

> "Whilst it may be accepted that it was open to the [appellants] in February 2005 to choose to pursue their relief through the Court of Appeal rather than via an appeal to the Full Bench …, the [appellants] made a calculated, informed choice in that respect and having failed in their endeavour to achieve relief in the Court of Appeal it is difficult to see why they should be provided with an opportunity to re-run the whole of their argument in another place."

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163 *Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* (2006) 66 NSWLR 151 at 162 [50].

164 *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 158 IR 281 at 293 [41].

Whether or not the appellants can be said to have "run the whole of their argument" in the Court of Appeal, they did not have the benefit of a considered decision by the Court of Appeal on the merits of the arguments they ran, because the Court of Appeal took the view that it was the Full Bench which should, at least in the first instance, consider the merits of the argument. The effect of the Full Bench's substantial acceptance of the second respondent's submissions was to preclude that Court from considering the merits of the appellants' arguments apart from one. The second respondent also advocated that the Court of Appeal make the orders adverse to the appellants which it made on 3 July 2008. When tactical decisions by the second respondent of that kind enjoy several successes but eventually fail, as they did in this Court, it is just that the second respondent should pay the appellants' costs of the entire series of proceedings. The fact that the appellants have never applied for special leave to appeal against the orders made is not an obstacle to ordering that the second respondent pay the appellants' costs of the proceedings before the Court of Appeal and the Court of Criminal Appeal determined on 30 June 2006. The reasoning of the majority indicates that the orders made by the trial judge rest on several injustices. The various pieces of litigation which the appellants have instituted since the trial judge fined them have been directed to overcoming those injustices. The pieces of litigation amount to attempts to exhaust all remedies legitimately available to the appellants. Among the consequences of those injustices have been several adverse costs orders. Now that the reasoning of the majority has revealed those injustices, the appellants ought to be rendered free of the detriments flowing from them in the form of costs orders suffered in the course of attempts to remedy the injustices.

132 *Costs of the Full Bench hearings.* The third question should be answered in the affirmative. The costs of the hearings which led to the orders made by the Full Bench on 15 November 2006 and 8 May 2007 were only incurred because of the course which the Court of Appeal took on 30 June 2006. The course taken by the Court of Appeal on that date was a course which the prosecution urged on the Court of Appeal, and it was an outcome which the prosecution defended and attempted to rely on at all later stages. For similar reasons to those stated in relation to the second question, it is not an obstacle to ordering that the second respondent pay the appellants' costs of the proceedings before the Full Bench that, though the appellants have filed special leave applications in relation to them, those applications have not been granted. The appellants, in their application disposed of by the Court of Appeal on 3 July 2008, sought an order that the second respondent pay their costs before the Full Bench. The second respondent did not argue that, and cited no authority to the effect that, if the appellants had been otherwise successful in obtaining the order of certiorari sought in relation to the Full Bench decisions, the appellants would not be entitled to costs before the Full Bench.

133 In the circumstances the costs order which the appellants seek in this Court is a just one.

134 *Costs of the two special leave applications.* The outstanding special leave applications, too, were only made necessary by the decision of the Court of Appeal of 30 June 2006, and by the conduct of the second respondent in seeking it. Although those two applications must be dismissed because it is unnecessary to consider them, the second respondent should pay the appellants' costs of each of them.