HIGH COURT OF AUSTRALIA

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

PUBLIC SERVICE ASSOCIATION OF SOUTH AUSTRALIA INCORPORATED APPLICANT

AND

INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA AND ANOR RESPONDENTS

Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia [2012] HCA 25
11 July 2012
A7/2011

ORDER

1. *Special leave to appeal granted.*

2. *Appeal treated as instituted and heard instanter, and allowed.*

3. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 15 March 2011.*

4. *Remit the matter to the Full Court of the Supreme Court of South Australia for determination of the appellant's summons for judicial review, including any questions of costs in the Full Court.*

5. *The second respondent, the Chief Executive, Department of the Premier and Cabinet of South Australia, pay the costs of the appellant in this Court.*

On appeal from the Supreme Court of South Australia

Representation

P A Heywood-Smith QC with P N Moloney for the applicant (instructed by Moloney and Partners)

Submitting appearance for the first respondent

M G Hinton QC, Solicitor-General for the State of South Australia with D F O'Leary for the second respondent and intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

S J Gageler SC, Solicitor-General of the Commonwealth with G R Kennett SC and C D Bleby intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

G L Sealy SC, Solicitor-General of the State of Tasmania with S D Gates intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Crown Solicitor for Tasmania)

S G E McLeish SC, Solicitor-General for the State of Victoria with P R D Gray SC intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R M Mitchell SC, Acting Solicitor-General for the State of Western Australia with A K Sharpe intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

CATCHWORDS

Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia

Administrative law – Judicial review – Excess or want of jurisdiction – Appellant commenced proceedings in Industrial Relations Commission of South Australia ("Commission") – Commission had jurisdiction with respect to "industrial disputes" which meant a dispute about an "industrial matter" as defined by *Fair Work Act* 1994 (SA) ("Act") – Commission determined that it lacked jurisdiction because there was no industrial dispute – Full Court of Supreme Court of South Australia dismissed summons for judicial review because s 206 of Act excluded review except for "excess or want of jurisdiction", which phrase it interpreted as excluding failure or refusal to exercise jurisdiction – Whether Commission had duty to determine jurisdictional fact of existence of industrial dispute – Whether s 206 of Act precluded mandamus but not prohibition and certiorari – Whether "excess or want of jurisdiction" in s 206 of Act included jurisdictional error or only some species of jurisdictional error.

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III – State Supreme Courts – Defining characteristics of State Supreme Courts – Application of *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 in determining characteristics of State Supreme Courts identified in Ch III of Constitution – Whether power to issue mandamus to inferior courts and to tribunals a defining feature of State Supreme Courts – Whether s 206 of Act limited State Supreme Court jurisdiction to exercise judicial review for jurisdictional error.

Words and phrases – "excess or want of jurisdiction", "judicial review", "jurisdiction", "jurisdictional error", "jurisdictional fact", "mandamus".

Constitution, Ch III.
Fair Work Act 1994 (SA), ss 26, 206.
Industrial Conciliation and Arbitration Act 1972 (SA), s 95.
Supreme Court Act 1935 (SA), s 17(2).

FRENCH CJ.

Introduction

1 On 15 March 2011, the Full Court of the Supreme Court of South Australia held that it did not have jurisdiction to entertain a summons, filed by the Public Service Association of South Australia Inc ("the PSA") for judicial review of a decision of the Full Commission of the Industrial Relations Commission of South Australia ("the Commission")[1]. The PSA contended that the Commission had wrongly refused to exercise its jurisdiction in relation to two industrial disputes between it and the Chief Executive of the Department of the Premier and Cabinet of South Australia ("the Chief Executive"). The Commission had decided that in each case there was no industrial dispute and that it therefore lacked jurisdiction[2]. The Full Court refused to entertain the PSA's summons because of s 206 of the *Fair Work Act* 1994 (SA) ("the Fair Work Act"), which provides:

> "(1) A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act.
>
> (2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction."

2 The Full Court held that a refusal by the Commission to exercise jurisdiction, even if wrongful, could not be judicially reviewed because the authority of the Court to hear and decide a challenge to a determination of the Commission was limited to a challenge brought on the ground of an excess or want of jurisdiction. The Full Court held, on the basis of the decision of this Court in *Public Service Association (SA) v Federated Clerks' Union*[3] ("the 1991 PSA Case"), that a refusal to exercise jurisdiction did not constitute an excess or want of jurisdiction[4].

---

1 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223.

2 *Public Sector Association of SA Inc v Chief Executive Department of the Premier and Cabinet* [2010] SAIRComm 11.

3 (1991) 173 CLR 132; [1991] HCA 33.

4 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223 at 228-229 [15].

3 The PSA sought special leave to appeal to this Court. Its application was referred to an enlarged Bench. The threshold question for determination in this Court is whether the decision of the Commission, that there was no industrial dispute before it, could be characterised as a decision on a question of jurisdictional fact which, if erroneous, constituted a decision in excess of jurisdiction. For the reasons that follow, the answer to that question is yes. That being so, the Full Court did have jurisdiction to entertain an application for mandamus to direct the Commission to exercise its jurisdiction. The appeal should be allowed and orders made as proposed in the joint judgment.

The history of the proceedings

4 The history of these proceedings began early in October 2010 with the notification by the PSA to the Commission of two disputes with the Chief Executive. The disputes related to security of employment for public sector employees and recreation leave loading and long service leave arrangements. Both disputes arose out of the 2010-2011 State Budget.

5 The Chief Executive and the PSA were parties to the South Australian Government Wages Parity (Salaried) Enterprise Agreement 2010 ("the Agreement") which had been approved by the Commission pursuant to s 79 of the Fair Work Act.

6 Clause 9 of that Agreement, entitled "Memorandum of Understanding", included a provision that:

> "There will be no forced redundancy for employees bound by this Enterprise Agreement for the period during which the MOU has been extended."

The first dispute concerned plans for reducing the size of the State public service. In a statement made at the time of the presentation of the 2010-2011 Budget, the State Treasurer is said to have told Parliament of plans to reduce public service employee numbers through redeployment and voluntary separation packages. If the required reduction could not be achieved through those mechanisms then, according to the Treasurer's budget statement, "the Government will reconsider its 'no forced redundancy' policy."[5]

7 The second dispute arose out of cl 2.2 of the Agreement which provided, inter alia, that the parties were committed to existing conditions of employment applying to a party not being reduced, subject to the terms of the Agreement and

---

5 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 16 September 2010 at 1279.

any applicable Workplace Flexibility Agreement. In connection with the State Budget, the Statutes Amendment (Budget 2010) Bill 2010 (SA), which was introduced into the Parliament, provided for the replacement of recreation leave loading, to which certain public sector employees were entitled, with two days extra leave, and a reduction of long service leave entitlements of all public sector employees with 15 years or more employment.

8 The matter having been referred to the Commission, Commissioner McMahon conducted a voluntary conference apparently pursuant to s 200 of the Fair Work Act. On 15 October 2010, he issued a statement to the effect that the Commission did not have any jurisdiction to deal with either dispute. The matter was then referred to a compulsory conference under s 202 of the Fair Work Act. Pursuant to the powers conferred by that section, the Commissioner referred the subject matter of the conference for determination by himself and formally declined to make orders in relation to the matters of dispute on the basis that the Commission lacked jurisdiction to do so. He incorporated by reference, as his reasons for that determination, the statement which he had made on 15 October 2010.

9 There followed an appeal to the Full Commission. The Commission took the view that there was no industrial dispute before it in relation to either the matter of redundancy or the matter of recreation leave loading and long service leave entitlements. This was on the basis that in neither case had the Chief Executive made any statement or taken any action which could be regarded as a threatened or impending breach of the relevant provisions of the Agreement[6].

10 Subsequently the PSA instituted proceedings in the Supreme Court of South Australia seeking orders quashing the order of the Commission made on 4 November 2010 and remitting the matter to the Commission to be determined in accordance with the law.

11 The summons for judicial review was dismissed by the Full Court on 15 March 2011 on the basis that the Full Court lacked jurisdiction to make the orders sought[7]. An application for special leave to appeal was filed in this Court on 30 March 2011. On 8 June 2011 the application for special leave was referred by Heydon and Bell JJ to an enlarged Court for hearing as on an appeal.

---

6 *Public Sector Association of SA Inc v Chief Executive Department of the Premier and Cabinet* [2010] SAIRComm 11 at 8-9 [26], [31].

7 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223.

12 Before turning to the reasons for the decision of the Full Court, which applied the 1991 PSA Case, it is helpful to refer to the decision of this Court in that case.

The 1991 PSA Case

13 In the 1991 PSA Case, this Court held by majority that a decision of the Full Commission of the Industrial Commission of South Australia ("the Industrial Commission"), refusing an application for leave to appeal against a decision of the Registrar of the Industrial Commission, could be reviewed on the ground that it involved an "excess of jurisdiction" within the meaning of s 95 of the *Industrial Conciliation and Arbitration Act* 1972 (SA) ("the ICAA 1972"). That section, like s 206 of the Fair Work Act, precluded judicial review of awards, orders or decisions of the Industrial Commission "except on the ground of excess or want of jurisdiction."

14 The 1991 PSA Case concerned a challenge to a decision by the Registrar of the Industrial Commission to register a change to the eligibility rule of the PSA to permit extension of its membership to employees of two charitable organisations. The Industrial Commission refused applications by two objecting unions for leave to appeal from the Registrar's decision and did so on the basis that the applicants were seeking leave to appeal from a discretionary decision and that they had not demonstrated error of the type necessary for interference with such a decision. The Full Court of the Supreme Court held that the Industrial Commission's characterisation of the Registrar's decision as discretionary was erroneous and that the error constituted an excess and/or want of jurisdiction within the meaning of s 95 of the ICAA 1972. The PSA appealed from that decision to this Court. The appeal was dismissed by majority (Brennan, Dawson and Gaudron JJ, Deane and McHugh JJ dissenting). The difference between the majority and dissentients lay in the characterisation of the Industrial Commission's decision, rather than the construction of the exception in s 95. All the judges agreed that a refusal to exercise jurisdiction would not fall within the description of "an excess or want of jurisdiction"[8].

15 Brennan J held that there was "no acceptable canon of construction" by which the exception for "excess or want of jurisdiction" in s 95 could be extended to cover the case of a wrongful failure or refusal to exercise jurisdiction[9]. Deane J also excluded "a failure fully to exercise jurisdiction

---

8 (1991) 173 CLR 132 at 142-143 per Brennan J, 153 per Deane J, 160 per Dawson and Gaudron JJ, 164-165 per McHugh J.

9 (1991) 173 CLR 132 at 142.

which was possessed" from the scope of the term "excess or want of jurisdiction"[10]. Dawson and Gaudron JJ observed, without elaboration[11]:

> "A failure to exercise jurisdiction is a jurisdictional error, although, prima facie, it is not an error involving an excess of or want of jurisdiction".

McHugh J said that[12]:

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

16 What was said in the 1991 PSA Case went to the construction of s 95 of the ICAA 1972. The construction of its successor, s 206 of the Fair Work Act, must be undertaken today in light of the constitutional limits on State legislative power discussed in *Kirk v Industrial Court (NSW)*[13] and encapsulated in the proposition in the joint judgment that[14]:

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

The privative provision of the Fair Work Act "must be read in a manner that takes account of these limits on the relevant legislative power."[15] That proposition applies the general principle of statutory construction that Parliament does not intend its statutes to exceed constitutional limits. A statute should therefore be construed, if its language allows, in such a way as to keep it within

---

10 (1991) 173 CLR 132 at 153.

11 (1991) 173 CLR 132 at 160.

12 (1991) 173 CLR 132 at 164-165.

13 (2010) 239 CLR 531; [2010] HCA 1.

14 (2010) 239 CLR 531 at 581 [100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

15 (2010) 239 CLR 531 at 581 [101] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

those limits[16]. That general principle is reflected in s 22A(1) of the *Acts Interpretation Act* 1915 (SA) ("the Acts Interpretation Act") which provides:

> "Every Act and every provision of an Act will be construed so as not to exceed the legislative power of the State."

It is complemented by the reading down provision, s 22A(2):

> "Any Act or provision of an Act which, but for this section, would exceed the power of the State, is nevertheless a valid enactment to the extent to which it does not exceed that power."

17 Before turning to the question of the construction and application of s 206 to this case, reference should be made to a decision of the Full Court of the Supreme Court of South Australia which was considered in the 1991 PSA Case.

18 In the course of their judgments in the 1991 PSA Case, Brennan J[17], Deane J[18] and McHugh J[19] rejected the proposition in *R v Industrial Commission of South Australia; Ex parte Minda Home Incorporated*[20] that the words "excess or want of jurisdiction" "should be given a wide meaning so as to include all the jurisdictional matters which at common law would have induced the Court of Queen's Bench to interfere by the machinery of the prerogative writs."[21]

---

16 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267 per Dixon J; [1945] HCA 30; *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 374 per Gibbs J; [1975] HCA 62; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic* Affairs (1992) 176 CLR 1 at 14 per Mason CJ; [1992] HCA 64; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 161 [355] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 519 [46] per French CJ; [2009] HCA 4.

17 (1991) 173 CLR 132 at 142-143.

18 (1991) 173 CLR 132 at 151-152.

19 (1991) 173 CLR 132 at 165.

20 (1975) 11 SASR 333.

21 (1975) 11 SASR 333 at 337 per Bray J.

19 In *Minda Home* the Full Court awarded mandamus against the Industrial Commission on the basis that that Commission had wrongly construed a provision of the ICAA 1972 as not giving it discretion to allow an amendment to a defective notice of appeal. Absent amendment, the Industrial Commission lacked jurisdiction to entertain the appeal. Bray CJ relied upon reasoning in the decision of the Full Court of the Supreme Court of Queensland in *R v Licensing Commission; Ex parte Nicolosi*[22] for the proposition that an administrative body which misconstrues its own governing statute strays beyond the limits of its jurisdiction[23]. Wells J, in a separate concurring judgment, also held that, in declining to exercise a discretion to allow an amendment to the defective notice, "the Full Commission … must have relied – upon grounds of fact or law or both that lay beyond the bounds of its jurisdiction" and that "[i]n short, its decision was based upon an excess or a want of jurisdiction."[24] When the basis upon which mandamus issued in *Minda Home* is considered, the wide construction of "excess or want of jurisdiction", rejected in the 1991 PSA Case, may not have been necessary to support the grant of that prerogative remedy.

The decision of the Full Court

20 The decision of the Full Court in this case, that it did not have jurisdiction to entertain the PSA's summons, applied to s 206 of the Fair Work Act the construction of s 95 of the ICAA 1972 which was adopted in the 1991 PSA Case. Chief Justice Doyle delivered the judgment of the Court. Duggan and Vanstone JJ agreed with his Honour's reasons[25].

21 The Chief Justice referred to the observation in the joint judgment in *Kirk*[26] that "[l]egislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power."[27] His Honour observed that s 206 of the Fair Work Act permitted the Supreme Court to correct decisions by the Commission which exceeded its

---

22 [1962] Qd R 90.

23 (1975) 11 SASR 333 at 338.

24 (1975) 11 SASR 333 at 344.

25 (2011) 109 SASR 223 at 232 [30] per Duggan J, 232 [31] per Vanstone J.

26 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223 at 225-226 [5].

27 (2010) 239 CLR 531 at 581 [100] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

jurisdiction[28]. However he did not go on to suggest that a wrongful failure to exercise jurisdiction would not amount to jurisdictional error. The Chief Justice also held that it was not open to the Full Court to hold that the 1991 PSA Case had been reversed by the decision of this Court in *Kirk*, even though *Kirk* was based on submissions not considered in the 1991 PSA Case[29].

22 The Chief Justice elaborated on his conclusion that the Full Court lacked jurisdiction by discussing the 1991 PSA Case in some detail. His Honour rejected, as inconsistent with the reasoning in that case, a submission that the Commission, having mistakenly denied the existence of the jurisdiction, had no jurisdiction to dismiss the appeal before it and was therefore in excess of jurisdiction in purporting to do so[30].

23 The Chief Justice went on to say that the Full Court, having no jurisdiction to entertain the challenge to the Commission's decision, should not express its own opinion, which in any event would be non-binding, about the correctness of that decision. He also noted that there was a question, which had not been argued, whether the reliance placed by the PSA on statements made by the State Treasurer in the South Australian Parliament might involve an infringement of the privileges of the Parliament.

24 The orders made by the Full Court were:

> "1. The Applicant's Summons for Judicial Review be dismissed.
>
> 2. There be no order as to costs."

Whether the PSA summons alleged excess of jurisdiction

25 In its amended summons filed in the Supreme Court, the PSA sought orders quashing the order of the Commission made on 4 November 2010 and remitting the matter to the Commission to be determined in accordance with the law. The proceedings were issued in reliance upon the general jurisdiction conferred upon the Supreme Court by s 17(2) of the *Supreme Court Act* 1935 (SA) and the provisions of rr 199 and 200 of the Supreme Court Civil Rules 2006 (SA). Rule 199(1) provides that "[t]he Court may make an order for judicial review." Consistently with the jurisdiction conferred by s 17(2) the term "order for judicial review" as defined in r 199(2) includes:

---

28 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223 at 226 [6].

29 (2011) 109 SASR 223 at 226 [6].

30 (2011) 109 SASR 223 at 229 [16].

> "(b) an order setting aside the decision of another court or a tribunal that has a duty to act judicially because of error, absence of jurisdiction, failure to observe the requirements of natural justice or fraud (***certiorari***);
>
> (c) an order to compel the performance of a duty of a public nature that cannot be enforced by some other adequate legal remedy (***mandamus***);"

Rule 200 provides that "[i]f a plaintiff claims to be entitled to an order for judicial review, an action for judicial review may be commenced but cannot proceed further in the Court without the Court's permission." In this case, the PSA obtained the permission of a judge and the matter was referred to the Full Court. Rule 200(3)(b) requires that the originating process for an action for judicial review, when filed in the Court, be accompanied by an application for the Court's permission to proceed and an affidavit:

> "(i) stating the nature of the order sought; and
>
> (ii) setting out, in detail, the grounds on which the applicant seeks the order for judicial review."

26 In its affidavit filed in support of its summons in the Supreme Court, the PSA contended relevantly that:

- it had notified two disputes in the Industrial Relations Commission of South Australia;
- it had lodged an appeal against the determination of Commissioner McMahon;
- the Commission had made its order dismissing the appeal to it and had published reasons which were exhibited to the affidavit;
- the Commission had ruled that there was a want of jurisdiction as there was no industrial dispute because those making the statements said to give rise to the dispute were not the relevant employer.

27 The PSA's complaint in the proceedings in the Supreme Court therefore was that the Commission had found it lacked jurisdiction to entertain the PSA's appeal upon the erroneous premise that there was no industrial dispute. The question for this Court is not whether there was such a dispute but whether, notwithstanding s 206 of the Fair Work Act, the Supreme Court had jurisdiction to entertain the proceedings by the PSA in which that error was asserted.

28 The submissions made by the PSA to this Court involved the propositions that:

- its complaint to the Full Court of the Supreme Court was that the Commission had committed a jurisdictional error in holding that there was no industrial dispute before it and therefore wrongly concluded that it lacked jurisdiction;
- the decision of the Commission was not a discretionary refusal to exercise jurisdiction;
- the decision of this Court in *Kirk* applied to protect the supervisory jurisdiction of the Supreme Court in respect of inferior State courts and the exercise of Executive power;
- in light of the decision of this Court in *Kirk* the jurisdiction of the Supreme Court to issue an order in the nature of mandamus to the Commission for jurisdictional error could not be cut down by legislation;
- to avoid invalidity, s 206 of the Fair Work Act should be construed as it was construed in *Minda Home* as extending to a wrongful refusal to exercise jurisdiction.

29 The State of South Australia argued that the Court's decision in *Kirk* did not deal with the case of wrongful refusal to exercise jurisdiction. The State argued that the supervisory jurisdiction of the State Supreme Courts, as they existed at Federation, derived from the supervisory jurisdiction of the Court of Queens Bench, and did not extend to correcting an inferior court or tribunal for wrongful refusal to exercise jurisdiction. The State placed reliance upon the judgment of the Privy Council in *Colonial Bank of Australasia v Willan*[31] in which the concept of "want of jurisdiction" was defined by reference to three limitations on jurisdiction, namely[32]:

- the character and constitution of the tribunal;
- the nature and subject-matter of the inquiry;
- the existence of the "essential preliminaries to the inquiry".

---

31 (1874) LR 5 PC 417.

32 (1874) LR 5 PC 417 at 442-443.

The Commission was said to have breached none of these limitations. There was therefore no excess or want of jurisdiction. On this basis the State argued that the construction of s 95 of the ICAA 1972, adopted in the 1991 PSA Case, was consistent with the constraints on the State legislature imposed by the decision in *Kirk*. That decision had the effect that State legislative power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the executive government of the State, its Ministers or authorities[33].

30 *Kirk* is not to be confined in the way for which South Australia contended. As was stated in the joint judgment in that case, it is the boundary between jurisdictional error and non-jurisdictional error that marks the limits upon State legislative power to abrogate the supervisory jurisdiction of a State Supreme Court[34].

31 It is sufficient, in order to dispose of the present case, to focus upon the character of the decision made by the Commission. Underpinning the Commission's decision, that it lacked jurisdiction to entertain the appeal from Commissioner McMahon, was its finding that there was no industrial dispute. That finding may be characterised as a question of jurisdictional fact. It was a matter which the Commission had jurisdiction to decide as an essential preliminary to the exercise of its substantive jurisdiction. That jurisdictional question – was there an industrial dispute in existence – allowed for only one correct answer, which was either yes or no. It was not a matter of discretion. The Commission was not authorised by the Fair Work Act to decide that question wrongly. If its answer to that question was wrong, it was acting beyond the limits of its jurisdiction. That is to say, it was acting in excess of its jurisdiction. To so characterise the nature of the question which the Commission had to answer and the consequence of a wrong answer, is to apply the approach which, as earlier explained, was sufficient to support the decision of the Full Court in *Minda Home* and the decision of the majority of this Court in the 1991 PSA Case. On that basis, the result in *Minda Home* may be regarded as correct notwithstanding the rejection by this Court in the 1991 PSA Case of the approach to the construction of s 95 of the ICAA 1972 adopted in *Minda Home*.

---

33 *South Australia v Totani* (2010) 242 CLR 1 at 27 [26] per French CJ, 78 [193] per Hayne J, 105 [268] per Heydon J; [2010] HCA 39; *Wainohu v New South Wales* (2011) 243 CLR 181 at 195 [15] per French CJ and Kiefel J, 224 [89] per Gummow, Hayne, Crennan and Bell JJ; [2011] HCA 24.

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

32 That approach is consistent with the statement of principle set out by Latham CJ in *R v Blakeley; Ex parte Association of Architects of Australia*[35]. The Chief Justice referred to the decision of Coleridge J in *Bunbury v Fuller*[36], that a decision on a collateral matter conditioning jurisdiction must be open to question and that if a judge forebore or proceeded on the main matter in consequence of an error on the collateral matter, the Court of Queens Bench would issue mandamus or prohibition to correct his mistake[37]. Latham CJ, after quoting Coleridge J, said[38]:

> "If an authority with limited jurisdiction has no power to make a conclusive decision as to the existence or non-existence of a collateral matter upon which jurisdiction depends, and makes a wrong preliminary decision either way, the mistake will be corrected by mandamus or prohibition – by mandamus if he wrongly decides that he has no jurisdiction, by prohibition if he wrongly decides that he has jurisdiction."

33 The Full Court of the Supreme Court did have jurisdiction to entertain the proceedings for an order of judicial review which were instituted by the PSA.

34 Consistently with these reasons, I agree with the proposition in the joint reasons that if the Commission decides erroneously not to proceed upon an application before it on the footing that there is no industrial dispute as required by s 26 of the Fair Work Act, the Commission has erred in the determination of its jurisdiction and has exceeded its jurisdiction in doing so[39]. Such a decision falls within the scope of "excess or want of jurisdiction" for the purposes of s 206(2).

35 As a practical matter, it is not easy to imagine circumstances in which the Commission would find it lacked jurisdiction in a matter before it without first having made a determination about the non-existence of a jurisdictional fact. Nevertheless, the 1991 PSA case suggests that s 206(2) is not capable of a construction covering all forms of jurisdictional error. If such a construction be open, then, consistently with the decision of this Court in *Kirk*, and the application of s 22A(1) of the Acts Interpretation Act, s 206 should be so construed. Otherwise, s 206(1) should be read down pursuant to s 22A(2) of the

---

35 (1950) 82 CLR 54 at 75; [1950] HCA 40.

36 (1853) 9 Ex 111; 156 ER 47.

37 (1853) 9 Ex 111 at 140; 156 ER 47 at 60.

38 (1950) 82 CLR 54 at 75.

39 Reasons of Gummow, Hayne, Crennan, Kiefel and Bell JJ at [65].

Acts Interpretation Act so as not to preclude the exercise by the Supreme Court of its supervisory jurisdiction with respect to jurisdictional error, whether or not such error answers the description of excess or want of jurisdiction.

Conclusion

36 For the preceding reasons, I agree with the orders proposed in the joint judgment.

37 GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. Section 17(2) of the *Supreme Court Act* 1935 (SA) ("the Supreme Court Act") vests in the Supreme Court of South Australia the like jurisdiction to that formerly vested in the English courts, including the Court of Queen's Bench, and thus includes the issue of the writ of mandamus and the other prerogative writs. The applicant ("the PSA") seeks special leave to appeal from a decision of the Full Court of the Supreme Court of that State (Doyle CJ, Duggan and Vanstone JJ)[40] which concerns the extent of the supervisory jurisdiction of the Supreme Court over the activities of the first respondent ("the Commission").

38 The resolution of that issue is said, in turn, to require appreciation of the significance for the Australian judicial structure of the conferral by s 73(ii) of the Constitution of jurisdiction on this Court to entertain "appeals from all judgments, decrees, orders, and sentences ... of the Supreme Court of any State", and of the decision in *Kirk v Industrial Court (NSW)*[41] respecting the defining characteristics of those Supreme Courts.

39 It will become apparent that matters of jurisdiction are involved in this litigation at least at two levels. The first is the determination of the Commission that it lacked jurisdiction, and the second is the extent of the jurisdiction of the Supreme Court to entertain a challenge by the PSA to that ruling. The PSA contends that the Commission erred by its determination that there was a want or absence of jurisdiction in the Commission because a particular jurisdictional fact, the presence of an industrial dispute, did not exist. These reasons seek to demonstrate that if the PSA makes good in the Supreme Court its contention that the Full Commission so erred, there will be presented an error by the Full Commission in the determination of its jurisdiction, and this error will be open to challenge in the Supreme Court.

40 Early in October 2010, the PSA wrote to the Commission notifying it of what it said were two "industrial disputes" as defined in s 4(1) of the *Fair Work Act* 1994 (SA) ("the Fair Work Act") and thereby instituting applications under s 194 of that statute. The term "industrial dispute" means "a dispute, or a threatened, impending or probable dispute, about an industrial matter", and the term "industrial matter" is broadly defined so as to apply to a matter affecting or

---

40 *Public Service Association of SA Inc v Industrial Relations Commission (SA)* (2011) 109 SASR 223.

41 (2010) 239 CLR 531; [2010] HCA 1.

relating to the rights, privileges or duties of an employer or employers or an employee or employees, or the work to be done in employment.

41 Part 3 (ss 23-40) of Ch 2 of the Fair Work Act is headed "The Industrial Relations Commission of South Australia". Section 26 sets out the jurisdiction of the Commission. Paragraphs (c) and (d) of s 26 respectively state that the Commission has jurisdiction "to resolve industrial disputes" and "to hear and determine any matter or thing arising from or relating to an industrial matter". The term "determination" means "an award, order, declaration, approval or decision" and "decision" includes "a refusal or failure to make a decision" (s 4(1)).

42 The second respondent, the Chief Executive of the Department of Premier and Cabinet ("the Chief Executive") is the active respondent in this Court and is represented by the South Australian Solicitor-General. The Commission entered a submitting appearance. The Chief Executive is the employer of public employees for the purposes of the Fair Work Act[42]. The applications to the Commission by the PSA were followed by a voluntary conference under s 200. This was held before Commissioner McMahon on 13 October 2010. The Chief Executive denied there was any dispute as contended by the PSA and maintained that the jurisdiction of the Commission had not been enlivened.

43 On 15 October 2010 the Commissioner issued a statement that the Commission was "of the preliminary view that it does not currently have any jurisdiction to deal with this matter". Thereafter, on 22 October 2010, the Commissioner made an order under s 202 of the Fair Work Act that it was the view of the Commission that "there is no jurisdiction" for the Commission to make orders in relation to the PSA matters.

44 Section 39 of the Fair Work Act provides for the constitution of the Full Commission and s 207 deals with appeals from the Commission constituted by a single member to the Full Commission. The Full Commission (Judge Parsons DP, Bartel DP and Commissioner Doyle) agreed with Commissioner McMahon and on 26 October 2010 dismissed an appeal by the PSA[43].

---

42 Fair Work (General) Regulations 2009 (SA), Reg 4(c).

43 [2010] SAIRComm 11.

45 Rule 200 of the Supreme Court Civil Rules 2006 (SA) ("the Rules")[44] requires the permission of the Supreme Court to proceed with an action for judicial review. The Court may grant that permission if it is "satisfied that there is a reasonable basis on which the applicant might establish a right to an order for judicial review" (Rule 200(4)). An order for judicial review may be "an order to compel the performance of a duty of a public nature that cannot be enforced by some other adequate legal remedy (**mandamus**)" (Rule 199(2)(c)). Permission was granted to the PSA to proceed with its application, and it was heard by the Full Court of the Supreme Court.

46 Section 206 of the Fair Work Act was a critical provision for that litigation because it concerns the extent of the supervisory jurisdiction of the Supreme Court. The section states:

> "(1) A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act.
>
> (2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction."

The expression "the Commission" is so defined as to be read as including the Full Commission and it appears to have been common ground in the Full Court of the Supreme Court that s 206 applies to decisions of the Full Commission on appeals to it under s 207.

47 The conferral of jurisdiction upon the Supreme Court by s 17(2) of the Supreme Court Act, carries with it the power to determine the satisfaction of criteria upon which this jurisdiction depends[45]. These criteria include the saving by s 206(2) of the Fair Work Act of certain jurisdiction from the exclusion otherwise made by s 206(1).

---

44 The Rules are made by the three or more Judges of the Supreme Court in pursuance of s 72 of the Supreme Court Act.

45 See *DMW v CGW* (1982) 151 CLR 491 at 507; [1982] HCA 73; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375; [1985] HCA 67; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 638 [8]; [2000] HCA 33; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177 [22], 185 [51], 278 [341]; [2000] HCA 62.

48 Is relief in the nature of mandamus available in the Supreme Court, despite s 206(1), where a determination of the Commission is challenged on the ground that the Commission erred in dismissing the proceeding before it on the ground that there was a want or absence of jurisdiction? As explained later in these reasons, a fair reading of s 206 would indicate that the answer is in the affirmative.

49 However, this Court, in *Public Service Association (SA) v Federated Clerks' Union*[46] ("the first PSA Case"), considered a similarly expressed provision to s 206 which was found in s 95(b) of the *Industrial Conciliation and Arbitration Act* 1972 (SA) ("the 1972 Act"). The first PSA Case was decided by Brennan J and by Dawson and Gaudron JJ on the immediate basis that the error in the decision of the Full Commission was that it had acted in excess of its jurisdiction with the result that s 95(b) did not preclude judicial review by the Supreme Court[47]. However, with respect to the phrase "excess or want of jurisdiction", all members of the Court in the first PSA Case[48] appear to have accepted that it did not include failure or refusal to exercise jurisdiction. The distinction was drawn by Brennan J as follows[49]:

> "Judicial review on the ground of excess or want of jurisdiction is available when a body purportedly acting in exercise of jurisdiction has no jurisdiction to act in the particular way. Judicial review on that ground stands in contrast with judicial review on the ground of a wrongful failure or refusal to exercise jurisdiction. In the former case, there is no jurisdiction to exercise; in the latter, there is jurisdiction but no exercise of it. The exception in s 95(*b*) covers the former case; there is no acceptable canon of construction by which it can be extended to cover the latter case. Thus, s 95(*b*) appears to permit erroneous assumptions of jurisdiction to

---

46 (1991) 173 CLR 132; [1991] HCA 33.

47 (1991) 173 CLR 132 at 144-145 per Brennan J, 161 per Dawson and Gaudron JJ. Deane J (at 152-153) dissented on the basis that any error was within the jurisdiction of the Commission. McHugh J (at 166) dissented on the basis that the Commission did not make a jurisdictional error of any kind.

48 (1991) 173 CLR 132 at 142-143 per Brennan J, 151 per Deane J, 160 per Dawson and Gaudron JJ, 164-165 per McHugh J.

49 (1991) 173 CLR 132 at 142.

be checked by judicial review, but not erroneous refusals to exercise jurisdiction."

50 In the present case, the Full Court of the Supreme Court correctly[50] held that it was required by this construction of s 95(b) of the earlier legislation to conclude that s 206 of the Fair Work Act denied it jurisdiction with respect to the judicial review sought by the PSA. On 15 March 2011 the Full Court dismissed the Summons by the PSA for judicial review.

51 On 8 June 2011, Heydon and Bell JJ referred to an enlarged Bench of this Court the special leave application by the PSA and directed that the application be fully argued as on an appeal. There are interventions by the Commonwealth, Victoria, Queensland, Western Australia and Tasmania, as well as by South Australia.

52 On 28 November 2011, the day before the application was fixed for hearing before the whole Court, the South Australian Attorney-General notified the Court that the Solicitor-General would be submitting that special leave should be refused because "underlying factual circumstances giving rise to the original dispute in the Full Commission have been affected by subsequent events so as to render the present matter hypothetical". At the hearing the next day the PSA disputed that this was so. Rather than this Court resolve a factual dispute presented in this unsatisfactory manner, the better course is to proceed now to determine the substantive issues respecting the jurisdiction of the Supreme Court. If the PSA succeeds in obtaining special leave and its appeal is allowed, it will then be for the Full Court of the Supreme Court, on remitter, to determine whether there ever was, or, if so, whether there now remains, any relevant current industrial dispute for the resolution of which by the Commission an order in the nature of mandamus should issue.

53 The primary submission of the PSA is that from the reasoning in *Kirk*[51] it follows that s 206 of the Fair Work Act is invalid to the extent to which it denies the jurisdiction of the Full Court to review for jurisdictional error decisions of the Commission. The Commonwealth intervened substantially in support of the

---

50 *Jacob v Utah Construction and Engineering Pty Ltd* (1966) 116 CLR 200 at 207, 217; [1966] HCA 67; *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1 at 2-3 [3]-[4]; 282 ALR 604 at 605; [2011] HCA 45.

51 (2010) 239 CLR 531.

PSA. The Solicitor-General of South Australia appeared for the Attorney-General as intervener, and was supported to some degree by the other State interveners. However, it will be unnecessary for this Court to determine any question of invalidity of s 206 if, upon its proper construction, the section does not, to any relevant degree, deny the jurisdiction of the Supreme Court[52].

54 The South Australian Solicitor General, as had counsel for the Chief Executive in the Full Court of the Supreme Court, accepted that the Commission had a duty not merely a power to determine whether it had jurisdiction. The dispute between the active parties concerns the operation of s 206 upon the jurisdiction of the Supreme Court. However, Victoria, with the support of Queensland and Tasmania, sought to sidestep the dispute as to the scope of s 206 and the availability of mandamus, by denying any duty on the part of the Commission to determine jurisdictional facts. That submission, even if within the scope of an intervention as of right under s 78A of the *Judiciary Act* 1903 (Cth), should be rejected.

55 Decisions of this Court given in its early years and collected in *In re Judiciary and Navigation Acts*[53], established that the existence of an industrial dispute was "a condition of jurisdiction" conferred by the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act"). It followed that mandamus might issue under s 75(v) of the Constitution to require determination of such a dispute, and, in particular, that it was no answer that the industrial tribunal had applied itself to the question whether it had jurisdiction, and that, therefore, in the absence of *mala fides*, the industrial tribunal had discharged the duty imposed upon it[54]. That is to say, it was not for the tribunal to determine

---

52 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [249]-[252]; [2001] HCA 51; *Wotton v State of Queensland* (2012) 86 ALJR 246 at 250 [9]-[10], 253 [23]; 285 ALR 1 at 4-5, 8; [2012] HCA 2.

53 (1921) 29 CLR 257 at 267-268; [1921] HCA 20.

54 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389; [1949] HCA 33; *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 502-503 [41]; [2002] HCA 42.

with finality whether or not an application was within its authority[55]. It is true that in the cases under the 1904 Act the jurisdictional fact of the existence of an industrial dispute also had the character of a constitutional fact, given the terms of s 51(xxxv) of the Constitution. Nevertheless, there is nothing in the text or structure of the Fair Work Act which requires any different construction of the jurisdictional provisions in s 26.

56 An object of the Fair Work Act is the provision of a means for settling industrial disputes that cannot be resolved by amicable agreement (s 3(h)). The relevant jurisdiction of the Commission is created by s 26 of the Fair Work Act for the public benefit. Upon an application made to it under s 194, the Commission is not at liberty to refuse to deal with the matter, but, rather, has a duty to determine any jurisdictional facts upon which the attraction of its jurisdiction depends. It is no answer to the case put by the PSA that, if having entered upon the exercise of jurisdiction, the Commission would be empowered by s 168(b) of the Fair Work Act to desist from further hearing of proceedings if, in its opinion, it was not "in the public interest" to continue.

57 It should be added that the species of jurisdictional error, constituted by a refusal or failure to exercise jurisdiction, is remedied by mandamus without any order in the nature of certiorari quashing any decision which refuses or fails to exercise jurisdiction. This is because the "ostensible determination is not a real performance of the duty imposed by law upon the tribunal"[56].

---

55 *Mutual Life & Citizens' Assurance Co Ltd v Attorney-General (Q)* (1961) 106 CLR 48 at 56; [1961] HCA 51; cf *Wade v Burns* (1966) 115 CLR 537 at 562; [1966] HCA 35.

56 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242-243; [1933] HCA 30. See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 193, 201, 203; [1965] HCA 27; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 193-194, 269, 287; [1981] HCA 74; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51], 644 [148]; [2002] HCA 11; Wade and Forsyth, *Administrative Law*, 9th ed (2004) at 624-625. Cf *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 144-145, where there is an incomplete reference to a passage in the 6th edition of Professor Wade's work which has been substantially repeated in the later editions in which Professor Wade participated before his death in 2004.

58 The relationship in this area between prohibition and mandamus is, as the Commonwealth Solicitor-General submitted, correctly explained by Latham CJ in *R v Blakeley; Ex parte Association of Architects of Australia*[57], a case under the 1904 Act. The Chief Justice said:

> "If an authority with limited jurisdiction has no power to make a conclusive decision as to the existence or non-existence of a collateral matter upon which jurisdiction depends, and makes a wrong preliminary decision either way, the mistake will be corrected by mandamus or prohibition – by mandamus if he wrongly decides that he has no jurisdiction, by prohibition if he wrongly decides that he has jurisdiction.
>
> In the present case the Commissioner has in my opinion erroneously decided that there are no disputes existing between the Association and its members on the one hand and the employers who were served with the log on the other. He has wrongly declined to exercise his power and to perform his duty of hearing and determining the disputes. Therefore, in my opinion, mandamus should issue."

59 The effect of the construction of s 206 for which the Chief Executive and the supporting interveners contend is to deny to the Supreme Court its jurisdiction to issue orders in the nature of mandamus whilst preserving the jurisdiction to issue orders in the nature of prohibition and certiorari to control other species of jurisdictional error. The upshot would be that the Commission becomes a body to which the legislature has committed final authority to decide adversely to applicants issues of jurisdictional fact. This, to adapt what was said by Bray CJ in *R v Industrial Commission of South Australia; Ex parte Minda Homes Incorporated*[58], is an interpretation of s 206 which "would produce a one-sided and partial result".

60 Further, as explained in *Kirk*[59], one of the defining characteristics of the Supreme Courts identified in Ch III of the Constitution is the supervision they exercise by the grant of remedies of which mandamus is one[60]. State legislative

---

57 (1950) 82 CLR 54 at 75; [1950] HCA 40.

58 (1975) 11 SASR 333 at 337.

59 (2010) 239 CLR 531 at 580-581 [98]-[99].

60 (2010) 239 CLR 531 at 581 [100]-[101].

power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of jurisdictional error by the Executive Government of the State, its Ministers or authorities[61]. Provisions such as s 206 of the Fair Work Act are to be read in a manner that takes into account the incapacity of State legislatures to take from the Supreme Courts their authority to grant relief for jurisdictional error. These propositions of constitutional law were not appreciated at the time when the first PSA Case was decided[62].

61 The Chief Executive and the State interveners sought to limit these propositions. They sought to do so by emphasising that the relief granted in *Kirk* was in the nature of certiorari to quash orders of the Industrial Court of New South Wales[63] and that there was a citation in the joint reasons in *Kirk*[64] of a passage from *The Colonial Bank of Australasia v Willan*[65] which referred to certiorari to quash for "manifest defect of jurisdiction". The adjective "manifest" then was said to identify only that species of jurisdictional error considered in the first PSA Case to be captured by the phrase "excess or want of jurisdiction".

62 There is some confusion of thought in these submissions. First, "manifest" is used with respect to certiorari in the sense of patent or apparent on the face of the record; what constitutes the "record" in a particular case may be a matter of debate. Secondly, as explained above, and contrary to what may be suggested by observations in the first PSA Case[66], mandamus is not an adjunct to certiorari. Thirdly, *Willan* was relied upon in the joint reasons in *Kirk* for the general proposition that[67]:

---

61 *South Australia v Totani* (2010) 242 CLR 1 at 27 [26]; [2010] HCA 39.

62 cf *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

63 (2010) 239 CLR 531 at 595-596 [134].

64 (2010) 239 CLR 531 at 580 [97].

65 (1874) LR 5 PC 417 at 442.

66 (1991) 173 CLR 132 at 145.

67 (2010) 239 CLR 531 at 580 [97].

> "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".

This was followed[68] by the statement that the supervisory role of the Supreme Courts was exercised through the grant of prohibition, certiorari, mandamus and habeas corpus.

63 Accordingly, as the PSA, with the support of the Commonwealth, submitted, s 206 would be invalid if on its proper construction it purported to preclude a challenge in the Supreme Court to a determination of the Commission on the ground of a failure to exercise jurisdiction.

64 The question then becomes one of the application to s 206 of a passage in the reasons of Isaacs J in *Federal Commissioner of Taxation v Munro*[69], but bearing in mind that his Honour's reference there to "the intention of the legislature" is not to any collective mental state of legislators but rather to an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws[70]. The passage in the reasons of Isaacs J is as follows[71]:

> "Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in *Macleod v Attorney-General for New South Wales*[72]. It is the principle which the

---

68 (2010) 239 CLR 531 at 581 [98].

69 (1926) 38 CLR 153; [1926] HCA 58. See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14 per Mason CJ; [1992] HCA 64.

70 *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28]; [2009] HCA 52; *Momcilovic v The Queen* (2011) 85 ALJR 957 at 984 [38], 1009 [146], 1033 [280]; 280 ALR 221 at 239-240 [38], 274-275 [146], 306 [280]; [2011] HCA 34.

71 (1926) 38 CLR 153 at 180.

72 [1891] AC 455.

Supreme Court of the United States has applied, in an unbroken line of decisions, from Marshall CJ to the present day (see *Adkins v Children's Hospital*[73]). It is the rule of this Court (see, for instance, per Griffith CJ in *Osborne v The Commonwealth*[74])."

65 The terms in which s 206 is expressed are not so intractable as necessarily to impose a dichotomy between those jurisdictional errors by the Commission which are analogous to a misfeasance by reason of acts of the Commission "which have been done or carried out in breach of the conditions which circumscribe [its] powers and authorities"[75], and those which are analogous to non-feasance by reason of failure to enter upon the exercise of jurisdiction. When the Commission decides erroneously not to proceed upon an application on the footing that there is no industrial dispute as required by s 26 of the Fair Work Act, the Commission has erred in the determination of its jurisdiction, and has exceeded its jurisdiction in doing so. The expression in s 206(2) "on the ground of excess or want of jurisdiction" is apt to include jurisdictional error, rather than merely some species of jurisdictional error.

66 The result, upon this construction, is that s 206 preserves the jurisdiction of the Supreme Court with respect to jurisdictional error, but denies that jurisdiction with respect to other errors by the Commission, whether on the face of the record or otherwise. It also may be that s 206(1) operates to exclude collateral attacks on determinations by the Commission[76]. It is unnecessary to decide that question here. In the end, the justification for not following, with respect to s 206, the interpretation given to s 95(b) of the 1972 Act in the first PSA Case, is that that interpretation has now been shown to be "wrong in a significant respect"[77].

---

73 261 US 525 at 544 (1923).

74 (1911) 12 CLR 321 at 337; [1911] HCA 19.

75 The words are those of McHugh J in the first PSA Case, (1991) 173 CLR 132 at 164.

76 See *Ousley v The Queen* (1997) 192 CLR 69 at 80, 87, 100, 140; [1997] HCA 49; *von Arnim v Ellison* (2006) 150 FCR 282 at 291-293 [33]-[40]; *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 132 [19], 133 [22]; [2008] HCA 43.

77 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 440; *Barns v Barns* (2003) 214 CLR 169 at 205 [104]; [2003] HCA 9.

67 Special leave to appeal should be granted, and the appeal treated as heard instanter and allowed. The orders of the Full Court of the Supreme Court made on 15 March 2011 should be set aside and the matter remitted to the Full Court for determination of the appellant's summons for judicial review, including any questions of costs in the Full Court. The second respondent should pay the costs of the PSA in this Court.

68 HEYDON J. The applicant opened his address by observing that "this is a relatively short point and can be determined relatively easily." The trouble is that opinions have differed about what the short point is and how it should be determined. The orders that the other members of the Court propose should be made, but for different reasons.

Background

69 A Full Bench of the Industrial Relations Commission of South Australia concurred with the decision of Commissioner McMahon at first instance. Commissioner McMahon had decided that there was no "industrial dispute" between the applicant and the second respondent (the Chief Executive of the Department of Premier and Cabinet)[78]. Commissioner McMahon therefore held that he lacked jurisdiction. Assuming that there was in fact an industrial dispute, his decision was a failure to exercise jurisdiction, and, subject to s 206 of the Act, relief in the nature of mandamus was available to compel the exercise of jurisdiction.

70 The Full Court of the Supreme Court of South Australia dismissed the applicant's summons for judicial review. The Full Court held that it lacked jurisdiction because of s 206 of the Act. This holding was contrary to a concession by the second respondent. Section 206 permits challenges before the Full Court to determinations of the Commission only on the ground of "an excess or want of jurisdiction."[79] The Full Court correctly treated the Commission as having failed to exercise jurisdiction[80]. But the Full Court held that the words "an excess or want of jurisdiction" did not apply to a failure to exercise jurisdiction by reason of an erroneous finding that there was no industrial dispute. The Full Court reached this conclusion in the light of dicta in *Public Service Association (SA) v Federated Clerks' Union*, which considered a precursor to s 206 of the Act[81].

---

78 The expression "industrial dispute" is defined in s 4(1) of the *Fair Work Act* 1994 (SA) ("the Act") as meaning "a dispute, or a threatened, impending or probable dispute, about an industrial matter". Section 4(1) gives an extensive meaning to "industrial matter".

79 See above at [46].

80 *Public Service Association of SA Inc v Industrial Relations Commission of SA* (2011) 109 SASR 223 at 229 [16]-[17].

81 (1991) 173 CLR 132; [1991] HCA 33.

71 This application raises three questions. First, in view of the principles stated in *Kirk v Industrial Court (NSW)*[82], is a State legislature precluded from preventing a State Supreme Court from engaging in judicial review of a wrongful failure by a tribunal to exercise jurisdiction? Secondly, if it is, does s 206 purport to do that? Thirdly, did the Act create a duty to exercise jurisdiction? For the reasons which follow, each question should be answered "Yes".

First question: is *Kirk's* case relevant to mandamus for failure to exercise jurisdiction?

72 The applicant's submissions on Kirk's case. The applicant's submissions rested on two incontrovertibly correct propositions. One was that wrongly to deny the existence of jurisdiction is to make a jurisdictional error[83]. The other was that mandamus is a remedy granted to deal with denial of jurisdiction[84]. The applicant submitted that it was beyond the power of the South Australian legislature to prevent the Supreme Court of South Australia from engaging in review of jurisdictional error. Kirk's case dealt with a privative clause which purported to exclude all relief by way of the prerogative writs. It purported not only to exclude orders of certiorari (quashing decisions based on jurisdictional error) and prohibition (preventing decisions based on jurisdictional error from being made), but also orders of mandamus (requiring the performance of a duty to exercise jurisdiction which the decision-maker had actually or constructively failed to exercise). The decision in Kirk's case did not distinguish between categories of jurisdictional error. It did not suggest that jurisdictional error arising when a decision-maker purports to exercise jurisdiction that that decision-maker lacks should be treated differently from jurisdictional error arising when a decision-maker wrongly fails or refuses to exercise jurisdiction which that decision-maker possesses. Further, the reasoning in Kirk's case was not limited to privative clauses preventing judicial review of courts for jurisdictional error; it extended to privative clauses preventing judicial review of tribunals for jurisdictional error.

73 *The applicant's submissions on Kirk's case accepted.* The applicant's submissions are correct. *Kirk's* case held that the Constitution requires that

---

82 (2010) 239 CLR 531; [2010] HCA 1.

83 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573-574 [72]; *Edwards v Santos Ltd* (2011) 242 CLR 421 at 439 [46]; [2011] HCA 8.

84 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633; [1997] HCA 11; *Bodrudazza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 675 [70]; [2007] HCA 14.

"there be a body fitting the description 'the Supreme Court of a State'."[85] A "constitutional corollary"[86] followed: "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."[87] This Court explained[88]: "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." It held that at the time of federation it was "accepted doctrine … that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision."[89] It held[90]:

> "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 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 … in which s 71 of the *Constitution* vests the judicial power of the Commonwealth." (emphasis added)

It held[91]:

> "The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is

---

85 (2010) 239 CLR 531 at 580 [96] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

86 (2010) 239 CLR 531 at 580 [96].

87 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ; [2006] HCA 44.

88 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580 [97] (footnote omitted).

89 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580 [97].

90 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98].

91 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99].

> governed in fundamental respects by principles established as part of the common law of Australia."

It also held[92]:

> "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." (emphasis added)

And it held that there was a[93]:

> "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." (emphasis added)

74 The Court drew no distinction between different types of jurisdictional error in *Kirk's* case. It drew no distinction between certiorari and prohibition on the one hand and mandamus on the other. To draw these distinctions would leave in existence the "islands of power" which the reasoning in *Kirk's* case denied. Indeed, the Court treated mandamus as a remedy of equal significance to certiorari and prohibition in its capacity to carry out the supervisory role of the Supreme Courts. Those three remedies were treated as remedies which, depending on the form of a particular jurisdictional error, can be deployed as necessary to deal with the consequences of that error.

75 South Australia's submissions on Kirk's case. South Australia did not dispute that Kirk's case applied to tribunals as well as to courts. But it, and at least two interveners, argued that Kirk's case held that both at federation and since, privative clauses were only ineffective to deny the capacity of State Supreme Courts to review for jurisdictional errors where those errors amounted to a "manifest defect of jurisdiction". The expression "manifest defect of jurisdiction" is taken from the Privy Council's advice in Colonial Bank of Australasia v Willan[94]. That passage was quoted with approval in Kirk's case[95].

---

92 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99].

93 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100].

94 (1874) LR 5 PC 417 at 442.

95 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580 [97].

South Australia's argument assumes that the expression "manifest defect of jurisdiction" draws a distinction between excess or want of jurisdiction on the one hand and a failure to exercise jurisdiction on the other. South Australia relied on R v Bolton to support its assumption[96]. It submitted that R v St Olave's District Board[97] applied that case. This reliance was misconceived. R v Bolton encountered some criticism in Kirk's case[98]. In any event, neither case supported South Australia's assumption. Neither case determined that a wrongful failure to refuse to exercise jurisdiction is to be distinguished from other forms of jurisdictional error.

76 *Willan's* case was decided in 1874. There is English authority before that period recognising the power of the Court of King's Bench to grant mandamus against a refusal to exercise jurisdiction[99]. There is also authority from that period that the State Supreme Courts had power to issue mandamus to correct a failure to exercise jurisdiction[100]. And in modern times the Court of Appeal of the Supreme Court of New South Wales has held that mandamus will lie where a magistrate fails to exercise jurisdiction on the ground of apprehended bias. Their Honours cited *Willan's* case to support that approach[101].

77 More importantly, the context in which the expression "manifest defect of jurisdiction" is quoted in *Kirk's* case shows that this Court did not construe the expression as supporting South Australia's assumption. South Australia's position rests on a misconstruction of the reasoning in *Kirk's* case.

78 In *Kirk's* case this Court did accept that there can be "legislation affecting the availability of judicial review in the State Supreme Courts."[102] South

---

96 (1841) 1 QB 66 [113 ER 1054].

97 (1857) 8 E & B 529 [120 ER 198].

98 (2010) 239 CLR 531 at 569-571 [60]-[65].

99 For example, *R v Justices of Cumberland* (1836) 4 Ad & El 695 [111 ER 949].

100 *Ex parte Himmelhoch* (1878) SCR NS (NSW) 247; *Gilbey v Stanton* (1880) 14 SALR 64; *In re Linley Hurst Lumb* (1880) 14 SALR 128. See also *Ex parte Thomas Cox* (1876) 14 SCR (NSW) 287 and *Ex parte Krefft* (1876) 14 SCR (NSW) 446, which are cases in which mandamus was sought on that ground, but was refused for reasons other than the absence of power to grant it.

101 *Sankey v Whitlam* [1977] 1 NSWLR 333 at 344-345 per Moffitt P (Reynolds JA concurring). See also Hutley JA at 359-360.

102 (2010) 239 CLR 531 at 581 [100].

Australia relied on that passage without elaboration. However, legislation like s 206 which precludes judicial review for one type of jurisdictional error while leaving it open for another type of jurisdictional error is not the permitted type of legislation alluded to in that quotation.

79 Three submissions of Victoria and Tasmania on Kirk's case. Tasmania supported all of Victoria's submissions without qualification and with little amplification. Three of those submissions relate to the submissions advanced by South Australia in relation to the first question.

80 First, Victoria submitted that the reference to "mandamus" in *Kirk's* case was a reference only to a power to grant mandamus incidentally to prohibition or certiorari where jurisdiction had been exceeded. It was not a reference to a power to grant it where jurisdiction had not been exercised at all. Contrary to that submission and to other submissions of Victoria, and the reasoning in *Kirk's* case is not so limited.

81 Secondly, Victoria submitted that since State legislatures can grant *powers* to act without creating *duties* to act, it would be anomalous to invalidate State legislation that limited judicial review for failure to exercise those *powers*. That submission overlooks the fact that what is under immediate consideration is not a *power* of the Commission, but a *duty*[103]. The submission is thus beside the point.

82 Thirdly, Victoria submitted that while *Kirk's* case suggested that Supreme Court supervision of other State courts is constitutionally protected[104], the protection did not extend to Supreme Court supervision of tribunals which were not courts. The submission departs from South Australia's position. There are no qualifications in the key passages in *Kirk's* case quoted above which support it[105]. And some of the words to which emphasis has been added in those passages – *executive* power and *legislative* power – suggest that there are no qualifications. Legislative power creates tribunals, and tribunals which are not courts exercise executive power. That there are no qualifications is also supported by the emphasised words, used twice, "*persons and bodies other than*" the Supreme Court. Those words extend not only to courts but also to tribunals which are not courts. The jurisdiction of the Court of Queen's Bench at the time of federation, to which *Kirk's* case referred, extended to the grant of prerogative relief not only in relation to courts but also other bodies. The "islands of power" to which the

---

103 Subject to arguments negating the existence of a duty, considered below at [89]-[97].

104 (2010) 239 CLR 531 at 573-574 [72].

105 See above at [73].

Court referred in *Kirk's* case and which would exist but for the entrenched supervisory jurisdiction of Supreme Courts could have been executive or judicial in nature, and could have involved powers exercised by a court, by a non-curial tribunal, or even by a body which is neither a court nor a tribunal. The application of *Kirk's* case beyond "courts" is rational, for it can be hard to distinguish between adjudicative bodies which are courts and those which are not, particularly in the case of non-federal bodies, for State constitutions do not embody any strict separation of powers.

83 Further, this Court's consideration of *Kirk's* case in two later decisions has not suggested that it is limited to jurisdictional review of courts.

84 The first was *South Australia v Totani*. It concerned a decision made by the South Australian Attorney-General under a South Australian statute. In that context the following statements were made. First[106]:

> "State legislative power does not extend to depriving a State Supreme Court of its supervisory jurisdiction in respect of *jurisdictional error* by the *executive government of the State, its Ministers or authorities*." (emphasis added)

Secondly, it was said that "judicial review of the Attorney-General's decision will be available in the Supreme Court."[107] Thirdly, it was said that for the reasons explained in *Kirk's* case[108] the privative clause in the South Australian statute does not "remove the supervisory jurisdiction of the Supreme Court for *jurisdictional error* including breaches of the obligation to give procedural fairness."[109] (emphasis added)

85 The second decision was *Wainohu v New South Wales*. It concerned a non-curial decision – a decision made pursuant to a New South Wales statute by a judge of the Supreme Court of New South Wales, but acting as a designated person. It was said not to be in dispute that the effect of *Kirk's* case was that a privative provision in the New South Wales statute "has the effect that the section would not prevent a person from seeking prerogative relief in the Supreme Court

---

106 (2010) 242 CLR 1 at 27 [26] per French CJ; [2010] HCA 39, citing *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99]-[100].

107 (2010) 242 CLR 1 at 78 [193], citing *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

108 (2010) 239 CLR 531 at 580-581 [98]-[100] and 585 [113].

109 *South Australia v Totani* (2010) 242 CLR 1 at 105 [268].

of New South Wales on the ground of jurisdictional error."[110] It was also said of the privative provision that the "effectiveness of that exclusion is denied by the decision in [*Kirk's* case]."[111] (footnote omitted)

Second question: is s 206 inconsistent with *Kirk's* case?

86 For the reasons just given, it is beyond the power of the South Australian legislature to prevent the Supreme Court of South Australia from reviewing a failure by the Commission to exercise jurisdiction. The second question therefore arises. Does s 206 purportedly prevent review of decisions which allegedly rest on a wrongful refusal to exercise jurisdiction? If it does not, it is valid. If it does, it is invalid.

87 A statute is to be construed bearing in mind the constitutional limits on the powers of the relevant legislature. If the impugned statute is capable of bearing two meanings, one which would render it invalid and the other which would render it valid, the latter is to be preferred[112]. "[S]o far as different constructions … are available, a construction is to be selected which, so far as the language … permits, would avoid, rather than result in, a conclusion that the section is invalid"[113]. But the meaning compatible with validity must be "available". It is wrong to take words which bear only one meaning, which meaning leads to invalidity, and to rewrite them to create another meaning leading to validity. It is not for the Court to stand in the shoes of the legislature and purport to enact legislation within power which is different from the statute which the legislature actually enacted.

---

110 *Wainohu v New South Wales* (2011) 243 CLR 181 at 195 [15] per French CJ and Kiefel J; [2011] HCA 24, citing *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98]-[99].

111 *Wainohu v New South Wales* (2011) 243 CLR 181 at 224 [89].

112 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180; [1926] HCA 58; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267; [1945] HCA 30; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14; [1992] HCA 64; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4. Similarly, s 22A(1) of the *Acts Interpretation Act* 1915 (SA) provides: "Every Act and every provision of an Act will be construed so as not to exceed the legislative power of the State." But this means only that it will be so construed if it is possible to do so.

113 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 161 [355] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52.

88 South Australia submitted that the construction which some dicta of this Court gave to the precursor to s 206 in *Public Service Association (SA) v Federated Clerks' Union of Australia*[114] was correct. That submission is sound. With respect to those who hold the contrary view[115], and unsatisfactory though the construction may be in point of policy, a failure to exercise jurisdiction cannot be described as "an excess or want of jurisdiction", however widely the latter words are construed. Hence s 206 is invalid, at least to the extent that it excludes the Supreme Court's jurisdiction in circumstances of the present kind. South Australia made no submission that s 206 should be read down pursuant to s 22A(2) of the *Acts Interpretation Act* 1915 (SA). The dicta in *Public Service Association (SA) v Federated Clerks' Union of Australia* assumed that the precursor to s 206 was valid, but the reasoning stated in *Kirk's* case was not advanced to the Court on that occasion. It is therefore right to depart from that assumption in the light of *Kirk's* case.

Third question: is there a duty on the Commission to exercise jurisdiction?

89 Neither of the first two questions would arise if the Act only conferred on the Commission various powers to resolve industrial disputes, without imposing any duty on it to exercise jurisdiction to resolve them. South Australia did not advocate that point of view. Victoria, Tasmania, Queensland and Western Australia, however, did. In that fashion the third question potentially arises.

90 The right of States to intervene in these proceedings depended on s 78A(1) of the *Judiciary Act* 1903 (Cth). The condition of intervention was that the proceedings "relate to a matter arising under the Constitution or involving its interpretation". There is a strong argument for the view that the role of an intervener under s 78A is limited to constitutional questions. What the interveners said about the first question fell within that limitation. What they said about the third question arguably did not. It may be desirable to bear in mind that s 78A(2) gives the Court power to make orders against interveners in relation to the costs of and occasioned by their interventions. However, no party in this case protested about being vexed by the conduct of the interveners, and it is therefore necessary to deal briefly with most of the interveners' arguments on the third question.

91 Section 26(c) of the Act provided that the Commission has "jurisdiction to resolve industrial disputes". In the absence of statutory language to the contrary, a grant of jurisdiction ordinarily carries with it a duty to exercise it. No statutory

---

114 (1991) 173 CLR 132 at 141-143, 149, 160-161 and 166.

115 For example, Bray CJ in *R v Industrial Commission of South Australia; Ex parte Minda Home Incorporated* (1975) 11 SASR 333 at 337.

language to the contrary exists. Hence, contrary to Victoria's approach, the circumstances do not create any task of "reconciling" s 206 with other provisions of the Act.

92 Reliance was placed on s 206(1). It provides: "A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act." It was submitted that s 206(1) confers power on the Commission to decline to exercise jurisdiction. The submission must be rejected. Victoria, Tasmania, Queensland and Western Australia relied on the words "excess or want of jurisdiction" in s 206(2) coupled with the absence of an express reference to a failure to exercise jurisdiction. But this mixes up two questions. One is: "Does the Commission have a duty to exercise jurisdiction?" The other is: "How far can a failure properly to carry out any duty be reviewable?" Section 206(2) is directed at the second question, not the first.

93 Queensland argued that some of the Commission's powers arose only if there were "an industrial dispute", and that expression is so vague as to call for fine judgments to be made. The answer to that argument is that many issues arise in the law which rest on indeterminate criteria, and which can be hard to resolve in particular instances. That does not preclude the existence of duties to resolve those issues.

94 Queensland submitted expressly, and Victoria and Tasmania submitted by implication, that the Act grants the Commission's powers of intervention under ss 82(3), 197, 200(1), 201(1) and 202 of the Act by the verb "may" rather than "must". It was pointed out that the Commission had power to reopen a decision that it had no jurisdiction pursuant to s 174. Victoria and Tasmania further relied on s 207. Tasmania also relied on s 199. The statutory provisions to which the submissions refer give the Commission specific powers, often in specific circumstances. The existence of those specific powers does not negate the Commission's general duty to exercise its jurisdiction which is to be inferred from s 26(c). Nor does the fact, on which Queensland relied, that despite the language of the Act the Commission cannot actually resolve disputes; it can only attempt to do so.

95 Victoria and Tasmania also relied on the importance of speed and finality in resolving industrial disputes[116]. That factor does not deny the existence of a duty on the Commission to resolve them. It may explain, however, the South Australian legislature's decision to limit access to judicial review by means of s 206(2).

---

116 They cited *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 147-148.

96 For those reasons there is no statutory language excluding a duty on the Commission to exercise its jurisdiction to resolve an industrial dispute. There are also strong indications in the legislation that the duty exists. One of these is the power conferred by s 168. That section gives power to the Commission to desist from hearing proceedings where they are frivolous or vexatious or where it is not in the public interest that there be any further hearing. It therefore assumes that if those fairly stringent conditions are not met there is a duty to hear the proceedings.

97 Western Australia advanced various additional arguments, but in view of its sound decision to take "no position on the correct construction to be given to the [Act]" these arguments need not be dealt with.

Hypothetical controversy?

98 South Australia submitted that special leave should be refused because changes in government policy favourable to the interests of the applicant's members had rendered the controversy moot and merely hypothetical. At least in relation to long service leave entitlements, that is not so.

Conclusion

99 Special leave should be granted, the appeal should be allowed, and consequential orders should be made.