1. As the title of my talk suggests, I’m here to discuss a decision which takes its significance primarily as a sequel, in this case as a sequel to *Kirk*.

2. As this audience will appreciate, in constitutional law terms, *Kirk* is significant for the discovery of a further limit on State legislative power.

3. The High Court in *Kirk* discovered a constitutional dimension to the interpretation and validity of *privative* clauses in State legislation.

4. The Court held that the jurisdiction of State Supreme Courts to correct jurisdictional errors of inferior courts and tribunals is a defining characteristic of such courts as provided for in Ch III. Consequently, it is beyond the power of a State to pass legislation depriving a Supreme Court of such jurisdiction.

**Danger of overstating significance of *Kirk* re State privative clauses**

5. There is a danger of overstating the practical significance of the decision in *Kirk*, at least in terms of its direct application to State privative clauses. As a constitutional guard dog, its bark may be worse than its bite.

6. Before *Kirk* the efficacy of privative clauses in State legislation was already severely constrained by exacting principles of interpretation, including the *Hickman* principle.
7. After all, the privative clause that was relevant to the dispute in Kirk – in s. 179 of the Industrial Relations Act 1996 – had already been held on its proper construction not to preclude review for jurisdictional error.¹ No one had suggested to the contrary in Kirk itself.

8. The most that one can say is that, prior to Kirk, there was a constitutional possibility that State privative clauses could operate in the shadowlands between the Hickman principle and jurisdictional error. Kirk has closed down that area of potential operation. The practical impact of that change for the availability of judicial review is likely to be marginal.

9. Otherwise, the High Court’s decision in Kirk amounts to an analytical shift – from principles of statutory construction to constitutional constraint – that is likely to produce the same result in many cases.

¹ Batterham v QSR (2006) 225 CLR 237; Kirk at [103]-[105]
**PSA v South Australia**

10. The case is a tale of two refusals to exercise jurisdiction.

**Attempt by the Public Service Association to invoke the jurisdiction of the Industrial Relations Commission**

11. The conditions of employment of public servants in South Australia are governed by an Enterprise Agreement made under the South Australian *Fair Work Act 1994* (SA). As of 2010, the Enterprise Agreement provided that there would be no forced redundancies for a certain period and that conditions of employment would not be reduced.

12. As part of the State Budget the South Australian Treasurer did two things that had the potential to alter these arrangements – he announced that there was a prospect of the Government reconsidering its no forced redundancy policy and he introduced into the parliament a Bill that provided for the reduction of certain public sector entitlements.

13. The PSA notified the Industrial Relations Commission that, on the basis of these developments, it had two disputes with the employer of public servants, the Chief Executive of the Department of Premier and Cabinet.

14. The jurisdiction of the Industrial Relations Commission turned on whether or not there was an “industrial dispute”. The Commission determined that there was no industrial dispute and it therefore had no jurisdiction to deal with the matter.

**The PSA seeks judicial review in the South Australian Full Court of the refusal to exercise jurisdiction**

15. The PSA sought judicial review of that decision in the Full Court of the Supreme Court of South Australia. The PSA wanted to contend that
the IRC had wrongfully refused to exercise its jurisdiction. In bringing
the challenge the PSA had to confront a privative clause in the *Fair
Work Act*. Section 206 of that Act provides:

**206 Finality of decisions**

(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.*

16. The South Australian Full Court held that the PSA could not seek
judicial review of the Commission’s decision because review was
precluded by s. 206(1). The Court held that the challenge did not come
within the terms of s. 206(2), because it could not be described as a
challenge “on the ground of an excess or want of jurisdiction”.

17. The Full Court was supported in this conclusion not just by the words
of s. 206, but also by a previous decision of the High Court involving
the same appellant (*Public Service Association (SA) v Federated Clerks’

18. In the *First PSA Case* the Court considered an equivalent privative
clause in earlier legislation. That is, the legislation allowed judicial
review only in cases of “excess or want of jurisdiction”. All of the
members of the Court held in the *First PSA Case* that a refusal to
exercise jurisdiction could not be characterised as an “excess or want of
jurisdiction”.

19. Fast forward two decades and the PSA again appealed to the High
Court, this time on the question of whether the South Australian Full
Court did have jurisdiction, despite s. 206 of the *Fair Work Act*, to entertain the PSA’s application.

**The decision of the High Court in PSA v IRC**

20. The Court held unanimously that the Supreme Court of South Australia did have jurisdiction to review the IRC’s refusal to exercise jurisdiction.

21. All of the Judges of the Court reasoned that the State privative clause had to be construed by reference to the constitutional limits identified in *Kirk*. Their Honours all agreed that if s. 206 had the effect of precluding review of the decision of the IRC refusing to exercise jurisdiction, then it would fall foul of the *Kirk* principle, because that is a species of review for jurisdictional error.

**Solving the constitutional problem by interpreting words**

22. With the exception of Justice Heydon, their Honours found that for the purposes of s. 206(2) of the *Fair Work Act* a wrongful refusal to exercise jurisdiction does constitute an “excess or want of jurisdiction”.

23. Justice Heydon was not prepared to stretch the words of s. 206 that far. His Honour held that s. 206 did preclude review of the kind sought by the PSA and was invalid to that extent.

24. Their Honours apart from Heydon J, found that the problem could be solved by reading s. 206(2) in such a way as to allow for review in circumstances where the IRC has refused to exercise jurisdiction. This involved the following sequence of reasoning:

   a. the IRC had a duty to determine whether or not it had jurisdiction to decide a matter before it, which in this case meant deciding whether or not there was an “industrial dispute”;
b. that involved the determination by the IRC of a jurisdictional fact;

c. the IRC did not have the authority to decide that jurisdictional fact wrongly. In other words, its jurisdiction did not extend to the wrong determination of questions of jurisdictional fact;

d. if the IRC determined a jurisdictional fact incorrectly, then it was acting “in excess of jurisdiction” or “in want of jurisdiction” and review under s. 206(2) was available.

25. The reasoning in the judgments of Chief Justice French and the plurality could be read as suggesting that this is the correct analysis of s. 206 of the Fair Work Act, simply as a matter of construction. However, their Honours expressly relied on the Kirk principle as a factor bearing on the construction.

26. This involves the application of the principle that legislation should be construed, if the language allows, in such a way as to keep the legislation within constitutional limits. That principle is well established (for example in Work Choices) and given statutory force by the Interpretation Acts.

27. The reliance on this principle by all of the Judges apart from Heydon J is at least partly explained by the need to justify how they came to an interpretation of s. 206(2) that was at odds with the reasoning of the Court in the First PSA Case.

28. The reasoning of the Court in the First PSA Case rejecting this construction had been emphatic – Brennan J, for example, found that there was “no acceptable canon of construction” by which the phrase “excess or want of jurisdiction” could be extended to cover the situation of a wrongful failure or refusal to exercise jurisdiction.

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29. It turns out that for 6 members of the Court the words are capable of having such extended coverage.

30. The case highlights the power of the interpretative principle that a statute should be construed in such a way as to remain within constitutional boundaries. It has to be observed that there is a price to be paid for the application of this principle. As the shift from the First PSA Case to the Second PSA Case illustrates, once the constitutional imperative is factored into the interpretative equation, words can be held to have an entirely different meaning. That proposition runs somewhat against the grain of contemporary principles of statutory interpretation. Having a statute mean something other than the words of the statute suggest is an outcome that is never ideal.

31. This was a point picked up by the Chief Justice in International Finance Trust Company Limited v NSW Crime Commission (2009) 240 CLR 319 at 349, [42]. His Honour in that case observed that the principle that legislation should be construed so as to keep within constitutional limits has to be applied with some caution:

   The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished.
Moreover, there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning.

32. These are important reasons for a restrained approach to the application of the interpretative principle. Of course, it is always a question of degree. The critical point is whether alternative constructions are truly open, having regard to text, context and purpose. Where there is ambiguity and a choice between interpretations that are open, it is reasonable that constitutional considerations should tip the balance one way.

33. The fact that 6 members of the Court in the Second PSA Case were able to stretch s. 206 of the Fair Work Act to accommodate the constitutional imperative says a lot about the yogic flexibility of the concept of “jurisdiction”. In that respect this may have been an unusually vivid example of the kind of surprising and counterintuitive results that can arise from the application of this principle.

What the PSA case tells us about the scope of Kirk

34. I turn then to what the Second PSA Case tells us about the scope of the constitutional principle identified in Kirk. The Court did not reformulate the principle in any significant way. Instead, in the course of restating and applying it, it rejected a couple of courageous attempts at reading Kirk narrowly.

35. South Australia and the interveners between them advanced two different bases for reading down Kirk. South Australia sought to argue that the principle in Kirk about the availability of review for jurisdictional error should be read as being concerned only with particular species of jurisdictional error and the jurisdiction of Supreme Courts to issue relief in the form of writs of certiorari. This
was said to be supported by a reading of Colonial Bank of Australasia v Willan (1874) LR 5 PC 417, which was critical to the reasoning in Kirk.

36. One difficulty facing South Australia in making this submission is that no plausible justification was advanced, based either in the logic of the constitutional system or history, to explain why there should be a lopsided supervisory jurisdiction to correct wrongful acts in excess of jurisdiction (misfeasance) but not wrongful failures to exercise jurisdiction (nonfeasance).

37. The Court emphatically rejected South Australia’s reading of Kirk. Their Honours emphasised that the constitutionally entrenched jurisdiction of State Supreme Courts is to review for jurisdictional error, of all kinds. In terms of relief, the jurisdiction of State Supreme Courts to grant mandamus to compel the exercise of jurisdiction is as much a part of the constitutionally entrenched jurisdiction as the jurisdiction to grant certiorari.

38. Victoria attempted an alternative narrow reading of Kirk, namely that the constitutionally protected jurisdiction of Supreme Courts is limited to review of inferior courts, but not tribunals. This submission found no favour. As Heydon J noted, the key passage in Kirk refers to the supervisory jurisdiction of the Supreme Courts to enforce the limits on the exercise of “State executive and judicial power by persons and bodies other than [the Supreme Court]”.

39. So the Second PSA Case tells us that the key passages in Kirk should be read as meaning what they say – the Constitution mandates that there be State Supreme Courts with supervisory jurisdiction to review all inferior courts and executive bodies for jurisdictional error of all kinds.

A shot across the bows of the interveners

40. While we are dealing with these attempts by the interveners to limit Kirk, it is worth noting a couple of interesting passages in the Second
PSA Case that touch on the role of interveners. In addition to taking the point about the distinction between courts and tribunals, the interveners ran an argument about the extent of the IRC’s role in determining its own jurisdiction. The essence of the argument was that the Commission has the power to resolve industrial disputes, but not the duty to do so, with the result that refusal to exercise jurisdiction would not constitute jurisdictional error.

41. The Court rejected the argument and along the way made some striking comments about the role of the interveners in making this submission. The implication in the comments is that the interveners may have been straying beyond the role permitted by s. 78A of the *Judiciary Act 1903* (Cth). In the plurality judgment, this takes the form of a shot across the bows – their Honours said the submission “even if within the scope of an intervention as of right under s. 78A of the *Judiciary Act 1903* (Cth), should be rejected.”

42. Heydon J devoted more attention to the issue. His Honour referred to s. 78A(1), which describes the condition for intervention as being that the proceedings “relate to a matter arising under the Constitution or involving its interpretation”. Heydon J went on to state: “There is a strong argument for the view that the role of an intervener under s 78A is limited to constitutional questions”. Heydon J went on to suggest there could be costs implications for an intervener in straying beyond constitutional questions, but found it unnecessary to draw any conclusions in this matter because “no party in this case protested about being vexed by the conduct of the interveners”.

43. At first blush s. 78A does not impose any limits on the role of an Attorney General, provided of course that the proceedings are proceedings of the kind described in s. 78A(1). However, on matters of construction, where there’s a will there may yet be a way. In light of the Court’s comments one cannot rule out the possibility of some
further attempts being made at constraining interveners, whether at the instigation of the Court or the primary parties.

44. The more interesting question would be how to police the limits of this rule. Working out where a “constitutional question” starts and ends is no easy matter. Minds may differ about how deeply one must delve into a legal controversy in order to put the constitutional question in its proper statutory and factual context. As the Second PSA Case demonstrates and as High Court has emphasised repeatedly in the past, at the heart of every constitutional question involving a statute is a question about the interpretation of the statute. One cannot get to the constitutional point without understanding how it is framed. Also, the speed at which the ground can shift in constitutional debates, as illustrated in the High Court in a number of recent matters, means that it can be difficult to anticipate in advance how a constitutional question is to be presented and argued. Even if the Court comes to the point of confining intervening Attorneys General to “constitutional questions”, the Attorneys may prove to be extremely difficult to quarantine.

What the Second PSA Case doesn’t tell us about Kirk

45. Finally, let me make a few observations about what the Second PSA Case doesn’t tell us about Kirk.

46. Kirk involved an application of the constitutional principle that was described in Forge in the following terms: Ch III of the Constitution not only assumes, it requires that there will always be a court in each State which answers the constitutional description of the Supreme Court of a State. That translates to the proposition that a State parliament lacks the power to alter the character of a Supreme Court so that it ceases to meet the constitutional description.\(^3\) A Supreme Court will cease to

\(^3\) Kirk at [96].
meet the constitutional description if it loses any of its defining characteristics.

47. Before *Kirk*, there were a number of cases where this principle was found to impose a limit on the kinds of jurisdiction that could be conferred on State Courts. Certain types of jurisdiction were found to be constitutionally infectious. In cases such as *Kable, International Finance Trust, Totani* and *Wainohu* it was established that the States cannot confer on their own courts, or on judges associated with such courts, jurisdiction that was incompatible with the standards required by Ch III.

48. Now in *Kirk* we see that there is also an entrenched minimum jurisdiction – that is, there is a species of jurisdiction that must be retained in order for a Supreme Court to maintain its defining characteristics.

49. One of the key questions from *Kirk* is whether there may be other aspects of Supreme Court jurisdiction that constitute a defining characteristic, such that they are also entrenched.

50. The *Second PSA Case* offers no new guidance on this front. The reasoning of the Court does not include any further elaboration of why the supervisory jurisdiction of the Supreme Courts is a defining characteristic of such Courts. Nor does it provide any hints as to how the concept of “defining characteristics” is to be understood.

51. It may be that the proposition does not have much further to go, at least in relation to the notion of entrenched jurisdiction. According to the Court in *Kirk*, what made the supervisory jurisdiction of State Supreme Courts a “defining characteristic” was that it was effectively entrenched pre-**Constitution**. Their Honours concluded, by reference to the Privy Council decision in *Colonial Bank of Australasia v Willan*, that
privative clauses in colonial legislation were not effective to preclude review for jurisdictional error.

52. There is a lively debate about the accuracy of that conclusion as a reading of Willan and as an historical proposition about the understood scope of the powers of Colonial legislatures as at Federation.

53. Regardless of that debate, it is clear enough from the reasoning in Kirk that this is the analysis which led the Court in Kirk to conclude that the jurisdiction to review for jurisdictional error is a defining characteristic of State Supreme Courts.

54. One consequence of this analysis is that one cannot say that the jurisdiction to determine particular matters is a defining characteristic of State Supreme Courts simply because that was a historical feature of their jurisdiction at federation. The High Court in Kirk was not saying that State Supreme Courts must always have the jurisdiction which they had at federation. It was the special character of the supervisory jurisdiction, understood by reference to the treatment of privative clauses, which gave that jurisdiction special constitutional significance.

55. An argument along these lines was attempted in the Supreme Court last year. In Ashjal Pty Ltd v Alfred Toepfer International (Australia) Pty Ltd [2012] NSWSC 1306 the plaintiff challenged the validity of certain provisions of the Commercial Arbitration Act 2010, on the basis that the legislation impermissibly removed the jurisdiction of the Supreme Court to review arbitral awards for error of law. That jurisdiction was said to have been a historical feature of the Supreme Court at federation. Stevenson J rejected that attempted extension of Kirk. A notice of intention to appeal has been filed in that matter, so the Court of Appeal may yet be given an opportunity to ponder these issues.

56. The High Court may also have something to say about these matters in TCL Air Conditioner (Zhongshan) Co Ltd v. The Judges of the Federal Court
of Australia. The primary argument in that matter concerned the proposition that the registration of arbitral awards in the Federal Court involved the enlistment of federal judicial power by arbitral bodies. However, the plaintiff also contended in that context that the scheme for enforcement of arbitral awards was constitutionally defective because it deprived the Court of the power to review the award for error of law. Judgment is reserved.

57. We will need to wait and see if the High Court finds new dimensions to the Kirk principle in that case or future cases.

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