'The dog that regained its bark: a new era of administrative justice in the Australian states.'

the Hon. Marilyn Warren AC*

It has been said, in an exchange between Kirby J and counsel, that the *Kable* doctrine is a 'guard dog that only barked once', and that any furtherance of its principles is like asking the dog 'to turn on the family.[1] These remarks, however apt at the time, now appear to be an outdated reflection of the constitutional framework in which states deliver administrative justice. The scope in which state courts[2] may deliver prerogative remedies is undergoing significant transformation. In turning one's mind to the challenges faced by courts in delivering judicial review, one must necessarily contemplate the rapidly evolving constitutional framework in which administrative law now operates. The past 18 months has seen a resurgence of activity in the High Court and at Supreme Court level that, on all accounts, reveals that the states are at an important juncture which might just see the 'guard dog' returned to its rightful owners.

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* Chief Justice of Victoria. Edited version of a speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010. The style of the author's delivery has been preserved as much as possible. The author acknowledges the assistance of her associate Jordan Gray.

[1] *Forge v Australian Securities & Investments Commission* [2006] HCATrans 22; *Forge v Australian Securities & Investments Commission* [2006] HCATrans 25.

[2] Many of the observations I make will apply to both state and territory courts as 'state courts'. However, having regard to s 122 of the *Constitution* and the different rapport it creates between the Commonwealth and the Territories, I will confine my remarks to the courts of the Australian States.

Following the High Court decisions of *Kirk*,[3] *International Finance Trust Company*,[4] *Pape*[5] and *Lane*,[6] and the Supreme Court of South Australia decision in *Totani*,[7] two principles are emerging that profoundly modify the traditional power of state judges to deliver administrative remedies. First, Supreme Courts must retain their integrity and independence from legislative or executive requirements to engage in activity considered fundamentally 'repugnant' to judicial process. Secondly, the constitutionally entrenched position of the High Court is shared by the Supreme Courts as a matter of constitutional necessity; administrative review now forms part of the constitutional law of the states. The supervisory jurisdiction of the Supreme Courts plays a role in the integrated federal judicial system created by the *Constitution*, both as a precondition of the entrenched appellate jurisdiction of the High Court, and as an incident of the supervisory jurisdiction they exercise to enforce the limits of state legislative and judicial power. The flow-on effect of these developments will no doubt create fresh challenges for practitioners and courts, but also present new and exciting opportunities.

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[3] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, (*'Kirk'*).
[4] *International Finance Trust Company v NSW Crime Commission* (2009) 261 ALR 220, (*'International Finance Trust Company'*).
[5] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.
[6] *Lane v Morrison* (2009) 239 CLR 230.
[7] *Totani v South Australia* [2009] SASC 301 *('Totani')*.

Legislative, executive and judicial power in the states

I offer some thoughts and observations on the possible impacts of these developments for lawyers engaged in state administrative law, but before exploring my enquiry further, we need to be clear about the traditional nature of administrative law in the states. Historically, informal separation of powers arrangements have shaped judicial review and imposed limitations on the scope in which the judiciary may deliver administrative remedies. There is a general assumption that the separation of judicial power is not a part of the constitutional law of the states[8] and that state parliaments have been able to either limit judicial power or confer non-judicial functions on the judicial arm,[9] in far more expansive ways than is achievable federally.

Some limitations have emerged over time to qualify this to some degree; namely, the *Hickman*[10] and *Kable*[11] doctrines. These give limited scope to a separation of powers in the states. But overall, important differences have remained between state and federal arrangements, mostly as a result of there being no equivalent to s 75(v) of the *Constitution* in the states.

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[8] *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood v Victoria* (No 2) [1994] 1 VR 652; *Kable v DPP* (NSW) (1996) 189 CLR 51 ('*Kable*'); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Kirk* (2010) 239 CLR 531.

[9] The benefits of state legislatures conferring non-judicial functions on the courts are well known, one example being the ability for judicial officers to hear and determine committal proceedings.

[10] *R v Hickman; Ex parte Fox & Clinton* (1945) 70 CLR 598 ('*Hickman*').

[11] *Kable* (1996) 189 CLR 51.

The Victorian *Constitution Act 1975* (Vic) provides an illustration of the limitations which may be placed on the judiciary by state parliaments. By s 85, the Supreme Court is afforded unlimited jurisdiction[12] but its jurisdiction may be removed.[13] Legislation may exclude or restrict judicial review by the Supreme Court of a decision of another court or tribunal where it expressly states its intention to do so by reference to s 85(5).

The language of s 55(10) of the *Confiscation Act 1997* (Vic) provides an example of such a legislative intention. That Act refers to s 85(5) of the *Constitution Act* and directs that 'a determination or purported determination ... under this section is not liable to be challenged, appealed against, reviewed, quashed or called in question in any court or tribunal on any account.'[14]

Some privative provisions are quite extreme. Prisoners in Queensland, for example, may seek judicial review for disciplinary decisions, but most other decisions by prison mangers are non-reviewable in any court, even if they are only purported decisions and even if they are tainted by jurisdictional error.[15]

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[12] *Constitution Act 1975 (Vic)*, s 85(1) ('*Constitution Act*').
[13] *Constitution Act 1975 (Vic)*, s 85(5).
[14] *Confiscation Act 1997 (Vic)*, s145(1). There are many such provisions in Victorian statutes, see for example, *Health Services (Conciliation and Review) Act 1987*, s31; *Education Act 1958*, s 81A; *Infertility Treatment Act 1995*, s 150; *Planning and Environment (Planning Schemes) Act 1996*, s22(2).
[15] *Corrective Services Act 2006 (Qld)*, ss 17, 66, 68, 71.

The observations made in obiter by Gaudron and Gummow JJ in *Darling Casino*[16] appear to have been influential on legislatures and the courts. Their Honours said that 'provided the intention is clear, a privative clause in a valid State enactment may preclude review for errors of any kind. And if it does, the decision in question is entirely beyond review so long as it satisfies the Hickman principle.'[17] So, state privative clauses may protect 'purported decisions' from jurisdictional error to a substantial degree, provided the administrative decision was not made in bad faith; related to the subject matter of the legislation and was reasonably capable of reference to the power given to the relevant administrative body.[18]

Courts have nonetheless insisted that the 'critical words'[19] excluding grounds of review for want of jurisdiction be present, by strictly construing such clauses.[20] Of course, s 75(v) of the *Constitution* offers no help in dealing with state privative clauses. For the reasons expressed by the High Court in *Plaintiff S157/2002*, a privative clause struck in such terms would be invalid in a federal

[16] *Darling Casino v NSW Casino Control Authority* (1997) 191 CLR 602
[17] Ibid 634.
[18] *Hickman* (1945) 70 CLR 598, 617 (Dixon J). See *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212 on the application of *Hickman* in the states following *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 ('*Plaintiff S157*'); see also *Woolworths Ltd v Hawke* (1998) 25 NSWLR 13. Vickery J recently considered the operation of a privative clause in the context of a building and construction industry dispute resolution which enabled the parties to nominate an authority to determine the dispute. His Honour considered that the Hickman principle applied and found that certiorari was available because the relevant constitutional reference was absent: *Hickory Developments Pty Ltd v Schiavello Pty Ltd* [2009] VSC 156.
[19] *Applicants A1 and A2 v Brouwer (No 3)* [2008] VSCA 99.
[20] *Public Service Association (SA) v Federated Clerks' Union of Australia South Australian Branch* (1991) 173 CLR 132, 160 (Dawson & Gaudron JJ), approved in *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602,633 (Gaudron & Gummow JJ); see also *Herald and Weekly Times Pty Ltd v A* (2005) 160 ACrimR299.

statute,[21] but the validity of a clear legislative intention to deny certiorari in the absence or excess of jurisdiction has been upheld at state level. Indeed, in *Re Biel*, a writ of certiorari was denied despite there being 'partial or total want of jurisdiction.'[22]

From the perspective of conferring jurisdiction on the courts, it is settled law that the conferral must respect the integrity of the *Constitution* in accordance with the *Kable* doctrine. This arises as a matter of implication from the *Constitution* to invalidate any legislative scheme that fails to preserve the integrity, independence, impartiality, and judicial procedures of the Supreme Court, as a court in which federal jurisdiction has been invested under Chapter III of the *Constitution.*[23]

It cannot really be said that *Kable* has represented a serious constraint on state parliaments when legislating about their courts or the functions and powers that can be conferred on state judicial officers.[24] Its application has been confined to a very narrow compass.[25] However, last year in the *International Finance Trust*

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[21] (2003) 211 CLR 476. It is now well established in Federal constitutional law that any attempt by the Commonwealth Parliament to oust the jurisdiction of the High Court to determine an application for judicial review of Commonwealth executive decision tainted by jurisdictional error is invalid.

[22] (1892) 18 VLR 456; see also *R v Commissioner of Police for the Northern Territory; Ex parte Holroyd* (1965) 7 FLR 8.

[23] *Kable* (1996) 189 CLR 51.

[24] The doctrine has been invoked in a number of challenges involving indefinite imprisonment regimes and deemed offences under criminal property confiscation laws. A survey in 2002 showed that, apart from *Kable* itself, no court in Australia had held, by majority, state legislation invalid on the *Kable* principle alone, see *P Johnston & R Hardcastle 'State Court Judges and Kable Limitations'* (2002) 4 CLPR 1.

[25] See *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; *Silbert v Director of Public Prosecutions* (WA) (2004) 217 CLR 181; *Fardon* v Attoney-General (Qld) (2004) 223 CLR 575 (*'Fardon'*); and *Baker v The Queen* (2004) 210 ALR 1, 39 [142].

Company case, a 4:3 majority of the High Court invalidated s 10 of the *Criminal Assets Recovery Act 1990 (NSW)*[26] on the ground that it was 'repugnant to the judicial process in a fundamental degree'.[27]

There are therefore some limitations on the manner in which state parliaments may confer or remove the Supreme Court jurisdiction. Kirk's case considerably broadens the limitations on the legislature to remove the court's jurisdiction.

Supreme Court to decide the limits of its own jurisdiction: administrative justice 'constitutionalised' in the states

It will be recalled that Mr Kirk and the Kirk company were convicted under the *Occupational Health and Safety Act 1983* (NSW), the High Court quashing those convictions because the charges failed to identify the act or omission said to constitute the contravention.[28] The matter came before the NSW Court of Appeal twice. On the first occasion, Basten JA noted that the matter raised a large question as to the limits on the powers of state parliaments to legislate with respect to the jurisdiction of their own courts, where the results may affect the constitutional jurisdiction of the High Court, but his Honour determined that the matter could be decided on a non-constitutional basis.[29] The court went on

[26] This section allowed for ex-parte restraining orders preventing dealings with property suspected of being the proceeds of crime and possibly liable to subsequent confiscation under that Act.
[27] *International Finance Trust Company* (2009) ALR 220, 247 [98] (Gummow, Bell JJ).
[28] *Kirk* (2010) 239 CLR 531, 558.
[29] *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 66 NSWLR 151, 171 [91].

to hold that it should refrain from intervening until the Full Bench of the Industrial Commission had decided the issue.[30] The Full Bench dismissed the conviction appeal[31] and the Kirk company and Mr Kirk applied again to the Court of Appeal for orders in the nature of certiorari quashing the decisions of the Industrial Court at first instance and of the Full Bench. It was accepted that the Court could exercise supervisory jurisdiction on the basis of jurisdictional error but the Court of Appeal declined to do so on the grounds that any such errors were based on findings of fact and did not qualify as jurisdictional error.[32]

The High Court held that the Industrial Commission proceeded on a wrong understanding by failing to identify the measures which the employer ought to have taken, the errors made at first instance involved a misconception of the nature of the Court's function and the extent of its powers.[33] There was therefore jurisdictional error. Having regard to constitutional considerations, the court held that the distinction between certiorari for jurisdictional error and certiorari for error of law on the face of the record has continued utility.[34]

I pause to make an observation about the privative provision in operation in *Kirk*. Section 179(1), when read withs 179(5), of the *Industrial Relations Act*

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[30] Ibid 159, [34].
[31] *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2007) 164 IR 146.
[32] *Kirk v Industrial Relations Commission (NSW)* (2008) 173 IR 465.
[33] *Kirk* (2010) 239 CLR 531, 561.
[34] Ibid 576.

1996 provided that a decision of the Industrial Commission is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal whether by order in the nature of prohibition, certiorari or mandamus, by injunction, declaration or otherwise. Now, s 179(4) entitled the Court of Appeal to review jurisdictional error after the Full Court of the Industrial Court had dealt with any appeal as to an issue of jurisdiction. The High Court held that s 179(1) could have been read as not extending to jurisdictional error only on the basis that it referred to 'decisions' but not 'purported decisions', but found that this question need not be decided because the construction of s 179(1) was guided by constitutional considerations.[35] Thus, the constitutional discussion is explicitly treated as part of the *ratio* of the decision.

The constitutional effect of the decision is that the supervisory jurisdiction to determine and enforce the limits on executive and judicial power by persons and bodies other than the Supreme Courts is a defining characteristic of Supreme Courts under Chapter III of the *Constitution*.[36] To deprive the Supreme Courts of that supervisory jurisdiction would create 'islands of power immune from supervision and restraint',[37] ultimately by the High Court, and

[35] Ibid 579.
[36] The court noted that the Supreme Courts at federation had the jurisdiction of the Court of Queen's Bench, including a general power to issue certiorari to inferior courts. The 1874 decision of the Privy Council in *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417,442 (*'Willan'*), which established that privative clauses did not stop the colonial Supreme Courts from granting certiorari on the ground of manifest defect of jurisdiction, was applied: *Kirk* (2010) 239 CLR 531, 581.
[37] *Kirk* (2010) 239 CLR 531, 581.

undermine the single common law of Australia.[38] The distinction between jurisdictional and non-jurisdictional error marks the relevant limit on state legislative power.

Affirming the integrity of judicial power: limitations on legislative and executive encroachment

That being the position with regard to the removal of jurisdiction, what are the trends in relation to the conferral of jurisdiction? In recent times, a number of states have introduced legislation that attempts to prevent the activities of criminal organisations and organised crime. The 'powers' they confer on courts are no doubt of great assistance to authorities in dealing with organised crime but often raise human rights and administrative law concerns.[39]

Organisational control legislation has been introduced in South Australia and New South Wales and proposed in others. The executive often refers to the 'problem' of bikie gangs as a justification for such legislation. The legislation manifests an intention on the part of state legislatures to retain significant control of matters which are normally determined by proper judicial process.

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[38] The constitutionalisation of *Willan* recalls the decision of the Tasmanian Supreme Court in *Tasman Quest*. It appears to have flown under the radar and curiously is not cited in *Kirk*, but Blow J (Crawford and Slicer JJ concurring) held that the Tasmanian Supreme Court's powers, originally conferred on colonial superior courts by the *Australian Courts Act 1828* ss 3 and 11, to grant orders in the nature of certiorari had survived the purported removal by the *Judicial Review Act (Tas) 2000* of the court's power to issue prerogative writs.

[39] See *Re application under the Major Crime (Investigative Powers) Act* [2009] VSC 381, in which I considered human rights issues concerning the coercive questioning powers in the *Major Crime (Investigative Powers) Act 2004 (Vic)* in the context of the Victorian *Charter of Human Rights and Responsibilities Act 2006*.

Review of executive decisions is excluded even in instances of jurisdictional error, posing problems to the exercise of judicial function.

In May 2009, the South Australian Attorney-General made a declaration pursuant to s 10(1) of the *Serious and Organised Crime (Control) Act 2008 (SA)* ('the Control Act') in respect of the Finks Motorcycle Club, by which it became a 'declared organisation'. Later that month, the Magistrates Court of South Australia made control orders in respect of one Mr Hudson and one Mr Totani pursuant to s 14(1) of the Control Act. The order prohibited them from associating with members of organisations which are 'declared organisations' by the Attorney-General, namely the Finks Motorcycle Club. Section 14(1) provides that 'the Court *must* ... make a control order against a person ... if the court is satisfied that the defendant is a member of a declared organisation.' Under the legislation, a defendant is denied access to any information classified as 'criminal intelligence' by the Attorney-General[40] This means that a control order may be made against a person without that person having the opportunity to know the evidence against them. As has come to be expected, the Control Act also contains a comprehensive privative provision.[41]

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[40] *Serious and Organised Crime (Control) Act 2008 (SA)*, s 13(2).

[41] Section41 provides:
'Except as otherwise provided in this Act, no proceeding for judicial review or for a declaration, injunction, writ, order or other remedy may be brought to challenge or question—
(a) a decision, determination, declaration or order under this Act or purportedly under this Act; or
(b) proceedings or procedures under this Act or purportedly under this Act; or
(c) an act or omission made in the exercise, or purported exercise, of powers or functions under this Act; or
(d) an act, omission, matter or thing incidental or relating to the operation of this Act.
(2) The validity and legality of a declaration under Part 2 cannot be challenged or questioned in any proceedings.

The Magistrate's order was challenged in September last year, the Full Court of the Supreme Court of South Australia holding, by a 2-1 majority,[42] that certain provisions of the Control Act are invalid by reason of the *Kable* doctrine, and as a corollary of that, by reason that the legislative scheme infringed the right to a fair trial, a fundamental element to judicial process.[43]

In the leading judgement, Bleby J approached the issue by asking whether Parliament had perversely directed the court as to how it must decide the issues that have been committed to it.[44] His Honour found that the Magistrates Court is required by the legislation to act on what is, in effect, the certificate of the Attorney-General, with no ability for the court to go behind that certificate.[45]

Once the Attorney-General makes a declaration, the court is prevented from inquiring into whether members of the organisation and the defendant associate for the purpose of organising or engaging in serious criminal activity, and whether the organisation represents a risk to public safety. This was held to be sufficient to undermine the institutional integrity of the court.[46] The most significant and essential findings of fact were made by a Minister of the Crown

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(3) The validity and legality of a control order or a public safety order cannot be challenged or questioned in proceedings for an offence against this Act.'

[42] Per Bleby J, Kelly J concurring, White J dissenting. It should also be noted that the judgment involved questions of extensive statutory construction, and that a number of construction issues remained outstanding at the conclusion of the appeal. The differences between the majority and minority view related principally to these questions of construction.

[43] *Totani* [2009] SASC 301, [162].

[44] Ibid [139].

[45] Ibid [155].

[46] Ibid [156].

without any judicial safeguards, binding on the court and unreviewable. Bleby J noted that in a very real sense, the court was required to '[act] as an instrument of the Executive'.[47]

Implications and observations

With this in mind, I return to my principal enquiry. Special leave was granted to appeal *Totani* on 12 February this year; from what was apparent, the High Court was not interested in why special leave should be granted but instead requested counsel persuade the court why special leave should *not* be granted.[48] Whilst argument throughout the course of an appeal hearing cannot be taken as a declaration of the court's final position, it is nonetheless instructive for the purposes of discussion. In the appeal hearing, the court was concerned by the appearance of 'subjugation and subordination of one branch of government to another.'[49] French CJ queried whether the 'judicial process is being co-opted into what is essentially an executive process because of the importance of those elements with which the Executive is concerned.'[50] The Chief Justice observed that the risk posed to the public by bikie gangs could not justify the 'imposition of this draconian regime' on group members.[51]

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[47] Ibid (quoting *Forge v ASIC* (2006) 228 CLR 45, 63). The majority also found that the process is devoid of the fundamental protections which the law should guarantee in the making of such an order, namely the right to have significant and possibly disputed factual issues determined by an independent and impartial judicial officer, and the right to be informed of and to answer, the case put against the person.
[48] *State of South Australia v Totani* [2010] HCATrans 22 (12 February 2010).
[49] *State of South Australia v Totani* [2010] HCATrans 95 (20 April 2010), Gummow J.
[50] *State of South Australia v Totani* [2010] HCATrans 95 (20 April 2010)
[51] Ibid.

Totani is not unlike *International Finance Trust Company* in many respects. Both manifest the inability for the courts to 'look behind' the factual determination of the executive by requiring it to make orders solely on that basis without more.

Supreme Courts may permit the conduct of matters in a way that departs from accepted standards of judicial fairness.[52] The key aspect is apparent from what the High Court said in *K-Generation* and *Gypsie Jokers*; that 'legislation which purports to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals'.[53] The power of the courts to make a control order has been held valid by the High Court,[54] the critical feature being that the discretion as to whether or not a control order could be made was based on factors the courts would assess. The South Australian regime grants no such discretion. This is borne out in the course of submissions to the High Court in the *Totani* appeal.

So, on the basis of *Kirk* and potentially *Totani*, it might be said that it is now engrained that the *Constitution* prevents state legislatures from conferring upon a state court functions which are incompatible with the defining characteristics

[52] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy Jokers*'); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K-Generation*').
[53] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [39].
[54] *Fardon* (2004) 223 CLR 575.

of a Chapter III court. Chapter III also prevents a state legislature from removing any of the defining characteristics of a state Supreme Court.

What this means for lawyers advising their clients on administrative remedies, and for courts who determine these disputes, involves some speculation, but I will propose a few thoughts. The most obvious implication to arise form these developments is the reduced effectiveness of state privative clauses. The *Hickman* principle will no doubt be of less importance. However, there is no reason why it will cease to apply as a rule of statutory construction. If it does, it is only the 'first step'.[55] A decision which satisfies the *Hickman* provisos may still be tainted by jurisdictional error and visa-versa. On the other hand, it may be that the types of things contemplated by the Hickman provisos will be subsumed by jurisdictional questions. It is clear that jurisdictional error is considerably broader.

The effect on the separation of state judicial power is a little more obscure. It has been said by Callinan and Heydon JJ that '[f]ederal judicial power is not identical with state judicial power'.[56] To the extent that *Kirk* has the effect that state supreme courts enjoy power to grant relief in the nature of certiorari consistent with those of federal courts, this distinction may now be refined. But their Honours went on to say that 'it is possible that a State legislative conferral

[55] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 488 (Gleeson CJ).
[56] *Fardon* (2004) 223 CLR 575, 655 (Callinan and Heydon JJ).

of power which, if it were federal legislation, would infringe Chapter III of the *Constitution*, may nonetheless be valid.'[57] *Kirk* does not affect this position. The High Court's judgment in *Totani*, when delivered, is likely to clarify the states' position in this regard. If *International Finance Trust Company* and the flavour of the submissions at the hearing in *Totani* are an indicator, it is likely that state legislatures will retain some ability to require state courts to exercise non-judicial power with the caveat that this power must not be fundamentally repugnant to judicial process. State judicial power remains without a s 75(v) equivalent. It seems unlikely that these developments go so far as engraining the separation of powers at state level as it exists in the Commonwealth.[58] That said, there are direct implications for the Victorian Constitution. The constitutionality of s 85(5) of the *Constitution Act* may be revisited. There is also the possibility that legislation profoundly affecting fundamental judicial function (such as natural justice and the right to a fair trial) may expose governments to new causes of action by those aggrieved by an executive decision.

What else can judges and practitioners engaged in judicial review expect? First, state Supreme Courts now have their own entrenched minimum provision of judicial review, with the result that the protection of 'purported decisions' will not preclude review if there is a jurisdictional error. With the reduced

[57] Ibid.
[58] Query whether the constitutional preservation of judicial review of Commonwealth decisions, provided for by s75(v) of the *Constitution*, now finds its counterpart in relation to state decisions in s 73(ii) of the *Constitution*.

effectiveness of state privative clauses, instances in the past where relief against an administrative decision may have been barred by virtue of a comprehensive privative clause are now vulnerable to review. It appears inevitable that new forms of administrative litigation will come to the fore. There being no prescribed formula for determining jurisdictional error, litigants will be free to explore the possibilities that jurisdictional error may provide. Indeed some commentators have questioned whether there is even a need for administrative law statutes in the states.[59] It is possible that state lawyers will need some time to adjust. The list of jurisdictional errors set down by the High Court in *Craig* were described in *Kirk* as 'examples'[60] and, thus, not exhaustive. State courts appear to have applied them in the belief that they are exhaustive.[61] Breach of the rules of natural justice, once denied as a jurisdictional error, may lead, in the right circumstances, to being recognised as jurisdictional error.[62]

Furthermore, lawyers in Victoria and the Australian Capital Territory now have human rights instruments at their disposal.[63] It remains to be seen the extent to which judicial review of executive decision making will be influenced by these instruments, but it adds an extra piece to the puzzle in those jurisdictions.[64]

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[59] See Matthew Groves, 'Reforming Judicial Review in Victoria' Research Project in conjunction with the Legal Services Board of Victoria (forthcoming).
[60] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573-574
[61] See *Kirk v Industrial Relations Commission* (NSW) [2008] NSWCA 156, [22] (Spigelman CJ); *Police (SA) v Lymberopoulos* (2007) 98 SASR 433, Doyle CJ.
[62] See: *Police (SA) v Lymberopoulos* (2007) 98 SASR 433.
[63] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (Act).
[64] A recent example of this influence can be observed in *Castles v Secretary of the Department of Justice* [2010] VSC 310.

It is also rather timely that shortly after *Kirk*, Gummow and Kiefel JJ reaffirmed the importance of jurisdictional error and jurisdictional fact to judicial review of administrative decision making. It is foreseeable that these notions will be crucial to future administrative action in the states to help guide practitioners in advising clients. In the *SZMDS* case,[65] the court[66] was considering provisions of the Commonwealth migration legislation that required the 'satisfaction' of the relevant Minister. The *Administrative Decisions (Judicial Review) Act 1977 (Cth)* did not apply to the class of decisions with which this case was concerned, leaving only s 75(v) of the *Constitution* as an avenue of review.

SZMDS stands for the proposition that a purported exercise of public power in the absence of the necessary jurisdictional fact will be treated as a failure to exercise jurisdiction. A decision which has no basis in the evidentiary material; is contrary to the overwhelming weight of that material; is based on a contradiction in the process by which conclusions are reached, or is made upon the drawing of inferences not properly open, will be tainted by jurisdictional error.[67]

The centrality of jurisdictional error leads to the question whether parliament may now legislate to determine what jurisdictional errors should be. I cannot

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[65] *Minister for Immigration and Citizenship v SZMDS* (2010) 266 ALR 367.
[66] The other members of the court disagreed with their Honours' findings on the effect of the tribunal's decision at first instance, approaching the issue on the bases of whether there was 'irrationality' and 'illogic' in the decision.
[67] *Minister for Immigration and Citizenship v SZMDS* (2010) 266 ALR 367, 23 (Gummow ACJ, Kiefel J).

do justice to this issue in the time available, however, I note in passing that many of the issues concerning parliaments prescribing the nature of jurisdictional error (e.g. open ended discretions, 'no-invalidity clauses') were discussed in *Plaintiff S157*, and the power to do so may come to be questioned.[68]

Conclusion

Administrative justice is now constitutionally entrenched in the states, and in many ways this will redefine the separation of powers at state level. The High Court will possibly make pronouncements in *Totani* that are likely to crystallize the application of the *Kable* doctrine. These developments will no doubt present certain challenges to judges and practitioners who are well accustomed to the administrative practices hitherto engrained by the informal separation of powers arrangements at state level. The precise effects of the developments, now and in the future, will no doubt show themselves in due course, but what a truly exciting time in administrative law it is. The guard dog is barking again.

[68] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 64, 102 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).