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Judicial review after Kirk v Industrial Court (NSW) – *Joshua P Knackstredt*

The High Court's recent decision in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 is likely to become regarded as a seminal case in the development of Australian administrative law for two reasons. First, the decision extends federal jurisprudence on the interpretation of privative clauses to the State context. Secondly, the decision confirms the broad and almost unconfined concept of jurisdictional error. The consequences of the decision are potentially far-reaching and cannot be easily predicted. However, three possibilities are posited. First, the decision might ultimately result in the invalidity of State legislation which prescribes limitation periods for judicial review applications. Secondly, the decision may herald the development of case law establishing that legislation restricting the grounds of judicial review is invalid for the same reasons that privative clauses are either read down or struck down. Finally, it may also result in an increase in the number of cases alleging novel instances of jurisdictional error. 203

The agency that knew too much? Use of privileged, confidential and inadmissible information by regulators and law enforcement agencies with civil, administrative and criminal powers – *Michael Duffy*

Australia has a number of agencies that seek to regulate and enforce the law. Many of these agencies have powers of civil, administrative and criminal enforcement. When agencies bring matters to court there is inevitably a balancing act between the objective of having all relevant evidence available and protecting other rights such as fairness to the accused, equitable confidences, legal professional and penalty privilege and the privilege

against self incrimination. The law also seeks to discourage sharp or at least unlawful practice in the obtaining of evidence. Where confidences or other privileges are enforceable, issues arise in relation to the ability of agencies or lawyers to utilise confidential or privileged information directly or indirectly. There may be a slightly stricter approach to lawyers (certainly when in private practice but also arguably when working in-house for agencies as well) than for other investigative staff but there are also questions about whether the latter too might be enjoined from utilising confidential information. Chinese walls provide a possible structural solution to some of these problems though courts remain somewhat sceptical about their use in law firms and they appear to be still uncommon in agencies. 215

Applying provisions of the Australian Constitution to protect rights from intrusion by State Parliaments – Anthony Gray

One of the limitations of the few written rights guarantees in the Australian Constitution is that they typically refer to Commonwealth laws only. Specific examples include the right to trial by jury, right to due compensation if property is confiscated by the government, and freedom of religion. In this article, I argue that it would be desirable to extend these guarantees to protection against State laws taking away these rights. There is no reason in logic to confine them to federal laws only. Extension of rights in this way finds support in the American case law on the extension of that country’s Bill of Rights provisions to the States, as well as some Australian jurisprudence concerning s 122 of the Constitution. 229

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