Chapter 2

The Concept of Jurisdictional Error

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The notion of "jurisdictional error" has assumed ever greater importance in Australian administrative law in recent years, and has become something of a unifying concept. Its importance has increased significantly as a result of the High Court's decision in 2010 in *Kirk v Industrial Court (NSW)*,[1] in which the Court held that State Parliaments may not validly deprive State Supreme Courts of supervisory jurisdiction to enforce the limits on the exercise of State executive or judicial power. Yet the concept of jurisdictional error is an evasive and difficult one. It is also not perhaps quite so important in practice as may commonly be assumed.

In this essay I seek to throw a little light on to the concept, examining the following issues:

1. the heart of the notion of "jurisdictional error" in administrative law;
2. the grounds of jurisdictional error, and how the notion relates to *Project Blue Sky*;[2]
3. the High Court's decision in *Kirk*;
4. whether privative clauses restricting judicial review have any effect;
5. the distinction between jurisdictional error and "error of law";
6. review of the decisions of superior courts of record; and
7. the practical significance, utility and future of the concept of jurisdictional error.

The notion of jurisdictional error in administrative law

In current Australian administrative law, jurisdictional error is what must be established to obtain relief in the nature of prohibition, mandamus and (with one significant qualification) certiorari.[3] Certiorari is also available for non-jurisdictional error of law which appears on the face of the record. I use the term "administrative

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1 (2010) 239 CLR 531.

2 (1998) 194 CLR 355.

3 See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [82]; *Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at [46].

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