

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

S ECI 2014 000686

AMASYA ENTERPRISES PTY LTD & ANOR
(in accordance with the schedule)

Plaintiffs

v

ASTA DEVELOPMENTS (AUST) PTY LTD & ANOR
(in accordance with the schedule)

Defendants

JUDGE: VICKERY J

WHERE HELD: Melbourne

DATE OF HEARING: 27 April 2015

DATE OF JUDGMENT: 2 June 2015

CASE MAY BE CITED AS: Amasya Enterprises Pty Ltd & Anor v Asta Developments
(Aust) Pty Ltd & Anor

MEDIUM NEUTRAL CITATION: [2015] VSC 233

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Whether s 28R(5)(a)(iii) of the Act validly passed - Section 85 *Constitution Act 1975* (Vic) - Whether proceeding commenced to which s 28R(5)(a)(iii) applies to set judgment entered under s 28R set aside - Whether s 28R(5)(a)(iii) is a privative provision which limits the jurisdiction of the Supreme Court of Victoria to exercise judicial review of the relevant adjudicator's determination - Section 28R(5)(a)(iii) limited in its operation by the requirements of Chapter III of the *Commonwealth of Australia Constitution Act - Kirk v Industrial Court (NSW)* [2010] 239 CLR 531 applied - Section 28R(5)(a)(iii) cannot be applied to take from the Supreme Court of Victoria power to grant relief in the nature of certiorari on the basis of jurisdictional error - Operation of the privative clause in s 28R(5)(a)(iii) confined to denying relief being granted by a court in Victoria, including the Supreme Court, where the error relied upon is an error on the face of the record - Jurisdictional error and error on the face of the record considered.

ADMINISTRATIVE LAW - *Building and Construction Industry Security of Payment Act 2002* (Vic) - Whether s 28R(5)(a)(iii) of the Act validly passed - Section 85 *Constitution Act 1975* - Whether proceeding commenced to which s 28R(5)(a)(iii) applies to set judgment entered under s 28R set aside - Whether s 28R(5)(a)(iii) is a privative provision which limits the jurisdiction of the Supreme Court of Victoria to exercise judicial review of the relevant adjudicator's determination - Section 28R(5)(a)(iii) limited in its operation by the requirements of Chapter III of the *Commonwealth of Australia Constitution Act* - *Kirk v Industrial Court (NSW)* [2010] 239 CLR 531 applied - Section 28R(5)(a)(iii) cannot be applied to take from the Supreme Court of Victoria power to grant relief in the nature of certiorari on the basis of jurisdictional error - Operation of the privative clause in s 28R(5)(a)(iii) confined to denying relief being granted by a court in Victoria, including the Supreme Court, where the error relied upon is an error on the face of the record - Jurisdictional error and error on the face of the record considered.

APPEARANCES:

For the Plaintiffs

For the First Defendant

Counsel

Mr MG Roberts QC with
Mr R Andrew of Counsel

Mr J Twigg QC with
Mr N Andreou of Counsel

Solicitors

Starnet Legal

LMS Lawyers

HIS HONOUR:

1 On or about 12 December 2014, Asta Developments (Aust) Pty Ltd (the 'First Defendant') entered judgment against Amasya Enterprises Pty Ltd (the 'Plaintiffs') in the sum of \$2,030,222.86 pursuant to s 28R of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the 'Act' or the 'Victorian Act'¹). The judgment was entered in proceeding SCI 2014 06395 according to the procedure outlined in the Act, on the basis of an adjudication determination made 18 November 2014² by the Second Defendant³ (the 'Adjudication Determination') and a subsequent adjudication certificate issued under s 28Q of the Act, following non-payment of the adjudicated amount.

2 On 16 December 2014, the Plaintiffs commenced the present proceeding S CI 2014 000686 seeking judicial review of the Adjudication Determination on the grounds of jurisdictional error on grounds including, *inter alia*, that:

- (a) there was no valid payment claim which vested jurisdiction on the adjudicator to make a determination;
- (b) the adjudicator denied the Plaintiffs natural justice by requesting, and receiving, detailed new submissions from the First Defendant, without giving the Plaintiffs sufficient opportunity to respond to the new submissions.

3 At a first directions hearing in this proceeding on 30 March 2015, it became clear that issues arising from the proper construction of s 28R of the Act required consideration.

4 The First Defendant submitted to the Court, that, by operation of s 28R(5) of the Act the Plaintiffs' proceeding could not be maintained because:

¹ Cf the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the 'NSW Act').

² The validity of which is challenged by the Plaintiffs.

³ The Second Defendant was John McMullan, the adjudicator appointed under the Act. He took no part in the proceeding.

- (a) there was no utility in the Court considering any application for judicial review of the Adjudication Determination;
- (b) there could not be any challenge to the judgment entered in proceeding S CI 2014 06395 by reason of s 28R(5)(a)(iii); and
- (c) the proceeding was therefore an abuse of process and ought be dismissed instanter.

5 Section 28R of the Act provides:

28R Proceedings to recover amount payable under section 28M or 28N

- (1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.
- (2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court –
 - (a) the adjudication certificate; and
 - (b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.
- (4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.
- (5) If a person commences proceedings to have the judgment set aside, that person –
 - (a) subject to subsection (6), is not, in those proceedings, entitled –
 - (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

- (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge an adjudication determination or a review determination; and
- (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.
- (6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.
- (7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.
- (8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

6 In the course of the directions hearing there was discussion about the following issues:

- (a) Even if the Court had theoretical power to review an adjudication determination for jurisdictional error in circumstances where a judgment had been entered upon it, what would be the utility of doing so, if the Court was precluded from entertaining the challenge to the adjudication determination in a proceeding brought to set aside the judgment?
- (b) If there was no capacity to challenge the adjudication determination for the purposes of setting aside any judgment founded upon it, the review of the adjudication determination would have no practical effect, even if it resulted in a declaration of invalidity.

7 In support of their claim, the Plaintiffs submitted that s 28R(5) must be interpreted in the light of the principles emanating from *Kirk v Industrial Court (NSW)*⁴ and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*,⁵ and that the Court retained residual jurisdiction to review an adjudication determination purportedly made under the Act, and grant appropriate relief.

8 In reply, it was submitted by the First Defendant that the Court, as a matter of entrenched law, does have the power to review a decision of an adjudicator for jurisdictional error. However, a proceeding to have a judgment of the Court entered pursuant to s 28R of the Act is in a different class. In such a proceeding, by operation of the clear text of s 28R(5)(a)(iii) of the Act, the person seeking to have the judgment set aside is not entitled to challenge an adjudication determination.

9 In these circumstances, a real question arises as to whether judicial review can be properly sustained as a claim which has a proper basis and whether it should be permitted to proceed.

10 In order to address these issues of significance, I ordered pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2005* the following question be fixed for separate trial:

Whether the Plaintiffs' challenge to the adjudication determination dated 18 November 2014 can be sustained in the light of s 28R(5) of the *Building and Construction Industry Security of Payment Act 2002*?

11 In this trial of the question the Plaintiffs submit that the answer to the question should be yes, essentially for the following reasons:

- (a) Section 28R(5) does not prohibit an application for judicial review of an adjudication determination; and

⁴ (2010) 239 CLR 531 ('*Kirk*').

⁵ [2010] NSWCA 190 ('*Chase Oyster Bar*').

- (b) in the alternative, even if s 28R(5) is to be construed as an attempt to prohibit an application for judicial review of an adjudication determination, or had the effect of so prohibiting, then to the extent that it does so it is void.

12 The First Defendant submits that on the proper construction of s 28R(5), the Plaintiffs' challenge to the Adjudication Determination cannot be sustained.

This Proceeding (S CI 2014 000686)

13 This proceeding was commenced by an Originating Process – RedCrest in the form of an originating motion dated 16 December 2014.

14 The relief sought in the originating process is:

RELIEF REMEDY CLAIMED

1. Pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules*, and or the inherent jurisdiction of the Court, judgment or orders that the adjudication determination purportedly made by the Second Defendant dated 18 November 2014 (the adjudication determination) under the *Building and Construction Industry Security of Payment Act 2002* (the Act) be quashed or set aside, on the grounds that:
 - (a) the First Defendant did not serve a valid payment claim under the Act;
 - (b) any such payment claim was served by the First Defendant in bad faith and is void and of no legal effect;
 - (c) the adjudication application was invalid and of no effect;
 - (d) the Second Defendant failed to accord the Plaintiffs a reasonable opportunity to respond to submissions made by the First Defendant;
 - (e) the Second Defendant failed to assess the value of the construction work the subject of the adjudication in accordance with the relevant construction contract, including *inter alia* by reference to the approval of a quantity surveyor as required by special condition SC7 of the contract;

(f) the Second Respondent took into account an irrelevant consideration, being a report by a quantity surveyor as to the market value of the work, no the value of the work under the relevant construction contract;

(g) further, by reason of the foregoing, the Second Defendant did not have jurisdiction to make the adjudication determination and/or committed an error of law on the face of the record and/or jurisdictional error.

2. Further or in the alternative, pursuant to the inherent jurisdiction of the Court, a declaration that the adjudication determination is of no effect.
3. An order setting aside any judgment entered against the Plaintiffs in reliance on the adjudication determination or any adjudication certificate issued as a consequence of the adjudication determination.
4. A final injunction restraining the First Defendant from seeking to enforce the adjudication determination against the Plaintiffs.
5. Such further or other orders as this Honourable Court deems appropriate.
6. Costs.

15 The relief specified in paragraph 3 of the originating process is of importance. It seeks an order setting aside the judgment entered in proceeding S CI 2014 06395. The only grounds specified in the claim for relief upon which such an order may be made is on the basis of the Adjudication Determination and the statutory certificate issued upon it were invalid and should be set aside or quashed on the grounds set out in paragraph 1. It is also apparent that the order for a 'final injunction' claimed in paragraph 4 is made on the same grounds.

16 Accordingly, in this case, the Plaintiffs have commenced proceedings to have a judgment entered under s 28R of the Act set aside, and s 28R(5)(a)(iii) of the Act applies.

Relief Short of Setting Aside the Judgment

17 It was submitted on behalf of the Plaintiffs that, provided the grounds claimed in paragraph 1 of the relief sought in the Originating Process could be made out (or one or some of the grounds) then, regardless of the existence and operation of s 28R(5)(a)(iii), they would be in a position to prosecute their claimed entitlement to an order in the nature of certiorari or declaratory relief, and they could achieve this without, at least in the first instance, seeking to set aside the judgment entered pursuant to s 28R.

18 By this means, the Plaintiffs sought to avoid the operation of s 28R(5)(a)(iii).

19 However, I am satisfied that there would be no utility in simply seeking an order in the nature of certiorari or for a declaration that the Adjudication Determination be quashed or set aside without more, in circumstances where a judgment entered upon it under the Act remained on the record and untouched.

20 As to an order in the nature of certiorari being granted in such circumstances, such relief would simply be unavailable. The High Court ruled on the subject in *Wingfoot Australia Partners Pty Ltd v Eyup Kocak*⁶ where it was said by French CJ and Crennan, Bell, Gageler and Keane JJ:⁷

The jurisdiction of the Supreme Court to make an order in the nature of certiorari is an aspect of its jurisdiction as “the superior Court of Victoria”. The exercise of that jurisdiction is regulated by rules of the Supreme Court which require that it be exercised only by way of judgment or order.

The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. Thus, an order in the nature of certiorari is available only in respect of an exercise or purported exercise of power which has, at the date of order, an “apparent legal effect”. An order in the nature of certiorari is not available in respect of an exercise or purported exercise of power the legal effect or purported legal effect of which is moot or spent.

⁶ 303 ALR 64 [24]-[25] (*Wingfoot*).

⁷ [2013] HCA 43; (2013) 303 ALR 64 [24]-[25].

An order in the nature of certiorari in those circumstances would be not simply inutile; it would be unavailable.

[Citations omitted]

21 Similar considerations apply in relation to declaratory relief.

22 In *Ainsworth v Criminal Justice Commission*,⁸ Chief Justice Mason and Justices Dawson, Toohey and Gaudron said:⁹

It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "it is neither possible nor desirable to fetter... by laying down rules as to the manner of its exercise". However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have "a real interest" and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" or if "the court's declaration will produce no foreseeable consequences for the parties". [Citations omitted]

23 In *Ansett Australia Ground Staff Superannuation Fund Pty Ltd v Ansett Australia Ltd & Ors*¹⁰ ('Ansett') Ormiston JA, with whom Callaway and Batt JJA agreed, observed:¹¹

I would not wish to lay down any rule which would trammel the usefulness of declaratory relief, which has been demonstrated over at least the last 100 years.

Nevertheless, there are limits to what courts of highest authority have seen to be the discretionary power to grant discretionary relief, which are perhaps best summarised in the judgment of six members of the High Court in *Bass v. Permanent Trustee Co. Ltd*. As was there said it is central to the purpose of judicial determination that there is a "notion that such a determination includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy". It followed, that "courts have traditionally refused to provide answers to hypothetical questions ... or to give advisory opinions".

[Citations omitted]

⁸ (1992) 175 CLR 564 ('*Ainsworth*').

⁹ *Ainsworth* (1992) 175 CLR 564, 581-2.

¹⁰ [2003] VSCA 117 ('*Ansett*').

¹¹ *Ansett* [2003] VSCA 117 [14]-[15].

24 In the present circumstances, it would be incompatible with these principles for the Court to proceed to decide whether the Adjudication Determination should be set aside, where to do so with the s 28R judgment remaining in place would produce no more than a theoretical outcome of no utility.

25 Applying *Wingfoot*, certiorari would not run to the Adjudication Determination because the legal effect or the apparent legal effect of that determination was spent upon the entry of the judgment.

26 Applying *Ansett* and *Ainsworth* results in a similar outcome in respect of declaratory relief. The parties are to be taken to have no real interest in such a result as it would produce no foreseeable consequences for them. In other words, the answer produced would provide no more than an answer to an abstract or hypothetical question.

27 This finding underscores the fact that the fact that in this proceeding, the Plaintiffs have indeed sought a practical outcome directed to the determination of a legal controversy, namely the force and effect of the s 28R judgment which has been entered. It has commenced this proceeding to have the judgment entered under s 28R of the Act set aside.

28 For this reason too, s 28R(5)(a)(iii) of the Act applies.

Section 28R and the Constitution of Victoria

29 Section 85 of the *Constitution Act 1975* (the 'Victorian Constitution') provides for the powers and jurisdiction of the Supreme Court. Pursuant to sub-section (1):

Subject to this Act the Court [the Supreme Court of Victoria] shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

30 Sub-section 85(5) then provides a facility permitting the passing of legislation which limits the otherwise unlimited jurisdiction of the Court, provided defined steps are taken, as provided for in s 85(5). Section 85(5) is in the following terms:

- (5) A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless—
 - (a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and
 - (b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and
 - (c) the statement is so made—
 - (i) during the member's second reading speech; or
 - (ii) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
 - (iii) with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

31 Section 51(2) of the Act expressly refers to s 85 of the Victorian Constitution and expressly states an intention to alter or vary the section. Section 51(2) is a provision which complies with s 85(5)(a) of the Victorian Constitution. It is in the following terms: 'It is the intention of section 28R to alter or vary section 85 of the Constitution Act 1975'.

32 Further, no challenge was made in relation to the passage of the Bill (which became the Act) through Parliament in accordance with the procedure prescribed by s 85(5)(b) and (c) of the Victorian Constitution.

33 Accordingly, applying the presumption of regularity,¹² s 28R validly alters or varies s 85(1) of the Victorian Constitution and has effect as an amendment of that section by limiting the power of the Supreme Court as provided.

Judicial Review of Adjudication Determinations

34 The Plaintiff urged an interpretation of s 28R(5) which does not prohibit an application for judicial review of an adjudication determination.

35 As a general proposition, an adjudication determination, as observed by Spigelman CJ in *Chase Oyster Bar*,¹³ (there discussed in the context of the NSW Act) is a public, relevantly a statutory, dispute resolution process (cf. a consensual arbitration), 'and as a consequence is subject to supervisory jurisdiction'.¹⁴

36 In *Chase Oyster Bar*¹⁵ Basten JA adopted what was said by this Court in *Grocon Constructors Pty Ltd v Planit Conciardi Joint Venture (No 2)*¹⁶ to the effect that an adjudicator acting under the Victorian Act was subject to judicial review and to relief by way of certiorari and declaration.¹⁷

An adjudication determination cannot finally resolve all of the rights of the parties under the applicable construction contract; they are left to be determined by later proceedings in the event of a continuing dispute. Nevertheless, an adjudication determination does have the effect of finally determining the right of a claimant to immediate payment of its progress claim. This has a discernable

¹² As to the presumption of regularity, see: *Minister for Natural Resources v Aboriginal Land Council* (1987) 9 NSWLR 154, 164 where McHugh JA explained the presumption of regularity in the following way: 'Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled. Thus a person who acts in a public office is presumed to have been validly appointed to that office.' See also: *Harris v Knight* (1890) 15 PD 170 (Lindley LJ, 179–80); and *United Transport Services Pty Ltd v Evans* [1992] 1 VR 240, 247–8.

¹³ [2010] NSWCA 190 [5].

¹⁴ *R v Criminal Injuries Compensation Board: Ex parte Lain* [1967] 2 QB 864, 882; cf. the position of a privately appointed arbitrator considered by Vickery J in *Grocon*, in turn referred to by the NSWCA in *Chase Oyster Bar* at [73].

¹⁵ [2010] NSWCA 190 [71].

¹⁶ (2009) 26 VR 172 ('*Grocon*').

¹⁷ *Grocon* (2009) 26 VR 172 [50].

or apparent legal effect upon rights, sufficient to found certiorari: *Hot Holdings Pty Ltd v Creasy* [1996] HCA 44; 185 CLR 149 at 159 per Brennan CJ, and Gaudron and Gummow JJ.

37 Accordingly, on the basis of current authority in Australia, an adjudicator appointed under the Victorian Act, in exercising the statutory functions of *inter alia* determining the amount of a progress payment and the date on which such amount becomes payable, falls comfortably within that class of decision-maker who is amenable to the supervisory jurisdiction of this Court by judicial review which may, in an appropriate case where error is shown, expose the adjudication determination to relief in the nature of certiorari and declaration to quash the adjudicator's determination for either jurisdictional error of law or error on the face of the record.¹⁸

Section 28R(5)(a)(iii) of the Act – Whether a Privative Clause

Statutory Context

38 In determining whether s 28R(5)(a)(iii) of the Victorian Act operates as a privative clause which purports to restrict the exercise of judicial review by the Supreme Court of Victoria, the statutory context of the section needs to be examined.

39 In the first place, as has been earlier observed, s 28R(5)(a)(iii), falling as it does within s 28R, is the subject of a statutory statement provided for in s 51(2) of the Act that it is 'the intention of section 28R to alter or vary section 85 of the *Constitution Act 1975*'. While other provisions of s 28R may well require observance of the procedures in s 85 of the Victorian Constitution to be valid,¹⁹ the limitations provided by s 28R(5) and in particular s 28R(5)(a)(iii) are obvious candidates. These particular provisions of s 28R can be construed to have the effect of limiting the jurisdiction of the Supreme Court of Victoria, hence invoking s 85 of the

¹⁸ See, also, *Hickory v Schiavello* (2009) 26 VR 112, 134 [88]; *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 (15 October 2013).

¹⁹ See, eg, s 28R(2) and s 28R(7).

Victorian Constitution to ensure validity. So much is made clear in the Second Reading Speech of the Bill which introduced s 28R into the Act, where the Minister for Planning said:²⁰

I make the following statement under section 85 of the *Constitution Act 1975* of the reasons for altering or varying that section in this bill.

Clause 40 of the bill amends section 51 of the principal act to provide that it is the intention of section 28R (to be inserted by clause 28 of the bill) to alter or vary section 85 of the *Constitution Act 1975*.

Clause 28R sets out a procedure for the bringing of proceedings in a court of competent jurisdiction for judgment to enable recovery of an unpaid adjudicated amount. It also provides that a person who brings proceedings to have that judgment set aside cannot challenge the adjudication determination or review determination made by the adjudicator or review adjudicator except on specified grounds. The reason for this restriction is to provide a timely, streamlined process for enforcing the adjudicated debt. This provision will not prevent a person from bringing separate proceedings under the construction contract to recover any amount allegedly overpaid or underpaid under the progress payment process. Section 47 of the principal act preserves this right.

40 These considerations referred to in the Second Reading Speech find support in the Explanatory Memorandum which accompanied the passage of the amending Bill through the Legislature, where it said:

New section 28R sets out procedures for the bringing of proceedings for the recovery of an unpaid adjudicated amount for which an adjudication certificate has been issued. This clause also places restrictions on a person seeking to set aside a judgement under those proceedings. The person cannot bring across-claim, raise a defence under the construction contract or challenge the adjudication determination or review determination. This is to ensure that the proceedings under section 28R can be dealt with in a timely and streamlined way.

This provision does not prevent a person bringing separate proceedings under the construction contract to recover any amount allegedly overpaid or underpaid under the progress

²⁰ Second Reading Speech, Mr Hulls (Minister for Planning) - 9 February 2006 - pp 220-1.

payment process. Section 46 of the Act expressly preserves this right.²¹

...

Clause 40 amends section 51 of the Principal Act to insert a new provision stating that it is the intention of section 28R to alter or vary section 85 of the *Constitution Act 1975*. This provision is inserted because of the inclusion in section 28R of the restriction on a person bringing proceedings to set aside a judgment to enforce an adjudicated amount preventing that person from challenging the adjudication determination or review determination. The notes on proposed new section 28R set out the purpose of this restriction.²²

41 Accordingly, the statutory statement provided for in s 51(2) of the Act, when read in the light of these extrinsic materials, provides an unequivocal acknowledgment that the intention of s 28R(5)(a)(iii) was to import a valid restriction on the power of the Supreme Court, which would apply to a person bringing proceedings to set aside a judgment to enforce an adjudicated amount, preventing that person from challenging the adjudication determination or review determination.

42 Secondly, the Victorian Act provides for an independent exercise of judicial power in entering a judgment pursuant to s 28R of the Act.

43 Under s 28R(1) of the Act, an adjudication certificate is issued by a respondent to the claimant, who is thereafter owed the certified amount. It is not the adjudication determination itself that is enforced, nor the adjudication certificate that is deemed as a judgment debt.²³ It is the operation of sections 28M or 28N of the Act which creates the obligation to pay. It is that debt (which is created only by the issue of the certificate under s 28Q) that is to be enforced in a court of competent jurisdiction.

²¹ Explanatory Memorandum to *Building and Construction Industry Security of Payment (Amendment) Bill* 14 June 2006, p 12.

²² Explanatory Memorandum to *Building and Construction Industry Security of Payment (Amendment) Bill* 14 June 2006, p 16.

²³ Cf the position under the NSW Act.

The process of obtaining the court's judgment may then be undertaken *ex parte*.²⁴

44 Under the Act, an applicant applies to the Court for a judgment recognising the debt owed, and, once judgment is entered, the procedures for enforcement of judgment debts may be enlivened.

45 The entry of judgment under the Victorian Act is an exercise of judicial power, it is not merely an administrative act. The Court must bring an independent mind to the application for a judgment debt. Provided that the Act applies, there are two matters required by s 28R which the Court must be satisfied of before entering judgment:

- (a) Is there an adjudication certificate filed with the application? and
- (b) Is there an affidavit to prove that all or some of the amount provided for in the certificate has not been paid?

46 However, in this process the Court is *not* required to consider the substance of the adjudication determination itself, nor the reasons for determination mandated to be written under s 23(3) of the Act, and provided to the 'parties' under s 23A of the Act.

47 It may be noted in this context, that the adjudication determination may not resolve the underlying dispute between the parties under the construction contract, as it is an interim award.²⁵ In commenting upon the NSW Act in *Birdon Pty Ltd v Houben Marine Pty Ltd*,²⁶ Keane CJ said:

It may be noted here that the Act is not concerned to give effect to the rights of the parties under the construction agreement. As is apparent from the terms of s 32(2), it expressly leaves the determination of those rights to the courts. The process for which the Act provides does not involve a determination, even of a

²⁴ *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd* [2009] VSC 425 [38].

²⁵ *Branlin v Totaro* [2014] VSC 492 [113]; *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCAFC 126 (Keane CJ [33]).

²⁶ [2011] FCAFC 126.

provisional kind, of the actual rights of the parties under their construction contract.²⁷

48 Accordingly, the Victorian Act provides by s 47 that the underlying dispute may be resolved by application of the general law to the construction contract in any subsequent proceeding before a court of competent jurisdiction, if instituted.

Different Statutory Context in NSW

49 The procedure under the Victorian Act is not identical to the process provided for in s 25 of its sister legislation, the NSW Act.

50 Section 25 of the NSW Act provides:

25 Filing of adjudication certificate as judgment debt

- (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
- (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
- (4) If the respondent commences proceedings to have the judgment set aside, the respondent:
 - (a) is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant, or
 - (ii) to raise any defence in relation to matters arising under the construction contract, or
 - (iii) to challenge the adjudicator's determination, and
 - (b) is required to pay into the court as security the unpaid portion of the adjudicated

²⁷ *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCAFC 126 [33].
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amount pending the final determination of those proceedings.

51 It may be noted that s 28R of the Victorian Act is different in form and substance from the NSW Act. Most relevantly, the NSW Act by s 25(1) provides that the adjudication certificate itself is 'filed as a judgment for a debt'. This process which, under the NSW Act makes the adjudication certificate enforceable 'as if it were a judgment of a court', it has been held, 'is not the product of the exercise of judicial power'.²⁸

52 Section 25(4)(a)(iii) of the NSW Act, which provides that a party in the position of a respondent to a payment claim may not in proceedings to have a judgment set aside 'challenge the adjudicator's determination', must be viewed in this context.

Chase Oyster Bar Distinguishable on Whether the Provision is a Privative Clause

53 The question whether s 25(4)(a)(iii) of the NSW Act acts as a privative clause which restricts or ousts judicial review was decided in *obiter dicta* by the New South Wales Court of Appeal in the case of *Chase Oyster Bar*.²⁹ It was *obiter dicta* because, on my reading of the decision, it was considered in different circumstances to the present, that is, before judgment for the debt was filed and for this reason s 25(4)(a)(iii) of the NSW Act could have no application.

54 Nevertheless, the Court of Appeal in *Chase Oyster Bar* determined that in New South Wales s 25(4)(a)(iii), if it applied after judgment had been filed pursuant to s 25, would not oust the jurisdiction of the Supreme Court of New South Wales to grant relief in the nature of certiorari to quash the determination of an adjudicator where it was made in relevant non-

²⁸ *Birdon Pty Ltd v Houben Marine Pty Ltd* [2011] FCAFC 126 [53], where Keane CJ observed that: 'It is readily apparent from the terms of ss 22-25 of the [NSW] Act that the adjudication certificate which s 25 makes enforceable as if it were a judgment of a court is not the product of the exercise of judicial power'.

²⁹ (2010) 78 NSWLR 393.

compliance with the statute, and it did so because the section was not construed as a privative clause of this character.³⁰

55 However, in Victoria, by reason that entry of judgment under the Victorian Act is in fact the exercise of judicial power, *Chase Oyster Bar* in my opinion is distinguishable on the issue as to whether or not s 28R(5)(a)(iii) operates as a privative clause. Considered in the context of limiting or curtailing a review of the exercise of judicial power, s 28R(5)(a)(iii) more readily lends itself to characterisation as a privative clause.

56 Further, the application of s 85 of the Victorian Constitution to s 28R(5) of the Victorian Act, in combination with the statutory statement provided for in s 51(2) of the Victorian Act, which have no counterparts in the legislation of New South Wales, provides another distinguishing feature, which in my view, justifies departure from applying the *obiter dicta* in *Chase Oyster Bar* in this case.

57 For these reasons, I respectfully decline to follow the *obiter dicta* in *Chase Oyster Bar* in relation to s 25(4)(a)(iii) of the NSW Act insofar as it was determined by the Court of Appeal that this provision should not be construed as a privative clause.

Construction of s 28R(5)(a)(iii) of the Victorian Act

58 As to construction of the text of s 28R(5)(a)(iii) of the Victorian Act, the provision is expressed in broad terms. In proceedings to have a judgment entered under the Act set aside, the person who commences such proceedings is not entitled 'to challenge an adjudication determination'.

59 It should be noted that the subject of the provision as expressed in its text is a 'challenge' to an adjudication determination or a review

³⁰ See, *Chase Oyster Bar* [2010] NSWCA 190 [59] (Spigelman CJ), [86]-[91] (Basten JA).

determination. The word 'challenge' as used in this provision is of wide compass. It may include a challenge to the correctness of the adjudicator's determination in terms of the factual assessment that is made. However, in my opinion, the concept is not so limited.

60 The purpose of the clause, insofar as it operates in law in Victoria, is to provide a measure of finality and a speedy resolution to the process of adjudication once a judgment has been entered upon a certified adjudication determination which has not been paid. The Explanatory Memorandum to *Building and Construction Industry Security of Payment (Amendment) Bill* which accompanied the Bill introducing s 28R in its passage through Parliament, described the statutory purpose of s 28R(5) as being: '... to ensure that the proceedings under section 28R can be dealt with in a timely and streamlined way'.³¹

61 It would not serve this end to confine the operation of the clause merely to a challenge to the correctness of the adjudicator's assessment. Applying the plain meaning of the text consistently with the apparent purpose of the provision, in my opinion, it is expressed to apply to any challenge that is open in law to be made, including any challenge by way of judicial review made to the Supreme Court which is open.

62 Further, it should be noted that for the purposes of s 28R(5)(a)(iii), an 'adjudication determination' has no special defined meaning.

63 The statutory scheme points to s 28R(5)(a)(iii) operating, insofar as the law otherwise permits, to any adjudication determination that is made, or purports to have been made, which founds a request under s 28O of the Act for the provision of an adjudication certificate, an adjudication certificate issued under s 28Q, and in turn a judgment entered under s 28R.

³¹ Explanatory Memorandum to *Building and Construction Industry Security of Payment (Amendment) Bill* 14 June 2006, p 12.

Whether Judicial Review Open Before Judgment Entered

64 It should be noted that the privative clause in s 28R(5)(a)(iii) of the Act operates only after a judgment has been entered under s 28R and only in respect of a proceeding to have that judgment set aside.

65 However, there are steps which may be taken by a respondent to a payment claim and a subsequent adjudication determination in other proceedings to prevent the entry of a judgment before this occurs. This process commonly gives rise to a challenge to the adjudicator's determination by way of judicial review. There is no privative clause in the Act which stands in the way of this occurring. It is a facility commonly availed of where the circumstances merit such a course.

66 Section 28R(5)(a)(iii) of the Act, and the time period within which it can operate, were discussed in *obiter dicta* in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*³² in the following passage:

... The provision only comes into operation once a judgment has been entered under the Act. The procedure which precedes this step involves passing through a number of gateways: first, the making of the adjudicator's determination which makes a finding that money is payable under the construction contract in respect of the progress claim: s 23; second, on any failure on the part of a respondent to pay, within the time limits specified by s 28M and s 28N, the sum determined by the adjudicator, the claimant may request the nominating authority to provide an adjudication certificate: s 28O(1)(a); third, following the issue of an adjudication certificate, an application may be made to a court of competent jurisdiction for the entry of judgment founded on the certificate and founded on evidence that the whole or part of the sum specified in the certificate remains unpaid: s 28R(1)-(4); judgment may then be entered by the relevant court. It is only at this point that proceedings may be commenced to have the judgment set aside. It is also only at this point that the privative clause s 28R(5)(a) comes into operation. At any time prior to the entry of judgment, s 28R(5)(a) has no application, and cannot, for example, work to prevent a challenge to an adjudication determination. Accordingly, during the albeit limited period before the entry of judgment, the provision has no application to proceedings in the nature of certiorari to quash an adjudicator's determination.

³² (2009) 26 VR 112, 133.

Scope of s 28R(5)(a)(iii) Limited by the Australian Constitution

67 However, as the decision of the High Court in *Kirk*³³ teaches, the extent of the operation of privative provisions, such as s 28R(5)(a)(iii) of the Act in this case, must remain consistent with the constitutional framework for the Australian judicial system overall, taking into account the requirements of Chapter III of the Australian *Constitution*.

68 The analysis explained by the High Court in *Kirk* concludes with this proposition: Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record (error on the face of the record) is not beyond power.³⁴

69 As was reasoned in *Kirk*:³⁵

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. 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. It would permit what Jaffe described as the development of “distorted positions”. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.

This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the 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.

[Citations omitted]

³³ (2010) 239 CLR 531, 539.

³⁴ *Kirk* (2010) 239 CLR 531, 581 [100].

³⁵ *Kirk* (2010) 239 CLR 531, 581 [99]–[100].

70 In this context, the question then becomes, what is the extent of jurisdictional error which in turn will serve to define the scope of the limitation of the power of the Supreme Court imposed by s 28R(5)(a)(iii) of the Act?

Jurisdictional Error and Error on the Face of the Record

71 Jurisdictional error and error on the face of the record are separate and distinct bases on which the Supreme Court of this State can make an order in the nature of certiorari where the circumstances call for the making of such an order.

72 As the High Court³⁶ observed in *Wingfoot*:³⁷

Jurisdictional error constitutes one basis on which the Supreme Court can make an order in the nature of certiorari to remove the purported legal consequences of a purported exercise of power under a state statute. That basis for the Supreme Court making an order in the nature of certiorari is entrenched by the Commonwealth Constitution. Error of law on the face of the record constitutes a separate and distinct basis on which the Supreme Court [of Victoria] can make an order in the nature of certiorari to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power under a state statute. That basis for the Supreme Court making an order in the nature of certiorari is not entrenched by the Commonwealth Constitution; its application can be excluded by statute. Where it is not excluded, however, it applies independently of jurisdictional error. That is to say, where error of law on the face of the record is not excluded by statute as a basis for making an order in the nature of certiorari, and where an error of law on the face of the record is found, an order in the nature of certiorari can be made so as to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power irrespective of whether the error of law also constitutes a breach of a condition of the valid exercise of that power.

[Citations omitted]

73 The difficulty in 'drawing a bright line' between jurisdictional error and error on the face of the record is well recognised.³⁸ However, the

³⁶ French CJ, Crennan, Bell, Gageler and Keane JJ.

³⁷ [2013] HCA 43; (2013) 303 ALR 64 [26].

³⁸ See: *Re Refugee Review Tribunal; Ex parte Aala*, (2000) 204 CLR 82, 141 [163]; quoted with approval in *Kirk* (2010) 239 CLR 531, 571 [66].

authorities do provide some guidance on the issue, at least going some way to dispelling Mark Leeming's, apparent desperation expressed in his article: '*The riddle of jurisdictional error*'³⁹ where in answer to the question 'How large is the class of errors that are "jurisdictional"?' Mark Leeming⁴⁰ writes 'So far as I can see, no one knows'.⁴¹

74 This is not the place to embark on a detailed analysis of the distinction between jurisdictional error and error on the face of the record for the purposes of considering an order in the nature of certiorari. However, because the difference becomes critical to the operation of s 28R(5)(a)(iii) of the Act as a valid privative clause, and because the future case management of this matter will be governed by these concepts, it is desirable to say a little about it.

Jurisdictional Error

75 As recognised in *Kirk*,⁴² Professor Aronson in his paper '*Jurisdictional Error without the Tears*' has collected authorities recognising eight categories of jurisdictional error.⁴³

76 In *Kirk*, the High Court summarised the ambit of jurisdictional error derived from *Craig v South Australia*.⁴⁴ The Court said:⁴⁵

First, the Court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions* or *powers* in a case where it correctly recognises that jurisdiction does exist" (emphasis added).

Secondly, the Court pointed out that jurisdictional error "is at its most obvious where the inferior court purports to act wholly or

³⁹ M Leeming, 'The riddle of jurisdictional error' (2014) 38 *Australian Bar Review* 139.

⁴⁰ Judge of Appeal, Supreme Court of NSW; Challis Lecturer in Equity, University of Sydney.

⁴¹ M Leeming, 'The riddle of jurisdictional error' (2014) 38 *Australian Bar Review* 139, 149.

⁴² *Kirk* (2010) 239 CLR 531, 573 [71].

⁴³ M Groves and H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 335–336.

⁴⁴ (1995) 184 CLR 163 ('*Craig*').

⁴⁵ *Kirk* (2010) 239 CLR 531, 573–574 [72].

partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers*" (emphasis added). (The reference to "theoretical limits" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.)

Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:

- (a) the absence of a jurisdictional fact;
- (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and
- (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

77 However, as the High Court further observed in *Kirk* as to *Craig* 'As this case demonstrates, it is important to recognise that the reasoning in *Craig* that has just been summarised above is not to be seen as providing a rigid taxonomy of jurisdictional error'.⁴⁶

78 Indeed, the High Court in *Craig* provided some further guidance on the kinds of errors that might be made by administrative tribunals or administrative decision-makers that could give rise to jurisdictional error:⁴⁷

If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

⁴⁶ *Kirk* (2010) 239 CLR 531, 574 [73].

⁴⁷ *Craig* (1995) 184 CLR 163, 179.

79 To these examples of jurisdictional error discussed in *Craig* and *Kirk* may be added Professor Aronson's two further examples which the author describes in the following terms:⁴⁸

Craig was built on an earlier catalogue given by Lord Reid in *Anisminic Ltd v Foreign Compensation Commission*. Lord Reid's list was longer by two items. However there is no reason to doubt that *Craig* would have included *Anisminic's* further items had it thought of them. These were:

1. Bad faith.
2. Breach of natural justice.

Jurisdictional Facts

80 By reason of time limits in particular, which operate at a number of levels in the processes described in the Act, a number which may be construed as jurisdictional facts underpinning a statutory adjudication determination, and because of the alleged absence of such jurisdictional facts based on time limits being commonly advanced as a ground of judicial review of an adjudication determination, a little needs to be said about jurisdictional facts, particularly those arising from the statutory time limits in this legislation, as a basis for judicial review.

81 The Victorian Act, as is the case with its interstate counterparts, fundamentally alters the risk of insolvency between the principal actors during the life of a construction contract. As observed by McDougall J in *Chase Oyster Bar*:⁴⁹

The *Security of Payment Act* gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the *Security of Payment Act* lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.

⁴⁸ M Groves and H P Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 336.

⁴⁹ *Chase Oyster Bar* [2010] NSWCA 190 [209].

82 As to what may amount to an absence of a jurisdictional fact, the observations of McDougall J in *Chase Oyster Bar* are also instructive.⁵⁰ His Honour commenced his analysis with a general observation taken from *Gedeon v Commissioner of the New South Wales Crime Commission*⁵¹ where a 'jurisdictional fact' was described as: 'a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question'.

83 It is open to the legislature to make any fact a jurisdictional fact.⁵² A jurisdictional fact may be the existence or non-existence of a specified state of affairs.⁵³

84 Whether a matter is a jurisdictional fact is to be ascertained by a process of construction of the legislation which confers the jurisdiction, applying the accepted principles of statutory construction.⁵⁴

85 If the exercise of power is challenged on the basis that the jurisdictional fact does not exist, the court must itself inquire into the existence of that fact. It may grant relief against the exercise of jurisdiction if it finds that the jurisdictional fact did not exist.⁵⁵ If on the other hand the legislature confers on the decision-maker the power to authoritatively determine the existence of a jurisdictional fact, the court may inquire into the decision-maker's decision that the jurisdictional fact exists, but it will not itself inquire into the existence of that jurisdictional fact.⁵⁶

86 McDougall J in *Chase Oyster Bar* summarised the position in the following way:⁵⁷

... the proper approach to construction, where some fact is specified as a pre-condition to the exercise of jurisdiction by a

50 *Chase Oyster Bar* [2010] NSWCA 190 [164]-[172].

51 (2008) 236 CLR 120, 139 [43].

52 *Chase Oyster Bar* [2010] NSWCA 190 [165].

53 *Chase Oyster Bar* [2010] NSWCA 190 [167].

54 *Chase Oyster Bar* [2010] NSWCA 190 [166].

55 *Chase Oyster Bar* [2010] NSWCA 190 [168].

56 *Chase Oyster Bar* [2010] NSWCA 190 [169].

57 *Chase Oyster Bar* [2010] NSWCA 190 [172] (McDougall J).

court, is to regard it as a matter for that court to decide whether or not the fact exists, unless the statute clearly precludes that approach.

87 It is to be noted that in *Chase Oyster Bar*, in the application of these principles, it was held that compliance with s 17(2)(a) of the NSW Act, which provided that the relevant adjudication application could not be made unless the prescribed steps had been taken within the time frames specified, is a condition of the right to make an adjudication application, and thus the power of an adjudicator to determine that application. For this essential reason it was further held that the time limit requirements of s 17(2)(a) of the NSW Act were jurisdictional, and that an incorrect finding that the time limit prescribed by the section had been complied with is vitiated with jurisdictional error and that the Supreme Court may in an appropriate case make an order in the nature of certiorari to quash the adjudicator's determination.

Error on the Face of the Record

88 The starting point is to consider what constitutes the 'record' for the purposes of entertaining a question as to whether there has been an error on the face of the record.

89 As noted in *Craig*,⁵⁸ the history of the writ of certiorari can be traced back to at least the fourteenth century, and that history provides part of the context in which questions of the ambit of the writ must be resolved.

90 The traditional approach has been to confine the 'record' for this purpose as the initiating process (including any pleadings) and the certified order made at the conclusion of the matter.⁵⁹ As observed by the High Court in

⁵⁸ *Craig* (1995) 184 CLR 163 [16], quoting *Ex parte Lovell; Re Buckley* [1938] NSW StRp 12; (1938) 38 SR (NSW) 153, 165; *Commissioner for Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368, 373, 390. See also Evans, de Smith's *Judicial Review of Administrative Action*, 4th ed (1980), Appendix 1, esp at 588.

⁵⁹ *Kirk* (2010) 239 CLR 531, 576 [82].

Kirk,⁶⁰ in *Craig* a more expansive approach to certiorari, which would include both the reasons for decision and the complete transcript of the proceedings, was rejected. Nevertheless, it was recognised that the concept of the 'record' for the purposes of certiorari could be modified or expanded by legislation.⁶¹

91 In Victoria, the definition of 'record' has been expanded by s 10 of the *Administrative Law Act 1978* to include reasons to be part of the record.

Section 10 provides:

Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

92 However, what may or may not constitute an error on the face of the record defies definitive or exhaustive statement. It remains, it seems, to be determined judicially on the facts of each case whether, as apparent on the face of the record, there is an error which warrants review.

Conclusion and Answer to the Question

93 The conclusions in relation to s 28R(5)(a)(iii) of the Act are:

- (a) s 28R(5)(a)(iii) of the Act has been validly passed by the Legislature in accordance with s 85 of the Victorian Constitution;
- (b) it is a privative provision which operates in circumstances where a person commences proceedings to have a judgment entered under s 28R of the Act set aside;
- (c) in this case the Plaintiffs have commenced such proceedings, and s 28R(5)(a)(iii) of the Act applies;

⁶⁰ *Kirk* (2010) 239 CLR 531, 577 [84].

⁶¹ *Kirk* (2010) 239 CLR 531, 577 [84].

- (d) section 28R(5)(a)(iii) of the Act is limited in its operation by the requirements of Chapter III of the Australian *Constitution* as found in *Kirk*;
- (e) section 28R(5)(a)(iii) of the Act cannot be applied to take from the Supreme Court of Victoria power to grant relief in the nature of certiorari on the basis of jurisdictional error on the part of an adjudicator appointed under the Act in challenging an adjudication determination which is the foundation of a judgment entered under s 28R;
- (f) the operation of the privative clause in s 28R(5)(a)(iii) is confined to denying relief being granted by a court in Victoria, including the Supreme Court, in the course of a proceeding to set aside a judgment entered pursuant to s 28R, where the error relied upon is an error on the face of the record in an adjudication determination which is the foundation of the judgment. In other words, pursuant to s 28R(5)(a)(iii) of the Act, it is not open to challenge an adjudication determination (or a review determination) in a proceeding to have a s 28R judgment set aside, on the basis or an error on the face of the record in the relevant determination.

94 It follows in this case that, if the Plaintiffs are able to establish a jurisdictional error in the Adjudication Determination, they are not precluded by the operation of s 28R(5)(a)(iii) of the Act from challenging the Adjudication Determination on that basis.

95 This conclusion however, does not in any way detract from the requirement of s 28R(5)(b) of the Victorian Act, which requires the Plaintiffs to pay into Court as security the unpaid portion of the amount payable under the determination pending the final determination of the proceeding to set aside the judgment entered under s 28R.

96 Provided that s 28R(5)(b) is able to be complied with, it further follows from these reasons that if the Plaintiffs are successful in a challenge to the Adjudicator's Determination founded upon jurisdictional error, the Supreme Court may make an order in the nature of certiorari or a declaration to remove the legal consequences or purported legal consequences of the Adjudication Determination under the Act, with the result that the judgment founded upon it, must also be set aside.

97 To repeat what was said by the High Court in *Wingfoot Australia Partners Pty Ltd v Eyup Kocak*:⁶²

Jurisdictional error constitutes one basis on which the Supreme Court can make an order in the nature of certiorari to remove the purported legal consequences of a purported exercise of power under a state statute.

Or as McDougall J put it in *Chase Oyster Bar*:⁶³

An application for *certiorari* involves an assertion that the determination is void. If it is found to be void, it is void *ab initio*: it has never been, in law, a determination.

98 By way of conclusion, the separate question as stated is: Whether the Plaintiffs' challenge to the adjudication determination dated 18 November 2014 can be sustained in the light of s 28R(5) of the Victorian Act?

99 The answer to the separate question is: Yes, but only to the extent that the Plaintiffs' challenge to the adjudication determination is founded upon a jurisdictional error in the making of the determination and compliance with s 28R(5)(b) is able to be achieved.

100 I will hear the parties on the costs of the separate question, should either party contend that costs of the separate question should be other than costs in the cause.

⁶² [2013] HCA 43; (2013) 303 ALR 64 [26].
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⁶³ *Chase Oyster Bar* [2010] NSWCA 190 [265].
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