

SUPREME COURT OF QUEENSLAND

CITATION: *Palmer v Magistrate McKenzie* [2026] QCA 129

PARTIES: **CLIVE FREDERICK PALMER**
(appellant)
v
MAGISTRATE McKENZIE
(first respondent)
COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
(second respondent)
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
(third respondent)

FILE NO/S: Appeal No 2775 of 2025
SC No 11622 of 2024

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2025] QSC 127 (Martin SJA)

DELIVERED ON: 14 July 2026

DELIVERED AT: Brisbane

HEARING DATE: 22 October 2025

JUDGES: Boddice JA, Brown JA, Wilson J

ORDERS: **1. Appeal dismissed.**
2. The appellant pays the respondents' costs of the appeal.

CATCHWORDS: COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – where the third respondent filed three criminal complaints against the appellant and an associated corporate entity – where the appellant applied to the Magistrates Court seeking orders that the complaints be summarily dismissed at the pre-committal stage – where the first respondent, exercising federal jurisdiction, heard and dismissed part of the application on the basis that the *Justices Act 1886* (Qld) did not provide the Magistrates Court with jurisdiction to grant the relief sought – where the first respondent's decision was made under the *Justices Act* as 'picked up' by s 79 of the *Judiciary Act 1903* (Cth) to apply in federal jurisdiction – where the appellant applied to the Supreme Court seeking judicial review of the decision in reliance on s 30 of the *Judicial Review Act 1991* (Qld) or s 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) – where the learned primary judge determined that the Supreme Court did not have jurisdiction to

hear and determine the appellant's application for judicial review – whether the primary judge erred in finding that s 79 of the *Judiciary Act*, as applied, operated such that the first respondent's decision was made under a federal enactment

ADMINISTRATIVE LAW – JUDICIAL REVIEW – PRIVATIVE CLAUSES – where, as a consequence of the finding above, the primary judge determined that s 9 and s 9A of the ADJR Act denied the Supreme Court of jurisdiction to hear the application for judicial review – whether the primary judge erred in failing to conclude that to the extent s 9 and s 9A of the ADJR Act denied the Supreme Court of jurisdiction to review the application for judicial review, those provisions were invalid consistent with *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531

Administrative Decisions (Judicial Review) Act 1977 (Cth), s 4, s 9, s 9A, s 16

Corporations Act 2001 (Cth), s 1337B(1), s 1337H, s 1337R, s 1338A, s 1338B(1), s 1338C

Criminal Procedure Act 2004 (WA), s 114(2)

Federal Court of Australia Act 1976 (Cth), s 23

Industrial Relations Act 1996 (NSW), s 179

Judicial Review Act 1991 (Qld), s 30

Judiciary Act 1903 (Cth), s 79(1)

Justices Act 1886 (Qld), s 22A, s 103B(1)

Misuse of Drugs Act 1981 (WA), s 6(1)(a)

The Constitution (Cth), s 51(xxxix), s 71, s 75(iii), s 76, s 77

Attorney-General v Huynh (2023) 280 CLR 341; [2023] HCA 13, considered

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1; [1992] HCA 64, cited

Citta Hobart Pty Ltd v Cawthorn (2022) 276 CLR 216; [2022] HCA 16, considered

Commissioner of Stamp Duties (NSW) v Owens [No 2] (1953) 88 CLR 168; [1953] HCA 62, considered

Fuller v Lawrence (2024) 282 CLR 646; [2024] HCA 45, considered

Harrison v President of the Industrial Court of Queensland [2017] 1 Qd R 515; [2016] QCA 89, distinguished

Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, distinguished

Pedersen v Young (1964) 110 CLR 162; [1964] HCA 28, considered

Public Service Association of South Australia Inc v Industrial Relations Commission (SA) (2012) 249 CLR 398; [2012] HCA 25, distinguished

Rizeq v Western Australia (2017) 262 CLR 1; [2017] HCA 23, considered

Tangalooma Island Resort Pty Ltd v Miles (1989) 96 FLR 47, considered

COUNSEL: P J Dunning KC, with S Palaniappan, with K Byrne, for the appellant
 No appearance for the first respondent
 A C Freeman KC, with D A Marley, with S E Harburg, for the second respondent
 A D Scott KC, with S L Walpole, with M P A Maynard, for the third respondent

SOLICITORS: Robinson Nielsen Legal for the appellant
 No appearance for the first respondent
 Director of Public Prosecutions (Commonwealth) for the second respondent
 Australian Government Solicitor for the third respondent

- [1] **THE COURT:** The appellant, Mr Palmer and Palmer Leisure Coolum Pty Ltd, who is not a party to the present appeal, were the subject of three complaints by ASIC in the Magistrates Court alleging various offences. The appellant and Palmer Leisure Coolum Pty Ltd applied to dismiss the three complaints. One of those complaints was filed against the appellant only. The learned magistrate dismissed the application on the basis that the Magistrates Court did not have the power to summarily dismiss the complaint at a pre-committal stage under s 22A or s 103B(1) of the *Justices Act 1886* (Qld).
- [2] The appellant sought judicial review of the magistrate's order in the Supreme Court including under the *Judicial Review Act 1991* (Qld) (JRA) and alternatively under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) seeking orders, amongst other relief, to quash or set aside the magistrate's decision. He contended, amongst other things, that the magistrate had made a jurisdictional error. Although submitting it was unnecessary to do so, the appellant also sought various orders under s 1337B(1) of the *Corporations Act 2001* (Cth) and s 23 of the *Federal Court of Australia Act 1976* (Cth) and for orders transferring the proceeding to the Federal Court of Australia. The second and third respondents filed cross-applications seeking dismissal of the appellant's judicial review application on the basis that the Supreme Court did not have jurisdiction to hear the appellant's application.
- [3] The learned primary judge determined that the Supreme Court did not have jurisdiction to hear and determine the appellant's application for judicial review under either the JRA or the ADJR Act or any of the other bases raised. He considered one basis for review could only be determined by the Federal Court. His Honour made orders that:
- (a) the appellant be granted leave to amend his originating application to seek relief in the form of paragraph 2C of the proposed Amended Originating Application dated 14 February 2025 (Amended Originating Application);¹
 - (b) the proceeding as it relates to the relief sought in paragraph 2C of the Amended Originating Application be transferred to the Queensland Registry of the Federal Court of Australia pursuant to s 1337H of the *Corporations Act 2001* (Cth);
 - (c) the proceeding otherwise be dismissed; and

¹ Seeking orders under s 1337B(1) of the *Corporations Act* and s 23 of the *Federal Court of Australia Act*.

- (d) the costs of the proceeding to date in the Supreme Court of Queensland be reserved and transferred to the Federal Court of Australia.
- [4] The appellant seeks to appeal those orders on two grounds:
- (a) first, he contends that the primary judge erred in dismissing the appellant's application and finding that the magistrate was exercising federal jurisdiction and that his decision was made under a Commonwealth enactment, contrary to the proper application of *Rizeq v Western Australia*;² and
 - (b) secondly and in the event that the appellant fails in relation to the first ground, that the primary judge erred in failing to find that, to the extent that s 9 and s 9A of the ADJR Act denied the Supreme Court of Queensland jurisdiction to determine whether the magistrate made a jurisdictional error, s 9 and s 9A were partially invalid consistent with the principles in *Kirk v Industrial Court (NSW)*.³
- [5] The appellant does not contest that the magistrate was exercising federal jurisdiction at the relevant time of making his decision. Nor does he contest that the provisions in the *Justices Act* were picked up by the *Judiciary Act 1903* (Cth) and *Corporations Act* in the way discussed below. His key contention in respect of ground one of the appeal is however that the State law which was picked up and applied by the magistrate remained a State law and the magistrate's decision was made under a State enactment such that the JRA applied.
- [6] The second and third respondents contend that the decision of the primary judge is correct. Both contend that the appellant's argument fails to appreciate that it is only through the *Judiciary Act* and the *Corporations Act* that provisions of the State act were "picked up" and applied as Commonwealth laws.
- [7] The third respondent also contends that there is no appeal right from the decision by virtue of the operation of s 1337R of the *Corporations Act*. That is a threshold question that must be determined for this Court to determine this appeal. For the reasons set out below we do not consider s 1337R applies to preclude this appeal.
- [8] The first respondent quite properly did not partake in the appeal and stated that he will simply abide the decision of this Court.

Key legislative provisions relevant to this decision

- [9] There are a number of legislative provisions relevant to the determination of this appeal.
- [10] Section 22A of the *Justices Act* provides that:
- "Magistrates Courts are to have the civil, criminal and other jurisdiction—
 - (a) that Courts of Petty Sessions or justices sitting in Petty Sessions had before the commencement of the *Justices Acts Amendment Act 1964*; and
 - (b) that is conferred on them by this Act and other Acts."

² (2017) 262 CLR 1.

³ (2010) 239 CLR 531.

[11] Section 103B of the *Justices Act* provides that:

- “(1) A magistrate has an overall supervisory responsibility for any committal proceeding coming before a Magistrates Court at a place where the magistrate is appointed to constitute a Magistrates Court.
- (2) The supervisory responsibility includes setting timetables for the committal proceeding to the extent not otherwise provided for under an Act or practice direction.
- (3) Subsections (1) and (2) do not affect—
 - (a) the powers of a justice or justices to act in relation to the examination of witnesses in relation to an indictable offence; or
 - (b) any other power of the court to control a proceeding or of a magistrate to give a direction under section 83A; or
 - (c) the operation of the provisions of this division relating to registry committals; or
 - (d) the duty of a magistrate to comply with directions or requirements given or made by the Chief Magistrate.”

[12] Sections 71, 75(iii) and s 77 of the *Constitution* provide as follows:

“71. Judicial power and Courts.

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

...

75. Original jurisdiction of High Court.

In all matters—

...

- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

...

the High Court shall have original jurisdiction.

...

77. Power to define jurisdiction.

With respect to any of the matters mentioned in the last two sections the Parliament may make laws –

- (i) Defining the jurisdiction of any federal court other than the High Court:

- (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
- (iii) Investing any court of a State with federal jurisdiction.”

[13] Section 79(1) of the *Judiciary Act* provides:

- “(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.”

[14] Section 1337R of the *Corporations Act* provides:

- “An appeal does not lie from a decision of a court:
- (a) in relation to the transfer of a proceeding under this Division; or
 - (b) as to which rules of evidence and procedure are to be applied pursuant to subsection 1337P(1).”

[15] Part 9.6 Division 2 of the *Corporations Act* governs the criminal jurisdiction and procedure of courts. Section 1338A provides:

- “(1) This Division provides in relation to the jurisdiction of courts in respect of criminal matters arising under the Corporations legislation and so provides to the exclusion of sections 68, 70 and 60A of the *Judiciary Act 1903*.
- (2) This Division does not limit the operation of the provisions of the *Judiciary Act 1903* other than sections 68, 70 and 70A.
- (3) Without limiting subsection (2), this Division does not limit the operation of subsection 39(2) of the *Judiciary Act 1903* in relation to criminal matters arising under the Corporations legislation or sections 68A to 68D of that Act in relation to proceedings in relation to an offence against the Corporations legislation that are brought before the Federal Court.”

[16] Section 1338B(1) of the *Corporations Act* provides:

- “(1) Subject to this section, a court of a State or Territory exercising jurisdiction:
 - (a) with respect to:
 - (i) the summary conviction; or
 - (ii) the examination and commitment for trial on indictment; or
 - (iii) the trial and conviction on indictment;
 of offenders or persons charged with offences against the laws of the State or Territory concerned, and with respect to:

- (iv) their sentencing, punishment and release; or
 - (v) their liability to make reparation in connection with their offences; or
 - (vi) the forfeiture of property in connection with their offences; or
 - (vii) the proceeds of their crimes; and
- (b) with respect to the hearing and determination of:
- (i) proceedings connected with; or
 - (ii) appeals arising out of; or
 - (iii) appeals arising out of proceedings connected with;
- any such trial or conviction or any matter of a kind referred to in subparagraph (a)(iv), (v), (vi) or (vii);

has the equivalent jurisdiction with respect to offenders or persons charged with offences against the Corporations legislation.”

[17] Section 1338C of the *Corporations Act* provides:

“(1) Subject to this Division, the laws of a State or Territory respecting:

- (a) the arrest and custody in the State or Territory of offenders or persons charged with offences; and
- (b) criminal procedure in the State or Territory in relation to such persons; and
- (c) the rules of evidence applied in criminal procedure in the State or Territory in relation to such persons;

apply in the State or Territory, so far as they are applicable, to persons who are charged with offences against the Corporations legislation.

(2) In this section:

criminal procedure means the procedure for:

- (a) the summary conviction; and
- (b) the examination and commitment for trial on indictment; and
- (c) the trial and conviction on indictment; and
- (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any related proceedings;

of offenders or persons charged with offences, and includes the procedure for holding accused persons to bail.”

[18] Sections 9 and 9A of the ADJRA Act provide:

“9 Limitation of jurisdiction of State courts

- (1) Notwithstanding anything contained in any Act other than this Act, a court of a State does not have jurisdiction to review:

- (a) a decision to which this section applies that is made after the commencement of this Act;

...

Note: This subsection has effect subject to the *Jurisdiction of Courts (Cross-vesting) Act 1987* and to subsection 1337B(3) of the *Corporations Act 2001*.

- (2) In this section:

decision to which this section applies means:

- (a) a decision that is a decision to which this Act applies; or
- (b) a decision of an administrative character that is included in any of the classes of decisions set out in Schedule 1.

review means review by way of:

- (a) the grant of an injunction;
- (b) the grant of a prerogative or statutory writ (other than a writ of *habeas corpus*) or the making of any order of the same nature or having the same effect as, or of a similar nature or having a similar effect to, any such writ; or
- (c) the making of a declaratory order.

- (4) This section does not affect:

- (b) the jurisdiction conferred on the Supreme Court of a State by section 32A of the *Federal Court of Australia Act 1976*; or
- (c) the jurisdiction of a court of a State in respect of any matter that is pending before it at the commencement of this Act.

9A Limitation of jurisdiction to review related criminal justice process decisions

- (1) Subject to subsection (2), at any time when:

- (a) a prosecution for an offence against a law of the Commonwealth, a State or a Territory is before any court; or

- (b) an appeal arising out of such a prosecution is before any court;

no court has jurisdiction to hear, continue to hear or determine an application under this Act, by the person who is or was the defendant in the prosecution, in relation to a related criminal justice process decision.

...

- (4) In this section:

appeal includes an application for a new trial and a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge.

related criminal justice process decision, in relation to an offence, means:

- (a) a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:
- (i) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and
 - (ii) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and
 - (iii) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and
 - (iv) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and
 - (v) a decision in connection with an appeal arising out of the prosecution; or

....

Note: A decision to prosecute a person for an offence is not reviewable under this Act: see paragraph (xa) of Schedule 1.”

The Decision below

- [19] In dismissing the appellant’s application (other than [2C]), the primary judge’s findings included that:

- (a) the Magistrates Court was invested with federal jurisdiction in dealing with the complaints against the appellant pursuant to s 75(iii) of the *Constitution* as ASIC was a complainant. The magistrate was therefore exercising federal jurisdiction in considering the justiciable controversy between the parties;

- (b) section 68(2) of the *Judiciary Act* applied, given the appellant was charged with offences both under Commonwealth law and State criminal law, and invested the State courts with federal jurisdiction. Given the charges arose out of the same controversy between ASIC and the appellant, the jurisdiction of the Magistrates Court extended not only to the direct federal claims but the entire justiciable controversy between the parties;
- (c) section 79 of the *Judiciary Act* and s 1338B and s 1338C of the *Corporations Act* “pick up” State law, when a State court is exercising federal jurisdiction;
- (d) the magistrate in dismissing the application for summary dismissal was applying federal law as s 22A and s 103B of the *Justices Act* only applied to the proceedings by virtue of the operation of the *Judiciary Act* or *Corporations Act*;
- (e) the decision of the magistrate was made pursuant to the authority conferred by the *Judiciary Act*, or the *Corporations Act* and was a decision made under an ‘enactment’ to which the ADJR Act and not the JRA would otherwise apply;
- (f) pursuant to s 9 of the ADJR Act, a State court does not have jurisdiction to review a decision to which the ADJR Act applies. That relevantly includes a decision made under a Commonwealth enactment. As the decision of the magistrate was made pursuant to federal law, not the State law, the effect of s 9 was that the Supreme Court had no jurisdiction to review the magistrate’s decision under the ADJR Act;
- (g) further, pursuant to s 9A of the ADJR Act, the Supreme Court did not have jurisdiction to hear any application related to the magistrate’s decision to dismiss the appellant’s application for summary dismissal; and
- (h) sections 9 and 9A of the ADJR Act did not oust the supervisory jurisdiction of the Supreme Court within the meaning of the principle in *Kirk*. *Kirk* was concerned with the Supreme Court’s inherent jurisdiction to supervise the exercise of State executive and judicial power, whereas in the present case the magistrate was exercising federal jurisdiction and “so far as federal jurisdiction is concerned, the Court only has the jurisdiction conferred upon it and that conferral can be subject to such conditions as the Commonwealth Parliament decides to impose”;⁴ and
- (i) no other statutory provisions upon which the appellant had sought to rely to seek orders and directions were available or otherwise applied as set out in [55]-[59] of the primary judge’s reasons.

Was the decision made under a State or Commonwealth enactment?

- [20] The first ground of appeal is that the primary judge erred in finding that the magistrate’s decision was a decision made under a Commonwealth enactment. The appellant contends that while s 79 of the *Judiciary Act* operates to pick up and apply the state law as Commonwealth law, the enactment for the purpose of the JRA, in this case the *Justices Act*, is still a State law.
- [21] The respondents contend that the appellant’s argument is misconceived given that, as noted by the plurality in *Rizeq*, State legislatures cannot make law with respect to

⁴ *Palmer v Magistrate McKenzie* [2025] QSC 127 (Reasons) at [51].

matters governing the exercise by a State court of federal jurisdiction. They contend that s 22A and s 103B of the *Justices Act* only had force, given the magistrate was exercising federal jurisdiction, because those provisions were picked up by s 79 of the *Judiciary Act* and s 1338C of the *Corporations Act* and applied as Commonwealth law. Therefore the enactment, relevantly for the purposes of judicial review, was a Commonwealth enactment not a State enactment.

- [22] Both parties relied on *Rizeq v Western Australia*.⁵
- [23] One of the key planks to the appellant's contention is that the *Justices Act* provisions applied as State law, notwithstanding that they were picked up by s 79 of the *Judiciary Act* and the *Corporations Act* provisions, consistent with the recognition by the plurality in *Rizeq* that the "... simple constitutional truth is that State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction...".⁶ Consistent with that view he contends that the fact that a State law may be applied by operation of s 79 of the *Judiciary Act*,⁷ which gives the court exercising federal jurisdiction the authority to do so, does not alter the fact that the law being applied remains a State law.
- [24] In *Rizeq*, consideration was given as to whether s 114(2) of the *Criminal Procedure Act 2004* (WA), which allowed for a majority decision of 11 of 12 jurors to be a verdict of guilty, applied to a Western Australian court exercising federal jurisdiction. It was uncontroversial that the Western Australian court was exercising federal jurisdiction by virtue of the accused being a New South Wales resident. The defendant contended that s 114(2) did not apply as the Western Australian law giving rise to his criminal liability, namely s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA), did not apply as a State law but rather its text was picked up and applied as a law of the Commonwealth by s 79(1) of the *Judiciary Act*, with the result that s 80 of the *Constitution* required a unanimous verdict. That argument was rejected by the High Court. The High Court held that the *Misuse of Drugs Act* was within the limits of State legislative capacity and applied of its own force in Western Australian law. It was held that the Western Australian law applied to impose criminal liability as a State law and was outside the operation of s 79 of the *Judiciary Act*. Section 80 of the *Constitution* therefore did not apply.
- [25] However, the High Court did hold that s 79 of the *Judiciary Act* was engaged to pick up and apply the text of s 114(2) of the *Criminal Procedure Act* as a law of the Commonwealth in the defendant's trial, filling a gap in the law governing the exercise of federal jurisdiction by the State court. The plurality⁸ observed that Chapter III of the *Constitution* was both empowering and limiting, insofar as the Parliament of the Commonwealth alone has power to vest federal jurisdiction, but that that power is limited to that conferred by s 76 and s 77 of the *Constitution*. The Commonwealth Parliament alone has the power to regulate the exercise of federal jurisdiction, but no power other than that conferred by s 51(xxxix) of the *Constitution*.⁹
- [26] The plurality summarised its conclusions, including the following:¹⁰

⁵ (2017) 262 CLR 1.

⁶ (2017) 262 CLR 1 at [56].

⁷ Or s 1338B and s 1338C of the *Corporations Act*.

⁸ Consisting of Bell, Gageler, Keane, Nettle and Gordon JJ.

⁹ (2017) 262 CLR 1 at [59].

¹⁰ (2017) 262 CLR 1 at [103].

“Within the limits of State legislative capacity, State laws apply in federal jurisdiction as valid State laws unless and to the extent that they are rendered invalid by reason of inconsistency with Commonwealth laws. What State laws relevantly cannot do within the limits of State legislative capacity is govern the exercise by a court of federal jurisdiction. A State law can determine neither the powers that a court has in the exercise of federal jurisdiction nor how or in what circumstances those powers are to be exercised. A State law cannot in that sense ‘bind’ a court in the exercise of federal jurisdiction, and that is the sense in which the word is used in s 79 the *Judiciary Act*. The operation of s 79 is limited to making the text of the State laws of that nature apply as Commonwealth law to bind a court in the exercise of federal jurisdiction.” (emphasis added)

- [27] The plurality stated that s 114(2) was a useful illustration of the operation of s 79 of the *Judiciary Act*, stating at [104] that:

“Consistently with the prescription in s 7 of the *Interpretation Act 1984* (WA) that every written law of Western Australia is to be construed ‘subject to the limits of the legislative power of the State’, s 114(2) is properly interpreted as applying to a Western Australian court only when exercising Western Australian jurisdiction. The text of s 114(2) is applied, as Commonwealth law, to a Western Australian court when exercising federal jurisdiction through the operation of s 79 of the *Judiciary Act*, except as otherwise provided by the *Constitution* or by some other Commonwealth law. That is what occurred in the trial of Mr Rizeq, there being no provision of the *Constitution* or of other Commonwealth law preventing it.”

- [28] As to s 6(1)(a) of the *Misuse of Drugs Act*, the plurality stated at [105] that:

“Section 6(1)(a) of the *Misuse of Drugs Act*, in contrast, is a law having application independently of anything done by a court. It is squarely within State legislative competence and outside the operation of s 79 of the *Judiciary Act*. It applied in the trial of Mr Rizeq as Western Australian law just as it applied to him before any court was called upon to exercise jurisdiction in relation to the charges brought against him.” (footnotes omitted)

- [29] While the appellant contends that the primary judge did not appreciate the dichotomy emphasised in [103] by the plurality of *Rizeq*, it is plain from the primary judge’s reasons that his Honour did understand the dichotomy as to the application of State laws in federal jurisdiction within the limits of State legislative capacity, as opposed to State laws which cannot, within the limits of State legislative capacity, govern the exercise by a court of federal jurisdiction and which are applied through their text being picked up by s 79 of the *Judiciary Act*. In particular, the primary judge emphasised the relevant part of [103], which was relevant to the application by the magistrate of s 22A and s 103B of the *Justices Act*,¹¹ having discussed the difference in the position between s 6(1)(a) of the *Misuse of Drugs Act* and s 114(2) of the *Criminal Procedure Act* identified by the plurality in *Rizeq*.¹²

¹¹ Reasons at [21].

¹² Reasons at [19]-[20].

- [30] The primary judge also had regard to the analysis by Kiefel CJ in *Rizeq*, where her Honour stated that a State court invested with federal jurisdiction is given authority to hear and determine a matter but that “says nothing about the laws to be applied in a particular case”.¹³ This is in contrast to the “provisions made by statute which provide a court with powers it may exercise in the hearing and determination of a matter, and in otherwise regulating the proceedings before it.”¹⁴
- [31] Chief Justice Kiefel proceeded to discuss the operation of s 79 of the *Judiciary Act* and stated that s 79 “fills the gap created by any absence of Commonwealth laws which provide a court with powers necessary for the hearing and determination of a matter and the presence of State laws of this kind which cannot operate of their own force in federal jurisdiction. [Section 79] operates by ‘picking up’ State laws and applying them as Commonwealth law” (footnotes omitted).¹⁵ Her Honour observed that the State laws provided a court with powers necessary for the determination of the matter. However, Kiefel CJ identified “[t]hese are not State laws which can operate of their own force upon courts exercising federal jurisdiction. It is necessary that s 79 operate upon them so that they may be ‘picked up’ and applied”.¹⁶
- [32] Chief Justice Kiefel concluded that:¹⁷
- “Section 79 of the *Judiciary Act* is directed to courts. Its purpose is to fill the gaps created by a lack of Commonwealth law governing when and how a court exercising federal jurisdiction is to hear and determine a matter and the inability of a State law to apply directly to that court whilst exercising federal jurisdiction. In such a case it is necessary that s 79 adopt the State provision and apply it. Section 114(2) of the *Criminal Procedure Act* is a provision of this kind. Section 6(1)(a) of the MDA is not. Its application was unaffected by the fact that the offence it created was tried in federal jurisdiction. It was not necessary for s 79 of the *Judiciary Act* to adopt it. Section 6(1)(a) of the MDA applied directly. It follows that s 80 of the *Constitution* was not engaged.”
- [33] The Chief Justice’s analysis did not suggest s 79 of the *Judiciary Act* applied to give authority to apply a State law as a State law, and that the *Criminal Procedure Act* remained a State law when relied upon by a court exercising federal jurisdiction.
- [34] The primary judge’s conclusion that s 22A and s 103B of the *Justices Act* did not apply “of their own force in the exercise of federal jurisdiction”¹⁸ followed his discussion of *Rizeq*. Consistent with the primary judge’s analysis of *Rizeq* and also of *Attorney-General v Huynh*,¹⁹ his Honour properly concluded at [35] and [36] that:
- “Sections 1338B and s 1338C, like s 79 of the *Judiciary Act*, pick up relevant State legislation and apply it as federal law. Given that two of the charges allege breaches of the *Corporations Act*, it follows that the decision by McKenzie M was made under both the *Judiciary Act* and the *Corporations Act*.

¹³ (2017) 262 CLR 1 at [9].

¹⁴ (2017) 262 CLR 1 at [11].

¹⁵ (2017) 262 CLR 1 at [16].

¹⁶ (2017) 262 CLR 1 at [21].

¹⁷ (2017) 262 CLR 1 at [32].

¹⁸ Reasons at [24].

¹⁹ (2023) 280 CLR 341.

... The Original Order was made pursuant to the *Judiciary Act* and *Corporations Act*, not under a State Act.”

- [35] Neither the plurality nor the Chief Justice in *Rizeq* support the appellant’s argument that the law being picked up and applied by s 79 of the *Judiciary Act* and s 1338B and s 1338C of the *Corporations Act* is the State law. What is picked up from the State law is its text, which is directed to the exercise of federal jurisdiction by the court. In this case it was s 22A and s 103B of the *Justices Act* that was picked up, not the *Justices Act* itself as a State law operating by its own legislative force. The text of the *Justices Act* that was picked up filled a gap in the exercise of federal jurisdiction by the magistrate.
- [36] Further support for the fact that it is the text of the *Justices Act* that is picked up and applied as a Commonwealth law, and not simply that s 79 of the *Judiciary Act* provides a State court with authority to apply the *Justices Act* when exercising federal jurisdiction, is found in the discussion by the plurality in *Rizeq* of the modern interpretation of s 79 of the *Judiciary Act*. The plurality identified that the purpose of s 79 had been encapsulated in *Commissioner of Stamp Duties (NSW) v Owens [No 2]*,²⁰ namely “to adopt the law of the State where federal jurisdiction is exercised as the law by which, except as the Constitution or federal law may otherwise provide, the rights of the parties to the *lis* are to be ascertained and matters of procedure are to be regulated”.²¹ The plurality observed that the Court in *Owens [No 2]* had not identified what was meant by “adopt” and “the law of the State”. That was clarified by later authorities. By reference to three further authorities, including the decision of Kitto J in *Pedersen v Young*,²² where his Honour stated that s 79 “does not purport to do more than pick up State laws with their meaning unchanged”, the plurality in *Rizeq* explained two aspects of how s 79 operated to “adopt” State statutes.²³ First, s 79 “operates to take the text of State law and to apply that text as Commonwealth law” (emphasis added).²⁴ Second, s 79 so operating does not alter the meaning of the text of the State law other than to make that text applicable to a federal court exercising jurisdiction in the State even though the State law on its proper construction applies only to a State court.²⁵
- [37] Similarly to Kiefel CJ, the plurality considered it was helpful to contrast the notion of “jurisdiction” of a court as used in Chapter III of the *Constitution* in referring to federal as opposed to State jurisdiction and the “power” that a court is required or permitted to exercise in the execution of jurisdiction, in understanding the scope of s 79 of the *Judiciary Act*.²⁶ None of that discussion suggests that the conferral of power to a court through the operation of s 79 provides for the exercise of power to be of a State law as a State law. That is apparent from [87] where the plurality stated that:

“Characteristically an exercise of jurisdiction is attended by an exercise of power’. By making State laws that are ‘binding’ on courts also binding on courts exercising federal jurisdiction, s 79 of the *Judiciary Act* takes the text of State laws conferring or governing

²⁰ (1953) 88 CLR 168, referred to by the plurality in *Rizeq* at [80].

²¹ (1953) 88 CLR 168 at 170.

²² (1964) 110 CLR 162 at 165.

²³ (2017) 262 CLR 1 at [81].

²⁴ (2017) 262 CLR 1 at [81].

²⁵ (2017) 262 CLR 1 at [81].

²⁶ (2017) 262 CLR 1 at [84]-[85].

powers that State courts have when exercising State jurisdiction and applies that text as Commonwealth law to confer or govern powers that State courts and federal courts have when exercising federal jurisdiction.” (citations omitted)

- [38] State parliaments have been recognised to have no power to add to or detract from federal jurisdiction, whether that federal jurisdiction is conferred on the High Court by s 75 or under s 76 of the *Constitution* or is conferred on another federal court under s 77(i) or invested in a State court under s 77(iii).²⁷

- [39] The operation of s 79 of the *Judiciary Act* being that it picks up the text of a State law and it is that text being applied as a Commonwealth law in the exercise of federal jurisdiction by a State Court was enforced by the majority in *Masson v Parsons*.²⁸ The majority cited *Rizeq* and stated that:²⁹

“In the case of a State court exercising federal jurisdiction ... or a federal court exercising federal jurisdiction ... such a gap exists by reason of the absence of State legislative power to command a court as to the manner of its exercise of federal jurisdiction. In such cases, s 79(1) fills the gap by picking up the texts of State laws governing the manner of exercise of State jurisdiction and applying them as Commonwealth laws governing the manner of exercise of federal jurisdiction”.

- [40] The fact that the text of a provision or provisions of a State law is picked up and applied as a Commonwealth law does not impinge on the fact that State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction referred to by the plurality at [56] of *Rizeq*, particularly when regard is had to [57], where the plurality stated:

“The qualification concerning the limitation on the capacity of non-federal laws to affect federal courts, expressed in *Fencott v Muller*, was formulated in that case in the specific context of examining the sources of law applicable to the determination of a matter within the federal jurisdiction which had been conferred on a federal court under s 77(i) of the *Constitution*. The incapacity so identified in that context is a particular manifestation of a more general incapacity of any law enacted other than by the Parliament of the Commonwealth to affect the exercise of federal jurisdiction by any court. That more general incapacity manifests also in the incapacity of a State Parliament to affect the exercise of federal jurisdiction by a State court.”

- [41] The State law is not altered by the operation of s 79 of the *Judiciary Act*. The suggestion by the appellant that it gives rise to an inconsistency or fragmentation of the single composite holding of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction is misconceived. First, because as was discussed by the plurality in *Rizeq*:³⁰

“Filling the gap in which State law cannot govern the exercise of federal jurisdiction by a federal court or a State court, by doing no more than applying as Commonwealth law with its meaning

²⁷ (2017) 262 CLR 1 at [60].

²⁸ (2019) 266 CLR 554 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

²⁹ (2019) 266 CLR 554 at [30].

³⁰ (2017) 262 CLR 1 at [91].

unchanged the text of State law governing the exercise of State jurisdiction, s 79 goes no further than is reasonably necessary ‘to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself’”. (footnotes omitted)

- [42] Secondly, as stated by the plurality in *Rizeq*, because State laws have no valid application within the field in which s 79 of the *Judiciary Act* operates, s 109 of the *Constitution* for that reason simply has no operation.³¹ Thirdly, as stated by the plurality, s 79 does not operate to alter the meaning of the text of the State law.
- [43] The appellant contends that the approach of the primary judge and the respondents, which identifies the *Judiciary Act* and s 1338B and s 1338C of the *Corporations Act* as being the relevant enactment under which the decision was made, transgresses the principles for determining whether a decision is made under an enactment most recently discussed by the High Court in *Fuller v Lawrence*.³² The High Court in *Fuller v Lawrence* confirmed that a decision is made under an enactment when it is expressly or impliedly required or authorised by that enactment and secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations and in that sense the decision must derive from the enactment. The appellant further contends that under the respondents’ approach, the picking up under the *Judiciary Act* “transforms” a State enactment into a federal enactment. As to the latter proposition, the State enactment does not become a federal enactment, because it is only the text of State legislation which is picked up and applied as a Commonwealth law. Nor is the former contention correct. No decision of the magistrate was authorised by the *Justices Act* as a State law. The decision was authorised by s 79 of the *Judiciary Act* and s 1338B and s 1338C of the *Corporations Act*, not the *Justices Act*, because the *Justices Act* did not of its own force authorise the making of the decision by the magistrate in federal jurisdiction, nor was the decision in the relevant sense derived from the *Justices Act*. The power to make the decision, as found by the primary judge,³³ was conferred by s 79 of the *Judiciary Act* and s 1338C of the *Corporations Act* applying the text of the *Justices Act* as a Commonwealth law. This does not deviate from the approach set out in *Fuller v Lawrence* in favour of an approach focussed on the “proximate” source of power or “true lawful source”. The magistrate’s decision derived its capacity to alter or otherwise affect the appellant’s legal rights from the *Judiciary Act* and *Corporations Act* applying the text of the *Justices Act* as Commonwealth law. The decision was made under a Commonwealth enactment.
- [44] The fundamental difficulty with the argument put forward by the appellant is that, as was stated by the second respondent, only the Commonwealth Parliament can direct courts exercising federal jurisdiction as to how they will exercise their lawful authority.³⁴ The magistrate’s authority to make his decision derives only from the Commonwealth Parliament, which is empowered to invest federal jurisdiction in State courts as a result of s 71 and s 77 of the *Constitution*.

³¹ (2017) 262 CLR 1 at [92].

³² (2024) 282 CLR 646 at [12]-[13].

³³ Reasons at [30], [35] and [36].

³⁴ (2017) 262 CLR 1at [61] and [63].

- [45] The decision of *Attorney-General (Cth) v Huynh*³⁵ was relied upon by the second respondent in further support of the fact that once picked up by provisions of the *Judiciary Act*, within federal jurisdiction a State law is applied as a federal law. *Huynh* does provide some support to that proposition. In that case, the High Court referred to the provisions of a New South Wales act being applied “as Commonwealth laws by force of s 68(1) of the *Judiciary Act*...”³⁶ not of their own force.³⁷ To the extent that the appellant contended that the judicial review was under the State act, that was not a matter explicitly addressed by the majority of Kiefel CJ, Gageler and Gleeson JJ.³⁸ Upon remittal to the New South Wales Court of Appeal, it was determined that for the purposes of s 9(1) of the ADJR Act, the primary judge’s decision was made under an enactment, being s 68(1) of the *Judiciary Act*.³⁹
- [46] The primary judge was therefore correct in his determination that the decision was not a decision under an enactment for the purposes of the JRA and was a decision to which the ADJR Act applied.
- [47] The primary judge was not in error. Ground 1 is not established.

Are s 9 and s 9A invalid due to *Kirk*?

- [48] Having determined that the decision was made under a Commonwealth enactment, the primary judge considered whether the Supreme Court’s supervisory jurisdiction was preserved under part 5 of the JRA, which involved his Honour considering:⁴⁰
- (a) whether the ADJR Act denies the Supreme Court that power; and
 - (b) the effect of *Kirk*.
- [49] The primary judge found that the magistrate’s decision made under the *Judiciary Act* and the *Corporations Act* is a decision made under an act to which the ADJR Act would otherwise apply.⁴¹ In those circumstances, the primary judge found that the Supreme Court had no jurisdiction to review the original order under s 9 of the ADJR Act. Further, he found that the magistrate’s decision was a “decision in connection with the ... committal for trial” of the appellant⁴² under s 9A of the ADJR Act, which specifically applied to criminal proceedings and to all courts. As a result, the primary judge found that under s 9A(1) of the ADJR Act “no court has jurisdiction to hear, continue to hear or determine an application under this Act, by the person who is or was the defendant in the prosecution, in relation to a related criminal justice process decision”.⁴³
- [50] None of these findings were the subject of challenge in ground 2 of the appeal. Rather the appellant contends the primary judge erred in failing to find that s 9 and s 9A of the ADJR Act had the effect of ousting the Supreme Court’s supervisory jurisdiction with respect to jurisdictional error and thereby falling foul of the principles established by *Kirk*.

³⁵ (2023) 280 CLR 341.

³⁶ (2023) 280 CLR 341 at [77].

³⁷ (2023) 280 CLR 341 at [8].

³⁸ With whom Jagot J agreed.

³⁹ (2023) 112 NSWLR 149 at [24], [33], [55] and [56].

⁴⁰ Referred to in the Reasons at [37].

⁴¹ Reasons at [40].

⁴² Reasons at [44].

⁴³ Reasons at [44].

- [51] The primary judge considered that *Kirk* was not concerned with the supervision by a State court of the exercise of federal jurisdiction by another State court or tribunal, but was directed to the constraints relating to the exercise of State executive and judicial power.⁴⁴ The primary judge, in his analysis, rejected the contention that s 9 or s 9A purport to interfere with or limit the inherent supervisory jurisdiction of the Supreme Court. His Honour considered that the provisions went no “further than confining the jurisdiction of courts with respect to applications under the [ADJR Act] concerning particular types of matters”.⁴⁵ The primary judge found that the subject provisions do not contain a privative clause purporting to immunise a relevant decision from any appeal or review in any court. Nor do they oust the supervisory jurisdiction of the Supreme Court, because so far as federal jurisdiction is concerned, the Supreme Court only has the federal jurisdiction conferred upon it and that conferral can be subject to such conditions as the Commonwealth Parliament decides to impose.⁴⁶
- [52] The appellant contends that the principles in *Kirk* as to depriving a State Supreme Court of its supervisory jurisdiction were not so limited. In particular, the appellant emphasises [99]-[100] of *Kirk*, where the majority stated:

“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. 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 is not beyond power.” (footnotes omitted, emphasis added)

- [53] The appellant contends that in making the above statements as to the State Supreme Court’s supervisory jurisdiction, the High Court was not confining itself to State

⁴⁴ Reasons at [50].

⁴⁵ Reasons at [51].

⁴⁶ Reasons at [51].

Supreme Courts supervising the exercise of State jurisdiction, as opposed to State inferior courts or tribunals exercising federal jurisdiction. The appellant contends that a decision of a magistrate is amenable to review for jurisdictional error, whether the magistrate is exercising State or federal jurisdiction, particularly given that a magistrate is a State judicial officer. The appellant contends that this is further supported by statements of the plurality in *Citta Hobart Pty Ltd v Cawthorn*⁴⁷ at [20]:

“Failure to exercise, or to observe the legislated limits of, a jurisdiction conferred on a court or a non-court tribunal established by Commonwealth legislation is amenable to compulsion or restraint by mandamus or prohibition granted in the entrenched original jurisdiction of this Court under s 75(v) of the *Constitution*. Failure to exercise, or to observe the legislated limits of, a jurisdiction conferred on a court or a non-court tribunal established by State legislation is correspondingly amenable to compulsion or restraint by an appropriate judicial remedy granted in the entrenched supervisory jurisdiction of the Supreme Court of that State.” (footnotes omitted)

- [54] The appellant contends that s 9 and s 9A of the ADJR Act deprive the Supreme Court of supervisory jurisdiction to enforce the limits on the exercise of state executive and judicial power by persons or bodies exercising federal jurisdiction. According to the appellant, it makes no difference to the application of the *Kirk* principles that the ADJR Act is a Commonwealth statute, and that the magistrate is a State judicial officer, albeit his Honour was exercising federal jurisdiction when the decision was made.
- [55] The respondents contend that *Kirk* was concerned with the State legislature’s capacity to limit the Supreme Court’s supervisory jurisdiction. They contend that State laws cannot affect federal jurisdiction and the exercise of federal power. They therefore contend that s 9 and s 9A do not remove the supervisory jurisdiction of the Supreme Court, given that such jurisdiction has never been conferred by the Commonwealth Parliament. According to the respondents, it is for the Commonwealth Parliament to determine the scope of any federal jurisdiction that it does confer upon a State court, including any conditions that it may wish to place on that jurisdiction. The respondents submit that the Commonwealth has done exactly that by imposing the limits on the federal jurisdiction of the State courts contained within s 9 and s 9A of the ADJR Act.
- [56] There is no error in his Honour’s determination that s 9 and s 9A of the ADJR Act were not invalid in light of *Kirk* for the following reasons.
- [57] First, *Kirk* concerned the State legislature’s capacity to limit the Supreme Court’s supervisory jurisdiction through a privative clause in s 179 of the *Industrial Relations Act 1996* (NSW). It was thus concerned with State legislation purporting to oust the Supreme Court’s jurisdiction to supervise the exercise of State jurisdiction by an inferior court or tribunal.
- [58] Secondly, *Kirk* was not concerned with the extent to which the Commonwealth Parliament may vest or withhold federal jurisdiction but the limits of State power. For example, the reference in [100] set out above, is to “legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error”

⁴⁷ (2022) 276 CLR 216.

which is beyond State legislative power. The exercise of State legislative power cannot apply to courts exercising federal jurisdiction.

- [59] *Kirk* was concerned with the use of State legislative power to enact privative provisions and whether that use diminished the maintenance of “the Supreme Court of a State” under Ch III of the *Constitution*.⁴⁸ In that regard, the reasoning of the High Court in *Kirk*, in part, relied on the recognition that the supervisory jurisdiction of the State Supreme Courts “was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus ... was, and is, a defining characteristic of those courts”.⁴⁹
- [60] The possibility for a State court to exercise federal jurisdiction did not arise until Australia’s federation and the introduction of the *Constitution*. Section 77 of the *Constitution* provides for the investing of federal jurisdiction in State courts and for the Commonwealth Parliament to define “the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States”.⁵⁰ As discussed above, State courts only have the federal jurisdiction which is vested in them by the Commonwealth Parliament, principally through s 39(2) of the *Judiciary Act* and s 1337B(2) of the *Corporations Act*. It has been recognised by the High Court that the Commonwealth Parliament may “... within the limits of the legislative power conferred upon it by the Constitution, ... grant or withhold jurisdiction”.⁵¹ An example is s 1337B of the *Corporations Act*, which confers jurisdiction on the Supreme Court with respect to “civil matters arising under the Corporations legislation” but makes that conferral subject to s 9 of the ADJR Act. Similarly, s 39(2) of the *Judiciary Act* is subject to s 9 and s 9A of the ADJR Act, given s 9 applies “[n]otwithstanding anything contained in any Act other than this Act” and s 9A provides “no court has jurisdiction to hear, continue to hear or determine an application under this Act”.⁵²
- [61] Given the above, it is evident that the Commonwealth Parliament may alter the extent to which it confers federal jurisdiction on a State Supreme Court without depriving that court of the characteristics encapsulated by its constitutional description of a “Supreme Court of a State”.⁵³
- [62] As the respondents submit and was found by the primary judge,⁵⁴ s 9 and s 9A withhold from the Supreme Court part of the federal jurisdiction otherwise conferred by s 39(2) of the *Judiciary Act* and s 1337B of the *Corporations Act*. That is specifically contemplated by s 77(ii) of the *Constitution*.
- [63] Thirdly, there are no “islands of power immune from supervision and restraint”⁵⁵ in depriving the Supreme Court of supervisory power over a magistrate exercising federal jurisdiction insofar as both the Federal Court⁵⁶ (as was borne out by the Order

⁴⁸ (2010) 239 CLR 531 at [96].

⁴⁹ (2010) 239 CLR 531 at [98].

⁵⁰ Section 77(iii) *Constitution*.

⁵¹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36-37 per Brennan J, Deane J and Dawson J.

⁵² See also s 4 ADJR Act.

⁵³ (2010) 239 CLR 531 at [96].

⁵⁴ Reasons at [51].

⁵⁵ (2010) 239 CLR 531 at [99].

⁵⁶ See s 1337B of the *Corporations Act*.

transferring proceedings to the Federal Court) and the High Court⁵⁷ have jurisdiction to review the magistrate's decision.

- [64] Fourthly, no case cited by the appellant supports the proposition that the Commonwealth Parliament cannot withhold from a State Supreme Court federal jurisdiction to supervise the exercise by inferior State courts and tribunals of federal jurisdiction. The cases *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)*⁵⁸ and *Harrison v President of the Industrial Court of Queensland*⁵⁹ were both cases concerned with the Supreme Court's inherent jurisdiction to supervise exercises of State jurisdiction.
- [65] As to *Citta*,⁶⁰ it is true that the statement of the majority which referenced *Kirk* and is relied upon by the appellant is broad in its terms and on one reading applicable to a tribunal or inferior court exercising federal jurisdiction. In that case there was however no discussion of the application of the principles of *Kirk*, which were only referenced by way of background, nor was there a discussion of the relevant constitutional framework. The case involved a different question from the present. The question was whether a State tribunal had properly determined that it lacked jurisdiction over a matter as a result of a constitutional defence raising s 109 of the *Constitution* which it found raised a matter of federal jurisdiction and which it did not have jurisdiction to decide as it was not a court within the meaning of s 77(ii) or s 77(iii) of the *Constitution*. The question for determination was whether the matter involved a matter within the description of s 76(i) and s 76(ii) of the *Constitution*.⁶¹ It did not involve a question of whether the State Supreme Court was deprived of supervisory jurisdiction. As such *Citta* cannot, in this context, clarify or expand the scope of the principles established by *Kirk*.
- [66] The appellant has not established that the principles applied in *Kirk* have any application to the circumstances of the present case.
- [67] His Honour's analysis is correct and the appellant's second appeal ground in this regard must fail.

Is there an appeal right at all?

- [68] The third respondent contends that there is no appeal right to this Court as a result of the operation of s 1337R of the *Corporations Act*, contending that insofar as the primary judge ordered the transfer of that part of the proceedings the subject of the ADJR Act to the Federal Court that his Honour's decision is a "decision of a court ... in relation to the transfer of a proceeding under this division" from which s 1337R(a) precludes any right of appeal.
- [69] The appellant however contends that the only relevant order to which s 1337R can apply is Order 2, by which the remainder of the proceeding was transferred to the Federal Court. According to the appellant, Order 3, which dismissed the application seeking relief including under the JRA on jurisdictional grounds is outside of the scope of the provision and is therefore appellable.

⁵⁷ See s 75(iii) of the *Constitution*.

⁵⁸ (2012) 249 CLR 398.

⁵⁹ [2017] 1 Qd R 515.

⁶⁰ (2022) 276 CLR 216.

⁶¹ (2022) 276 CLR 216 at [28], [33] and [35].

- [70] The phrase “in relation to” is a broad term. That is consistent on jurisdictional grounds, including the application of the JRA, with the purpose of such decisions being “quickly made and conclusively determined” and to limit interlocutory appeals.⁶² However, the dismissal of an application for review is distinct from a decision to transfer proceedings. It is not one which bears any relation to the transfer of proceedings, albeit that it led to the balance of the application being transferred in light of the determination that the Supreme Court lacked jurisdiction, as it was framed as alternative relief. There is a disconnect rather than a relationship between the Orders. In our view, his Honour’s dismissal of the application for review for want of jurisdiction is not part of the decision “in relation to” the transfer of the proceeding to the Federal Court. Section 1337R therefore does not exclude the appeal to this Court.

Utility

- [71] The primary judge granted the alternative relief sought by the appellant and made orders to transfer the application for review to the Federal Court. Notwithstanding that the court granted that alternative relief, the appellant has sought to appeal the decision. That raises a further question as to whether this appeal was inutile.
- [72] When questioned about the utility of the appeal, counsel for the appellant contended that they were exposed to the possibility that the Federal Court may find that the judicial review in fact is one to which the JRA not the ADJR Act applies. We accept that does provide some basis as to why this appeal has utility.
- [73] In the appellant’s written submissions, various possibilities are raised foreshadowing that the appellant may abandon the Federal Court proceedings, including seeking an order under r 668 UCPR to set aside the order transferring the proceedings, if the appeal was successful or seeking an order transferring the matter back to this Court. There is much to be said in favour of the respondents’ contention that r 668 UCPR would not apply, as it would be inconsistent with s 1337R of the *Corporations Act*, and would not be picked up by s 79 of the *Judiciary Act* as Commonwealth law has “otherwise provided” for that matter and that to permit r 668 UCPR to be applied as contended by the appellant would circumvent the effect of s 1337R of the *Corporations Act*. It is however unnecessary to finally decide this matter given that the appeal has been unsuccessful, and we have determined that there is otherwise some utility in the appeal insofar as if the appellant were successful in the appeal he would be faced with the conundrum of having review proceedings in two courts.

Conclusion

- [74] The appellant has failed to succeed on either ground. Costs should follow the event.

Orders

- [75] The orders of the Court should be:
1. Appeal dismissed.
 2. The appellant pays the respondents’ costs of the appeal.

⁶² *Tangalooma Island Resort Pty Ltd v Miles* (1989) 96 FLR 47 at 48 per Kirby J.