1. **Common Law and Constitutional Judicial Review**

South Australia has no statutory judicial review, but the Supreme Court has judicial review jurisdiction by way of the common law. This is derived from the English Courts’ power to review the decisions of lower courts and public authorities.

**State Common Law Judicial Review**

The Supreme Court is invested with the judicial review jurisdiction of the UK Queen’s Bench (s 17 Supreme Court Act 1935 (SA)). The Court is able to grant remedies ‘in the nature of prerogative writs’ (s 199(1) Supreme Court Civil Rules 2006 (SA)), and equitable remedies, when reviewing the decisions of the executive and the lower courts.

**Constitutional Judicial Review (s 75(v))**

Constitutionally entrenched judicial review of decisions made by ‘officers of the Commonwealth’.

- Original jurisdiction of the High Court.
- Referred to as “constitutional writs”.
- Mandamus, Prohibition and Injunction in the Constitution, Court has held that Certiorari is ancillary and Declarations also possible.

**S 39B Judiciary Act 1903 Judicial Review**

Replicates the High Court’s original jurisdiction under s75(v).

- Confers that original jurisdiction upon the Federal Court.
- Essentially – despite its statutory basis – this replicates constitutional jurisdiction.
- S 44 Judiciary Act 1903 (Cth) High Court may remit matters commenced in High Court’s original jurisdiction to the Federal Court.

**Jurisdictional Error**

The foundation of common law (and constitutional) judicial review is jurisdictional error. It is a prerequisite to obtaining one of the prerogative writs in both the state and constitutional review jurisdictions.

- Jurisdiction - the authority to decide
- Jurisdictional error – go beyond jurisdiction
  - If the decision-maker makes a jurisdictional error – the decision is invalid

**NB:** Jurisdictional error and *ultra vires*

- Different historical development; was a time when jurisdictional error was used for judicial bodies and *ultra vires* for administrative bodies.
- In Australia, the terms are now used interchangeably.
- High Court has focused on jurisdictional error as a central concept in judicial review in recent years.

Jurisdictional error is the ground for judicial review, imagine it as an overarching label; many things we will call grounds of review are simply examples of jurisdictional error.

- There is no list of things that are jurisdictional errors, in *Kirk* the HC explicitly rejected the making of such lists.
**Error of Jurisdictional Fact**

- Exceptions to rule that Courts will not review errors of fact
- The fact must objectively exist in order for the decision-maker to lawfully exercise a power. Hence incorrect determination of the fact will create a jurisdictional error, as the decision-maker will go beyond his/her jurisdiction.
- Thus where a finding of fact is classed as ‘jurisdictional’ a court WILL decide that question of fact for itself.

*Corp of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135*

- Involved a proposal to establish a liquid waste treatment plant in the Enfield Council area.
  - Not surprisingly there was considerable opposition from the surrounding community and the Council to the proposal.
- There were questions whether it would be classified as a special or general industry. That classification was important because if a special industry the Local Council had rights as part of the development assessment process and to subsequently pursue a merits review.
- Whether the development was a ‘non-complying’ development was a question of jurisdictional fact
  - “[28] The term "jurisdictional fact" (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion.…..
  - “The determination of the question whether Collex proposed a "non-complying" development, which turned upon the application of the criterion of "special industry", was a condition upon the existence of which there operated the obligation that the Commission not grant consent.”

*Kirk v Industrial Court of New South Wales (2010) 239 CLR 531*

- “It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error”. [71]
- Craig does not provide a rigid taxonomy of jurisdictional error – merely examples [73]
- Citing Craig: Jurisdictional error “if [inferior court] 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 recognizes that jurisdiction does exist” [72]
- In Kirk Industrial Court of New South Wales was a court of limited jurisdiction
  - Subject to judicial review by New South Wales Supreme Court
  - Industrial Court misconstrued provisions of the Occupational Health and Safety Act 1983 (NSW)
  - Did not properly apply the rules of evidence
  - Misapprehended the limits of its functions and powers – jurisdictional error

**Inferior Court Review – Different Standards**

*Craig v South Australia (1995) 184 CLR 163*

- What a jurisdictional error is may be different if you are looking at an inferior court.