

## Administrative Law ( Topic 2 )

### **JURISDICTION TO CONDUCT JUDICIAL REVIEW**

- Superior courts normally possess both a CL and statutory jurisdiction to conduct judicial review.
- Judicial review originated in the inherent CL jurisdiction of superior courts of record to grant prerogative writs. The common purpose of each writ was to enable a court to examine whether a public sector body was complying with the limits proposed by law.
- Each writ control unlawful action in a different way:
  - *Mandamus*: compels the exercise of a public duty
  - *Certiorari*: quashes certain unlawful action
  - *Prohibition*: prohibits a person from acting outside the scope of their powers
- In more recent items the inherent jurisdiction has extended to include equitable remedies.
  - *Injunction*: prevents someone from acting contrary to law
  - *Declaration*: declares the legal rights and obligations of parties.
- CL constraints on jurisdiction:
  - Some constraints come from the nature of jurisdiction, and the underlying constitutional principles which both justify and limit it.
  - Specifically: courts can only review the **legality** of administrative action and not the **merits**.

*Attorney-General (NSW) v Quin (1990)* 170 CLR 1 (Brennan J)

*Justifications for judicial review of administrative action:*

- “The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government.”
- “The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power.”

*Limits on judicial role:*

- “The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.”
- “The authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual... The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice”
- “If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk.”

*What judicial review is:*

- “The court has no jurisdiction simply to cure administrative injustice or error ”
- “The scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.”
- “...what is the law? And that question, of course, must be answered by the court itself”
- These comments explain Australia’s rejection of overseas developments, eg the *Chevron* doctrine.

### COMMON LAW JURISDICTION

- At the Commonwealth level this general law jurisdiction is located in s 75(v) of the Constitution.
- This section grants the HC a general right to issue specific remedies against ‘an officer of the Commonwealth’.
- Although this jurisdiction is constitutional in nature, the HC applies the grounds of judicial review in their CL form.
- Most applications do not raise a general point of importance that is suitable for the HC, so Parliament has granted the Federal Court an equivalent jurisdiction.
- This enables application under s 75(v) to be either passed by the HC to the Federal Court or commenced directly in the Federal Court.
- An equivalent jurisdiction is granted to the Federal Court by s 39B of the *Judiciary Act* 1903. This enables people seeking to invoke the constitutionally entrenched jurisdiction of the HC to lodge claims directly in the Federal Court.
- At Commonwealth level there are three avenues to get jurisdiction:
  - i. High Court: s 75(iii) and 75(v) Constitution;
  - ii. Federal Court: s39B Judiciary Act (same terms of s 75(v))
  - iii. Federal Court via ADJR Act.

## Original jurisdiction of the High Court

- S 75: In all matters:
  - i. arising under any treaty;
  - ii. affecting consuls or other representatives of other countries;
  - iii. in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
  - iv. between States, or between residents of different States, or between a State and a resident of another State;
  - v. *in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;*the High Court shall have original jurisdiction.

### 'In all matters'

- *Re McBain; Ex parte Australian Catholic Bishops Conference (2002)* 209 CLR 372
  - “At the heart of the constitutional conception of a “matter” is a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled. The controversy must be real and immediate.” (Hayne J)
- Facts: Dr McBain, a gynaecologist obtained a declaration from the Federal Court that enabled him to offer in-vitro fertilisation treatment to single woman on the basis that provisions in the Infertility Treatment Act 1995 (Vic) that excluded single women were with the Sex Discrimination Act 1984 (Cth), and therefore inoperative as a result of s 109 of the Constitution.
- The Commonwealth AG granted the Bishop a fiat which allowed it to bring the case before the HC.
- The Bishop did not succeed in the HC. The federal court decision that provision inconsistent with the Commonwealth Act stood and could be relied upon by Dr McBain.
- Court only has jurisdiction over controversy that is capable of resolving by applying legal standard. There is nothing the court can do that affects the legal rights of the Bishops – no legal rights to be affected.

### 'Mandamus, prohibition, injunction'

- Note: you must seek one of the listed remedies to enliven the HCA's original jurisdiction.
  - **Mandamus**: compels the performance of a public duty
  - **Certiorari**: quashes an unlawful decision
  - **Prohibition**: prohibits action which is beyond jurisdiction
  - **Habeas Corpus**: requires the release of a person from unlawful detention.
  - **Injunction**: restrains or compels
  - **Declaration**: declares legal rights

### 'Against an officer of the Commonwealth'

- *R v Murray & Cormie (1916)* 22 CLR 437, 452 (Isaacs J):
  - “An "officer" connotes an "office" of some conceivable tenure, and connotes an appointment, and usually a salary.”
- Includes public servants, federal judges and tribunal members, Ministers.
- State officials are not officers of the Commonwealth as State Government appoints them.
- State judges are generally not officers of the Commonwealth unless federal jurisdiction is exercised.

## English position

- *R v Panel on Takeovers and Mergers; Ex parte Datafin plc* [1987] 1 QB 815, 839 (Donaldson MR)
  - “It is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centre-piece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation”
- It established that the decisions of a **private body exercising public functions** may be amenable to judicial review.
- Before *Datafin*, only bodies established by statute were so amenable, while private bodies could only be sued for their actions in contract or tort law.

## Australian position on Datafin

- Acceptance of *Datafin* by State superior courts, eg *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121, but contra *Mickovski v Financial Ombudsman Service Ltd* (2012) 91 ACSR 106, 116.
- FCA seems to have assumed that statutory corporations are not ‘officers of the Commonwealth’, eg *Post Office Agents Association v Australia Postal Commission* (1988) 84 ALR 563, 575.
- HCA has not dealt with the issue - *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 ('Offshore Processing Case').
- Aronson and Groves argue that a person's right to review shouldn't depend on whether a function was contracted out or not