

TOPIC 2 JURISDICTION TO CONDUCT JUDICIAL REVIEW

[Plaintiff] will seek the judicial review of the administrative decisions [re: x] to demonstrate that the [decision-maker] did not use the right legal reasoning.

2.1 'COMMON LAW' JURISDICTION

2.1.2 The High Court's: S75(V)

Statute: s 75(v) Constitution

In all matters:

(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.

Specific requirements of the High Court's s 75(v) jurisdiction:

- (1) There must be a '**matter**' – see 'justiciability' topic below;

Case: Re McBain; ex parte Australian Catholic Bishops Conference (2002) 209 CLR 372

Facts:

- Victorian Act prohibited IVF treatment to single and same-sex relationships women
- Dr McBain wanted to undertake IVF treatment on his patient who was a single woman
- Dr McBain went to court and argued that the Victorian Act was inconsistent with the Sex Discrimination Act of the Cth.
- The court agreed with him. The state of Victoria did not appeal the Federal court's decision.
- However, years later, Bishops commenced proceedings

Issue: whether the dispute was a 'matter'; that is, some immediate right, duty or liability that was required to be resolved by the court

Held:

- The majority of the court held that the matter was non-justiciable as it did not amount to a 'matter'
- Hayne J: "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**."
- Gleeson CJ held that this dispute did not give rise to a matter to be determined by the court and therefore was non-justiciable:

'The parties to the proceedings (McBain and the Victorian govt.) were bound by the decision. Others (i.e. the bishops) may not have been happy with the decision, or with the process of reasoning by which it was reached. The process of reasoning was not itself a matter, although it may have been of concern to others because of the precedential weight that might be attached to it in other cases. But the fact that somebody, not a party to proceedings, who reads a judge's reasons for a decision, disagrees with those reasons, even where, if applied in another case they may directly affect the reader, does not give rise to a justiciable issue between the reader and the judge.'

- Gaudron and Gummow JJ explained how there was no controversy to be quelled between the parties and hence held that the dispute was non-justiciable.

There is no controversy apparent between the applicants and the respondents, Sundberg J (the judge responsible for the decision) and Dr McBain. The latter has the protections against action against him by the State of Victoria of the declaration made in his favour. But no relief by way of prohibition is sought against him. The learned judge has no interest in the matter; he has discharged the duty to exercise the judicial power of the Commonwealth in the proceeding which came before him and the orders have been entered.

- In other words, the Bishops had no controversy with McBain and Sunberg J. instead, they merely did not like the outcome of the court's decision. As a result, there was

no immediate right, duty or liability that required determination by the court and as a result, there was no 'matter'.

(2) **'in which a writ of Mandamus or prohibition or an injunction is sought'** - You must ask the High Court for at least one remedy in this section. i.e.: mandamus, prohibition or an injunction.

(3) DM must be the **'Commonwealth'** or an **'officer of the Commonwealth'**

What is an 'officer of the Commonwealth'?

- "An "officer" connotes an "office" of some conceivable tenure, and connotes an appointment, and usually a salary." – as per Isaacs J in *R v Murray & Cormie* (1916)
- It is clear that public servants (i.e. a person who works for the state or for local government, such as a judge or teacher), statutory office holders, federal judges, tribunal members, and Ministers are all 'officers of the Commonwealth'.

Can a private company (e.g. a contractor) be an 'officer of the Cth'?

- Federal Court seems to have assumed that statutory corporations are not 'officers of the Commonwealth'. Statutory corporations are created by Acts of state or federal parliaments. E.g. Australia Post
 - E.g. *Post-Office Agents Association v Australia Postal Commission* (1988) 84 ALR 563, 575.
- Some statutory corporations have been privatized. E.g. Qantas, Telstra
- High Court has (so far) avoided grappling with this issue
 - *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 ('Offshore Processing Case').

2.1.3 Federal Court: S 39B Judiciary Act 1903 (Cth)

Statute: s 39B, Judiciary Act 1903 (Cth)

"Subject to subsections (1B), (1C) and (1EA), the **original jurisdiction** of the **Federal Court of Australia** includes jurisdiction with respect to **any matter** in which **a writ of mandamus or prohibition or an injunction is sought** against **an officer or officers of the Commonwealth.**"

2.1.4 Justiciability

- If a dispute is considered fit for judicial review, then it is justiciable
- If a dispute is not considered fit for judicial review, then it is non-justiciable

Justiciability is closely related to the notion of jurisdiction because it raises the question of whether the court is capable of considering a matter. Justiciability is a common law doctrine that applies **only** to judicial review cases commenced outside the *ADJR* Act.

Previously: prerogative power and cabinet decisions were non-justiciable. However, this view changed in *CCSU*.

Case: Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

Facts:

- Margaret Thatcher (PM and Minister for Civil Service) decided that employees of the British Intelligence would not be allowed to join a trade union/participate in strikes for national security reasons
- This decision was made without any warning with British Intelligence staff
- Thatcher used the royal prerogative power to achieve this

- The trade Union of these employees sought judicial review of this decision
Issue: Whether the use of a prerogative power made the dispute non-justiciable
Held: