TOPIC 02

Jurisdiction

Superior courts have both common law and statutory jurisdiction to conduct judicial review

- Supreme Courts of States have inherent jurisdiction from Constitution to conduct supervisory judicial review and issue prerogative writs
- The High Court recently held that the supervisory jurisdiction of Supreme Courts has constitutional protection: ***Kirk v Industrial Relations Commission of NSW (2010)***
- This means State legislation cannot validly exclude judicial review for jurisdictional error

At Commonwealth level, there are 3 avenues for jurisdiction:

- The High Court: **s 75(v)** ***Commonwealth Constitution***
- The Federal Court: **s 39B** ***Judiciary Act***
- The Federal Court: ***ADJR Act***

2.1 COMMON LAW JURISDICTION

2.1.1 High Court

The High Court has original jurisdiction

1) **s 75(v)** ***Constitution*****:** *The High Court shall have* ***original jurisdiction****…In all* ***matters****…in which* ***a writ of Mandamus or prohibition or an injunction*** *is sought against an* ***officer of the Commonwealth****.*

However:

2) **s 44** ***Judiciary Act***: The High Court can **remit** matters it receives under **s 75(v)** to the Federal Court.

This allows applicants who do not have a general point of important administrative issues to be heard whilst allowing the High Court to focus on more important litigation.

2.1.2 Federal Court

3) **s 39B(1)** ***Judiciary Act*****:** *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****.*
    a) Similar if not near identical to **s 75(v)** ***Constitution***
4) **s 77** ***Constitution***: *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****;*

2.1.3 Jurisdictional requirements for judicial review under s 75(v) *Constitution* & s 39B *Judiciary Act*

- **Requirement of a 'matter'**
- Must ask whether there is a matter in respect to which the claimant has standing however there will be no such matter if the matter is entirely political in nature – the matter must be something which the court can rule upon - Consider **justiciability** below
- Need a question of law arising from an attempt/proposal to *administer* a law
- An *immediate* right, title, privilege, immunity, duty or liability must be in issue
- Not merely hypothetical or abstract questions, or seeking advisory opinion (***Re McBain***)

***Re McBain* (2002) 209 CLR 372**

- The Bishops Conference made a contrary submission in support of the validity of the *Infertility Treatment Act 1995* (Vic) after Dr McBain initiated proceedings in the Federal Court in which Sandberg J held that a provision of the Victorian Act was invalid as it was inconsistent with the *Sex Discimination Act 1984* (Cth)

➢ *'People who were not parties to litigation do not have a claim of right to judicial decisions quashed because they are erroneous"* – **Gleeson CJ** at 395

➢ *'At the heart of the constitutional conception of a "matter" is a controversy about rights, duties or liabilities…The 'controversy' must be real and immediate'* – **Hayne J** at 458

➢ *The exercise of judicial power is restricted to cases which require legal rights and interest of and claim by an individual.*

- **Decision made by an 'officer of the Commonwealth'**
- Broad interpretation
- Includes public servants, federal judges, tribunal members and ministers and delegates of ministers
- *'An "officer" connotes an "office" of some conceivable tenure, and connotes an appointment, and usually a salary'* (***R v Murray* (1916) 22 CLR 437** - **Isaacs J at 452)**
- "*The Prime Minister, Ministers, justices of federal courts, officers of statutory bodies and federal public servants are officers of the Commonwealth …"* (***Woodward* (1982) 154 CLR 25** - **Murphy J at 65**)
- ***The decision is a sort that a writ/prohibition/injunction is available as a remedy***
- Examples:
    - Writ of mandamus – compel to perform a public duty
    - Writ of prohibition – restrain a proposed exercise of public power
    - Writ of certiorari – quash the legal effect or legal consequences of a decision
    - Injunction – order to do, or refrain from doing, a particular act
    - Declaration – statement of the legal position (e.g. rights, liabilities, etc)
- By listing these common law remedies, the Constitution entrenches the common law principles associated with these remedies - gives the High Court the same jurisdiction that superior state courts inherently had at federation under common law

2.1.4 Justiciability requirement for common law jurisdiction

1) Justiciability is a common law doctrine that applies only to judicial review cases commenced outside the ***ADJR Act*** – this includes Supreme Courts of States

2) Raises the question of whether the court is capable of considering a matter

- When a court pronounces a matter to be non-justiciable it is expressing a conclusion to one or both of the below questions.

Justiciability raises two separate but related questions (both must be satisfied in order for an issue to be jusiticiable):

- Whether a decision or controversy is amenable to judicial determination (i.e. whether the court *can* resolve the case)
- Whether a decision or controversy should be resolved by a court (e.g. where a court would have to consider the competing merits of many claimants for a limited resource, such as a limited number of fishing licences)

Considerations that may lead a court to conclude that a matter is/is not justiciable (**no single factor is decisive**):

- The **status** of the decision-maker
- The **source** of the power exercised (prerogative versus statute)
- The **nature** of the power and what is involved in its exercise.
- Subject matter of the decision – looking at whether the decision is a highly political one (**polycentric**).

× **<u>Status of the Decision maker</u>**

- The High status of a DM is not fatal to a justiciability claim (***FAI***)

***FAI Insurances Ltd V Winneke* (1982) 151 CLR 342**

- FIA sought a declaration that the decision was void on the ground the Governor in Council (GIC) had not given FAI a reasonable opportunity to be heard in breach of the rules of natural justice (procedural fairness)
- Held: In deciding whether to renew an approval previously given for the purpose of the Act the GIC is subject to the requirements of natural justice, and should give the company an opportunity to be heard before a decision not to renew the approval is made. A decision not to renew given without affording such an opportunity is void.
- Just because a decision was made by the Executive Council does not itself provide reasons to exclude review.
- The Executive Council was empowered to make many decisions ranging from mundane to important – blanket exclusion of the Executive Council from review would create big gap.
- '*In Victorian legislation it is the merest commonplace to assign to the Governor in Council the making of a host of routine administrative decisions, involving neither matters of high government policy nor any nice exercises of policy-oriented discretion'* - **Stephen J** at 353

- *'This may be a case where the discretionary content of a power reposed in the Governor is not of itself sufficient to exclude a right to be heard. Much depends upon the nature of the decision that is made in a particular case'* – **Wilson J** at 398

× **Source of the power**

- Source of power is not decisive; need to look at nature and subject matter of power (***Peko-Wallsend; Council of Civil Service Unions***)
- There was a historical presumption that prerogative powers were not open to judicial review, however this case ruled against this.
- Whilst some prerogative powers are not justiciable (making of treaties, mercy, appointment of ministers, awarding of honours, entering into wars) some can be and therefore are open to judicial review.

d) Nature of the power and what is involved in its exercise

- If the subject matter is particularly complex, involves policy issue, there is a real argument that the matter is non-justiciable
- Moreover, if the court is being asked to consider whether something another country has done is lawful or not, the act state doctrine also comes into play and strengthens the argument that the matter is non-justiciable
- But, if something is a really major breach of human rights, the court may still look into it (***Hicks***)

Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd (1987) 15 FCR 274

- **Bowen CJ and Sheppard J** expressed doubts about whether **cabinet** decision should ever be subject to judicial review as it is a political body

➢ *'In my opinion, subject to the exclusion of non-justiciable matters, the court of this country should now accept responsibility for reviewing the decisions of ministers or the Governor-General in council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or the prerogative* - **Bowen CJ** at 278

➢ *However, the whole subject matter of the decision involved complex policy questions relating to the environment, the rights of Aboriginals, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests such as those of the respondents to this appeal. It appears to me that the subject-matter of the decision in conjunction with its relationship to the terms of the Convention placed the decision beyond review by the court* - **Bowen CJ** at 278-9

➢ *'It is not possible to exclude the judicial review of a decision merely because it was one made by the Cabinet, merely because it was a decision taken in the exercise of the prerogative powers of the crown or merely because the decision combined both of these characteristics. The critical matter is the nature and effect of the relevant decision'*- **Wilcox J** at 304

- The issues at stake here were **non-justiciable** because their subject matter was **highly political**
- Must consider if the decision is justiciable, whether it contains some feature – for example, a relationship to national security or to international relations which makes judicial review inappropriate in the particular case

***Hicks v Ruddock* (2007) 156 FCR 574**

- Mr Hicks confined at Guantanamo Bay – sought judicial review of a decision by Minister for Immigration not to request his release and an order for *habeas corpus*
- The **act-of-state doctrine** states that every sovereign state is bound to respect the independence of every other sovereign **state**, and the courts will not sit in judgment of another government's acts done within its own territory
- Just because a matter involves foreign relations does not make it non-justiciable per **Tamberlin J**

- **'***It is clear in the case before me that the deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle, and is such an exceptional case as to justify proceeding to hearing by this Court'* - **Tamberlin J** at 91

2.2 STATUTORY JURISDICTION THROUGH THE ADJR ACT

A person seeking judicial review of a Commonwealth decision can do so under the ***ADJR Act*** as an alternative to the common law jurisdictions as the Act confers jurisdiction on the Federal Court (and the Federal Circuit Court **s 8(2)**)

- **s 8(1)***: The Federal Court has jurisdiction to hear and determine applications made to the Federal Court under this Act*

3 avenues for review:

- **s 5** – decisions
- **s 6** – conduct related to making of decisions
- **s 7** – failures to make a decision

s 3(1) Interpretation

A ***decision to which this Act applies*** means:

- a decision;
- of an administrative character;
- proposed (or required) to be made under an enactment;

other than

- a decision by the **Governor-General**.
- any class of decision in **Schedule 1**;
    - E.g Security intelligence bodies, Cth/state ministerial councils, Foreign investment approval, Taxation assessment, Industrial arbitration, Defence force discipline, Criminal prosecution etc;

2.2.1 'A decision' or 'conduct for the purpose of making a decision'

s 3(2) *ADJR Act*:

- In this Act, a reference to the **making of a decision** includes reference to:
    - Making, suspending, revoking or refusing to make an **order, award or determination**
    - Giving, suspending, revoking, refusing to give a **certification, direction, approval, consent or permission**

- Issuing, suspending, revoking or refusing to issue a **license, authority or other instrument.**
- Imposing a condition or **restriction.**
- Making a declaration, demand or **requirement.**
- Retaining, or refusing to deliver up, an **article.**
- Doing or refusing to do any other act or thing.

and a reference to a **failure to make a decision shall be construed accordingly**

s 3(3) *ADJR Act*):

Where provision is made by an enactment for the **making of a report or recommendation before a decision** is made in the exercise of a power under that enactment or under another law, **the making of**