TOPIC 2: Jurisdiction to Conduct Judicial Review

Introduction

- There are two avenues to seek judicial review of a Commonwealth decision:
    - Section 75(v) of the Constitution (or s 39B *Judiciary Act*);
    - ADJR Act 1977.

Avenue 1 – The High Court and the Constitution

- Section 75 of the Constitution:

    The HCA shall have original jurisdiction in all **matters**:

    (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

    (v) in which a writ of mandamus or prohibition or an injunction is sought against an **officer** of the Commonwealth.
- Section 77(iii) – Commonwealth Parliament may vest any court of the State with federal jurisdiction.
- As s 75(v) does not include a scheme for review, the original jurisdiction still allows for common law judicial review.
- Direct to High Court of Australia:
    - Section 75(v); and
    - Section 32 of the *Judiciary Act* allows HCA to grant any remedies not listed in s 75(v) as are appropriate to settle the dispute, like declaration/certiorari.
- Direct to Federal Court of Australia:
    - Section 39B of *Judiciary Act* grants jurisdiction to FC where writ of mandamus, prohibition or injunction is sought against officer of Commonwealth.

        - S 39B(1A)(c) specifically enables FC to review validity of subordinate legislation, which court cannot do under ADJR Act because it is not of an administrative character.
        - Federal Circuit Court has no jurisdiction to undertake judicial review at common law, only under ADJR.
- Via High Court to Federal Court:
    - If HCA does not want to hear matter itself, by virtue of s 44(2A) *Judiciary Act*, it can remit matter to FC, which will then exercise jurisdiction under s 39B.

Elements of s 75(v)

E1: Matter

- 'Matter' requires some immediate controversy between the parties (*McBain*).

McBain; Ex parte Catholic Bishops Conference (2002) CLR
F: Case concerned Infertility Treatment Act. Dr McBain wanted to undertake IVF treatment on a single woman, contrary to Act which only allowed married/de facto women. He sought declaration from FC that Act was inconsistent with the Sexual Discrimination Act. Victoria did not put up a fight to the validity of legislation, but the Bishops made submissions as 'amicus curiae'. FC sided with McBain so Bishops appealed to HCA seeking certiorari on basis that FC's reasoning was flawed, not on the grounds that FC was acting outside jurisdiction. H (Gleeson CJ): Bishops had no controversy with McBain – they merely did not like outcome of judgment. There was no immediate right, duty or liability that required determination by a court, and so no matter. Thus 'matter' requires that there be some controversy about rights which, by the application of judicial power, will be quelled, and that controversy must be immediate.

E2: A writ is sought

- Broadly, a prerogative writ (prohibition, certiorari, mandamus) or other remedy (injunction, declaration) must be sought by the applicant for the HCA to have jurisdiction to hear the application.
- By virtue of s 32 *Judiciary Act* certiorari/declaration can be granted.
- The prerogative writs are:
    - Prohibition – order prohibiting DM from taking a proposed course of action or making a proposed decision;
    - Certiorari – order quashing a defective decision;
    - Mandamus – order requiring DM to exercise a discretion in accordance with the law and make a decision.
- Other remedies are more popular as they are not subject to the same stringent conditions as are the prerogative writs. These include:
    - Declaration – order by court, which has no coercive effect, but merely declares the legal rights and liabilities of the parties.
    - Injunction – order by court that DM refrains from undertaking a particular act or to undertake a particular act.

Prohibition and Certiorari – Public Power

- For prohibition and certiorari to operate, it is necessary that the decision that is sought to be challenged was made pursuant to public power (*Datafin*).
- Certiorari is further limited as it operates only to quash the legal effects or the legal consequences of a decision under review, as opposed to a mere tarnished reputation (*Hot Holdings*).

R v Panel on Take-Overs & Mergers; ex parte Datafin (1986) QB
F: Panel administered London stock exchange and was capable of excluding a party from the stock exchange. There was no statute empowering the Panel. Panel excluded Datafin who then sought judicial review. H: Panel was exercising public power: a body, in carrying out a particular function, exercises public power if it is a power the government would so

exercise.

Hot Holdings v Creasy (2002) ALR

F: WA Mining Act gave Minister discretion to grant or refuse an application for a mining lease. Before he made his decision, he had to receive a report from Mining Warden containing a recommendation to grant or refuse an application. If more than one applicant, in report Warden must specify who has priority with regards to who lodged first. Eight applications were lodged within 51 seconds of the Mining Registry's doors opening. Warden used a ballot to pick the priority applicant, but before he did this HH, who was the first person to walk in, commenced proceedings seeking certiorari to quash decision of Warden to hold a ballot.

H: If certiorari was sought against decision of Minister to grant or refuse a mining application, that would have a legal effect because it would determine whether HH could mine the land or not. The decision of the Warden here, although much earlier, carried with it legal consequences also – Minister had to get report from Warden recommending a priority applicant before making its decision. Thus if a decision is a necessary precondition for a DM to make a decision which will affect someone legally, that is regarded as having legal effect.

Forbes v NSW Trotting Club (1979) CLR

F: Club had a trotting course and was vested with power by parliament to regulate all trotting meetings in NSW. Under the club's Rules, it could issue a 'warning off' notice to exclude a person in that state from attending. Forbes was issued one so he sought a declaration he was denied procedural fairness. Club argued the decision to exclude Forbes was made as an exercise of a private right to exclude people from its property. Forbes argued it was public power per the Rules which applied to all members of the public attending racecourses in NSW.

H: Here the Club was exercising public power, as it was under the Rule. To determine whether public law applies, look at the type of power being exercised

and the extent to which it affects the public – here Club had power to prohibit anyone in NSW from attending a racecourse, so clearly public power.

John Fairfax v Aus Telecommunications Commission [1977] NSWLR

F: JF rented two teleprinters from Commission. There was a contract in place which had a clause stipulating that while Commission is liable for any disruption or delays in transmission, it would not be liable for any loss suffered as a result of delays in telegraphic communication. There were by-laws in place which provided that when a teleprinter was rented from Commission, Commission would maintain it. Machine broke, Commission refused to repair as workers were engaged in industrial action. JF sought mandamus.

H (Moffit J): Commission had both contractual (private) and statutory (public) obligations to maintain printer, but the duty to maintain and repair was private. This is because right to payment of rent is a private right, as is the right to have the service maintained, when rent is paid. Court awarded injunction.

NEAT v AMB (2003) CLR

F: WEA was a statutory body established to regulate export of Australian wheat. To export, statute required the exporter get WEA's consent first. However, Act also stipulated that this rule did not apply to AWB and WEA had to consult with AWB each time consent was asked for. Thus AWB could export without consent and could refuse exporting from competitors. NEAT wanted consent, AWB refused so NEAT brought judicial review arguing refusals were made under its statutory power and that AWB adopted an inflexible policy without regard to the merits of the individual applicant.

H (Gleeson CJ): Although AWB had statutory powers, it was a private company entitled to act in best interests of its shareholders. While AWB had private commercial interests in denying NEAT's export, it also had a broad statutory power to do so, so its policy of refusing consent was consistent with statute.