HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE JOHN McBAIN — SECOND RESPONDENT

EX PARTE AUSTRALIAN CATHOLIC BISHOPS CONFERENCE & ANOR — APPLICANTS

Re McBain; Ex parte Australian Catholic Bishops Conference
[2002] HCA 16
18 April 2002
C22/2000

ORDER

Application dismissed with costs.

Representation:

D F Jackson QC with J A McCarthy QC and M Christie for the applicants (instructed by Dibbs Barker Gosling)

No appearance for the first respondent

F P Hampel QC with S J Moloney for the second respondent (instructed by John W Ball & Sons)

Interveners:

R G Orr QC with R Sofroniou intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Ellicott QC with A J Tudehope intervening on behalf of the Australian Family Association (instructed by O'Hara & Company)

B W Walker SC with K L Eastman intervening on behalf of the Human Rights and Equal Opportunity Commission (instructed by the Human Rights and Equal Opportunity Commission)

C M Maxwell QC with K L Emerton intervening on behalf of the Women's Electoral Lobby (Victoria) Inc (instructed by Blake Dawson Waldron)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE JOHN McBAIN — SECOND RESPONDENT

EX PARTE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA EX REL THE AUSTRALIAN EPISCOPAL CONFERENCE OF THE ROMAN CATHOLIC CHURCH — APPLICANT

Re McBain; Ex parte Attorney-General (Cth) ex rel Australian Episcopal Conference of the Roman Catholic Church
18 April 2002
C6/2001

ORDER

Application dismissed with costs.

Representation:

D F Jackson QC with J A McCarthy QC and M Christie for the applicant (instructed by Dibbs Barker Gosling)

No appearance for the first respondent

F P Hampel QC with S J Moloney for the second respondent (instructed by John W Ball & Sons)

Interveners:

R G Orr QC with R Sofroniou intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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CATCHWORDS

Re McBain; Ex parte Australian Catholic Bishops Conference

Re McBain; Ex parte Attorney-General (Cth) ex rel Australian Episcopal Conference of the Roman Catholic Church

Constitutional Law (Cth) – Judicial power of the Commonwealth – Matter – Claims in Court's original jurisdiction to certiorari for non-jurisdictional error of law on the face of the record in respect of concluded Federal Court litigation – Claimants not parties to prior litigation – No parties to prior litigation instituted appeal or sought constitutional relief in respect of the judgment in that litigation – Claimants include Commonwealth Attorney-General seeking to affirm the operation of a State law as not inconsistent with federal law within the meaning of s 109 of the Constitution – Whether claims give rise to a "matter" under Ch III of the Constitution – Whether a matter arises under s 75(v) or s 76(i) of the Constitution independently of the right of appeal – Whether, if so, relief should be granted in the exercise of the Court's discretion.

High Court – Jurisdiction – Whether Court's original jurisdiction extends to claims to certiorari for non-jurisdictional error of law on the face of the record in respect of concluded Federal Court litigation – Claimants not parties to prior litigation – Whether claims give rise to a "matter" under Ch III of the Constitution – Whether a matter arises under s 75(v) or s 76(i) of the Constitution independently of the right of appeal – Exercise of discretion to provide such relief.

Certiorari – Whether available against a judge of a federal superior court in respect of non-jurisdictional error of law on the face of the record – Discretion to grant – Whether Attorney-General entitled to certiorari as of right – Factors favouring discretionary refusal to grant certiorari in respect of non-jurisdictional error of law on the face of the record in litigation to which claimants were not parties.

Practice and procedure – Application to extend time – Application by Commonwealth Attorney-General on the relation of another for writ of certiorari instituted out of time – Factors favouring non-extension of time.

Practice and procedure – Parties – Intervention – Application by Commonwealth Attorney-General – Intervention by Attorney-General to put submissions partly at odds with submissions put by relator in name of Attorney-General.

Words and phrases – "matter".

Commonwealth Constitution, ss 75(v), 76(i).
Judiciary Act 1903 (Cth), ss 30(a), 32, 33, 78A.
High Court Rules, O 55 r 17, O 64 r 2.

1 GLEESON CJ. These proceedings are brought, in the original jurisdiction of this Court, to quash a decision of a single judge of the Federal Court of Australia, Sundberg J[1]. The ground of challenge to the decision is not that the judge acted outside jurisdiction, or otherwise fell into jurisdictional error. It is that the decision, made within jurisdiction, was wrong in law. No party to the action in the Federal Court desires to question the judge's decision. It was not the subject of any appeal. The applicants in this Court were not parties to the action in the Federal Court. The primary question that arises in this Court concerns the manner in which the challenge to the Federal Court decision is now made. It raises considerations of importance to the structure and role of the federal judiciary. If that question is resolved adversely to the applicants, it would be both unnecessary and inappropriate for this Court to decide whether the decision of Sundberg J was correct.

2 The starting point must be a consideration of the nature of the matter which came before the Federal Court, and in respect of which that Court exercised the judicial power of the Commonwealth. The power of the Parliament to make a law defining the jurisdiction of the Federal Court is, relevantly, a power to make laws with respect to "matters" (Constitution, s 77). The original jurisdiction of this Court is conferred by the Constitution in "matters" (Constitution, ss 75, 76). It is necessary to identify the matter with respect to which the jurisdiction of the Federal Court was exercised, to relate that to the proceedings in which the jurisdiction of this Court is invoked, and to inquire whether the claims made in these proceedings involve a matter.

3 The framers of our Constitution adopted the term "matters" in preference to the terms "cases" and "controversies" which appear in Art III of the United States Constitution, and there are material differences between the two contexts[2]. Even so, Ch III was written "with a close eye to the judicial provisions of the United States Constitution"[3]. In neither jurisdiction is giving advisory opinions to the other branches of government regarded as a legitimate function of the federal judiciary. In *In re Judiciary and Navigation Acts*[4] the majority of this Court, holding invalid legislation purporting to confer on the Court such a jurisdiction, said:

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1 *McBain v Victoria* (2000) 99 FCR 116.

2 *Truth About Motorways v Macquarie Infrastructure Investment Management* (2000) 200 CLR 591 at 603 [21] per Gleeson CJ and McHugh J.

3 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507-508 per Mason J; Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 209.

4 (1921) 29 CLR 257 at 265.

> "we do not think that the word 'matter' in s 76 [of the Constitution] means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court."

4 This does not mean that there must always be a controversy between parties. As was pointed out in *In re Judiciary and Navigation Acts*[5], and again in *R v Davison*[6], judicial power may be exercised in proceedings *ex parte*, and in relation to subjects which, in another context, may have an administrative character. But the essential flaw in the legislation held invalid in the former case was that, inconsistently with s 76 of the Constitution, it purported to empower the Court "to determine abstract questions of law without the right or duty of any body or person being involved."[7]

5 Thus the Court does not pronounce, in the abstract, upon the validity or meaning of Commonwealth or State statutes. To do so would not be an exercise of judicial power conferred by or under Ch III. Such pronouncements are made in an adversarial context, where there is an issue concerning some right, duty or liability. As the majority in *North Ganalanja Aboriginal Corporation v Queensland*[8] put it, quoting from *In re Judiciary and Navigation Acts*:

> "The law is not judicially administered by judicial declarations of its content 'divorced from any attempt to administer that law'."

6 It is the relationship, or absence of relationship, between the question of law sought to be raised for the Court's decision in the present case, and any attempt to administer that law, that, in my view, is decisive.

7 The adversarial context in which, subject to the qualifications earlier mentioned, the judicial power of the Commonwealth is exercised, may impose practical limitations upon the capacity of the judicial branch of government to resolve legal questions. Not all parties to legal disputes submit their disputes for resolution by the judicial process. If they do not, no occasion for the exercise of judicial power arises. Courts do not have a mandate to seek out interesting and important questions of law, and decide them, irrespective of the desire of parties to litigate. Whatever may be seen as the precise extent of the role of judges in

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5 (1921) 29 CLR 257 at 266-267.

6 (1954) 90 CLR 353 at 368 per Dixon CJ and McTiernan J.

7 (1921) 29 CLR 257 at 267.

8 (1996) 185 CLR 595 at 612.

making or declaring the law, it is limited in one vital, and salutary, respect: it can only be exercised in the course of deciding cases that are brought for judicial decision. And, even where litigation takes place, a losing party may, for any one of a number of reasons, including expense, accept a judicial decision without pursuing rights of appeal. Most decisions of courts of first instance never become the subject of appeal. Those decisions bind the parties, even though their precedential value may be limited, or their correctness may later be called in question, either at first instance, or on appeal, in proceedings between other parties. Many issues, or potential issues, of both private and public law, may never be judicially decided, or may never be decided by an appellate court, simply because of the manner in which people pursue their individual interests. And there may be limits, including limits dictated by political considerations, upon the lengths to which law enforcement authorities are prepared to go to enforce legislation in the courts.

8 In the present case, a law of the State of Victoria, which apparently bound a citizen in the conduct of his professional practice, was claimed by the citizen to be invalid. The Victorian authorities did not attempt to enforce the law against the citizen, or, when confronted with a legal challenge, to argue in support of its validity; although the Parliament of Victoria did not repeal the law. The validity of the law was a matter of concern to people other than the particular citizen and the law enforcement authorities, but the process of adversarial litigation turned out to be an unsatisfactory vehicle for testing that question. That is not an unusual situation. Decisions of courts often leave the law in a condition unsatisfactory to people who may be frustrated by the absence of an opportunity to challenge such decisions, or to test the law themselves.

9 Dr McBain found that certain treatment he proposed to administer to his patient, Ms Meldrum, was prohibited by s 8 of the *Infertility Treatment Act* 1995 (Vic) ("the Victorian Act"). That legislation was enacted for purposes which included the purpose of regulating the use of in-vitro and other fertilisation procedures and donor insemination procedures (s 1). The Victorian Parliament, in the Act, declared an intention that, in the administration of the Act, the welfare and interests of persons born as a result of a treatment procedure were to be paramount, and that infertile couples should be assisted in fulfilling their desire to have children (s 5). Section 8 of the Act limits the class of persons to whom treatment procedures can be provided. It provides that a woman who undergoes a treatment procedure must be married and living with her husband or must be living with a man in a de facto relationship. Section 6 imposes a penalty of fine or imprisonment for carrying out a fertilisation procedure contrary to s 8. Other provisions of the Act (eg ss 9, 10, 11, 20, 21, 63, 74, 75) reflect an assumption that infertility treatment will be provided, and children born, in a familial context, where two parents take responsibility for the upbringing of a child. It is not for this Court to decide whether that is sound legislative policy; but it is obvious that this is a subject upon which many people in the community hold strong views. Dr McBain claimed that s 8 was inconsistent with s 22 of the *Sex Discrimination*

Act 1984 (Cth) ("the Commonwealth Act"). If that contention is correct, then, by virtue of s 109 of the Constitution, s 8 is invalid and Dr McBain, accordingly, is free to act in a manner contrary to its provisions without fear of prosecution or punishment. To vindicate his claim, he commenced proceedings in the Federal Court against the State of Victoria, the Minister for Health of the State of Victoria, and the Infertility Treatment Authority. He also joined Ms Meldrum as a respondent. He claimed a declaration that s 8 was invalid and sought consequential relief. Proceedings so constituted involved an assertion by Dr McBain, advanced against those responsible for administering the relevant Victorian law, that the law was invalid because of inconsistency with a law of the Commonwealth, and that he was not bound by its terms. That claim gave rise to a matter arising under the Constitution. The matter concerned the claim that Dr McBain was at liberty, without fear of contravention of the law and of the possible consequences of such contravention, to administer infertility treatment contrary to the terms of s 8 of the Victorian Act.

10 We have only limited information as to the circumstances which prompted Dr McBain to commence his action in the Federal Court. We do not know whether he was ever threatened with prosecution. We do not know what attitude was taken by the Victorian authorities, before the commencement of the Federal Court action, to the enforcement of the provisions of the Victorian statute.

11 As the contentions advanced in argument in this Court demonstrate, the question whether s 8 of the Victorian Act is inconsistent with s 22 of the Commonwealth Act is one upon which cogent arguments can be advanced either way. It involves the true construction of the Commonwealth Act and, according to certain submissions put to us, questions as to the validity of s 22 itself.

12 In the event, none of the respondents to Dr McBain's action sought to resist his claim. The State of Victoria and the Minister did not concede inconsistency, but they did not address any argument to the Federal Court in support of the validity of the Victorian legislation. The Infertility Treatment Authority adopted a passive role. Ms Meldrum, appearing by counsel, supported Dr McBain. We do not know when Dr McBain or his lawyers first discovered that this would be the litigious stance of the various other parties to the action. It was not suggested in argument that the proceedings in the Federal Court were collusive. But they were not defended by the parties joined by Dr McBain as respondents to his action. As sometimes happens, the adversary procedure failed to produce a contest between the supposedly adversarial parties. Members of the public who supported the policy of the Victorian Act found that, in the proceedings brought to test the validity of the Act, no party sought to uphold the legislation.

13 Notices of the proceedings were given to all Attorneys-General, including the Attorney-General of the Commonwealth, pursuant to s 78B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Sections 78A and 78B of the Judiciary Act

are a legislative response to some of the difficulties mentioned above. It often happens that issues as to the meaning or validity of statutes, including constitutional issues, are raised in proceedings between private parties; proceedings of which governments affected by such issues may not be aware. Section 78A empowers the Commonwealth and State Attorneys-General to intervene in proceedings that relate to a matter arising under the Constitution or involving its interpretation. (Dr McBain's case was such a matter). Section 78A(3) provides that, where such intervention occurs, the intervener is, for purposes of instituting or resisting an appeal, to be taken to be a party to the proceedings. Section 78B requires notification to the Attorneys-General of pending causes which involve a matter arising under the Constitution or involving its interpretation. Section 40 provides that, if such a cause is pending in a federal court other than the High Court, or in a court of a State or Territory, then, upon the application of an Attorney-General, the cause shall be removed into the High Court. In Dr McBain's case, there was no intervention by any Attorney-General, and no application for removal of the cause into this Court.

14 In the Federal Court, the only active supporters of the validity of the Victorian legislation were the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church ("the Bishops"). The Bishops filed a notice of motion seeking, in the alternative, that they "be joined in this proceeding as fifth and sixth respondents respectively pursuant to O 6 r 8 [or] that [each group of Bishops] be granted leave to intervene … as *amicus curiae*". On the hearing of the motion, the application was confined to an application for the Bishops to be heard as *amici curiae*. Sundberg J said in his reasons for judgment that he granted that application because otherwise there would have been no contradictor. There may have been a question whether O 6 r 8 of the Federal Court Rules applied to the Bishops. That rule permits joinder as a party of a person who ought to have been joined or whose joinder is necessary to ensure that all matters in dispute may be effectually and completely determined upon. The Bishops clearly did not fall into the first category. Ultimately, they did not press an argument that they fell into the second category. If such an argument had been successful they would have had a right to appeal against an adverse decision; but they would have been at risk as to costs. The reference in the notice of motion to *intervening* as *amici curiae* was inaccurate, but nothing turns on that[9]. Ultimately the Bishops sought and obtained leave to be heard as *amici curiae*. They were not parties, and had no right of appeal.

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9 As to the difference between intervention and putting submissions as *amicus curiae*, and as to the basis for making an application to take one or other course, see *Levy v Victoria* (1997) 189 CLR 579 at 600-605 per Brennan CJ and 650-652 per Kirby J.

15 Sundberg J decided the case in favour of Dr McBain, declaring that s 8 of the Victorian Act was invalid, and that Dr McBain could lawfully carry out treatment procedures contrary to its terms. Consistently with their conduct in the action, none of the respondents to the action appealed.

16 It was against that background that the proceedings in this Court were instituted. The steps that were taken are described in the reasons for judgment of Gaudron and Gummow JJ. Stripped of some of the procedural complexities there examined, including problems as to standing, limitations upon time, and the role of interveners in this Court, the applications seek relief in the form of certiorari, quashing the decision of Sundberg J for error of law on the face of the record. The essential error is said to lie in the conclusion that s 8 of the Victorian Act was inconsistent with s 22 of the Commonwealth Act and therefore, by virtue of s 109 of the Constitution, invalid.

17 The ordinary processes of appeal not having been invoked, and the parties to the proceedings before Sundberg J being content to accept his decision, the question arises as to the capacity of the applicants (effectively, the Bishops and the Attorney-General of the Commonwealth at the relation of the Bishops) to have the decision quashed by certiorari. That question requires consideration of the jurisdiction of this Court which the applicants seek to invoke.

18 There are two possible sources of jurisdiction: ss 75(v) and 76(i) of the Constitution. Reliance on s 76(i), in turn, directs attention to ss 30(a) and 32 of the Judiciary Act. In each case, it is necessary to identify the matter in which the Court is said to have jurisdiction.

19 Since no jurisdictional error is attributed to Sundberg J, no officer of the Commonwealth is alleged to have acted in excess of jurisdiction, and no basis for prohibition has been shown[10]. Certiorari under s 75(v) of the Constitution is ancillary to the jurisdiction to grant prohibition, mandamus, or an injunction[11]. Accordingly, there being no jurisdiction under s 75(v), it becomes necessary to turn to s 76(i) and to ss 30(a) and 32 of the Judiciary Act.

20 Section 76(i) empowers the Parliament to make laws conferring original jurisdiction on the Court in any matter arising under the Constitution or involving

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10 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 644 per Brennan CJ, Deane and Dawson JJ, 653 per Toohey, McHugh and Gummow JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14], [16] per Gaudron and Gummow JJ.

11 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14] per Gaudron and Gummow JJ.

its interpretation. It is argued for the applicants that ss 30(a) and 32 of the Judiciary Act are such laws. Section 30(a) confers jurisdiction on the Court in all matters arising under the Constitution or involving its interpretation. Section 32 empowers the Court in the exercise of such jurisdiction to grant all such remedies as the parties are entitled to; so that as far as possible all matters in controversy between the parties may be completely and finally determined. What is the matter arising under the Constitution or involving its interpretation? What are the matters in controversy between the parties?

21 Before those questions are answered, it should be noted that the argument for the applicants assumes that a writ of certiorari is a remedy of the kind to which s 32 refers, and that such a remedy may be granted in respect of a decision of the Federal Court on the basis of non-jurisdictional error of law on the face of the record. The second part of that assumption was strongly disputed, reliance being placed on the reasoning of Deane J in *R v Gray; Ex parte Marsh*[12]. It is unnecessary to decide that question in this case. Furthermore, it is common ground that, assuming certiorari may go to the Federal Court for non-jurisdictional error, the remedy is discretionary. Arguments were advanced both ways on the matter of discretion. As will appear, I do not reach that issue. But if I did, I would find it necessary in considering the position of the Bishops, and the significance of their failure to press for joinder as parties to the action in the Federal Court under O 6 r 8 of the Federal Court Rules, to form a view on whether their position was covered by that rule. If O 6 r 8 did not apply to their position, and they had no realistic prospect of becoming parties to the proceedings, then their decision to confine their role in the Federal Court to that of *amici curiae*, with the consequence that they had no right of appeal, would, in my mind, have a discretionary significance different from that which it might otherwise have. Furthermore, a full appreciation of their position would require attention to the significance of the fact that the Victorian authorities did not seek, by argument, to uphold the Victorian legislation.

22 The controversy (such as it was) between Dr McBain and the public authorities responsible for the administration of the Victorian legislation, concerning the question whether Dr McBain would be in breach of the law, and liable to prosecution and punishment, if he were to provide treatment to Ms Meldrum and others, contrary to the terms of s 8 of the Victorian Act, was settled by the exercise of federal judicial power by Sundberg J; and the parties to that controversy were content to accept his decision. The Federal Court's exercise of judicial power in relation to the matter the subject of its jurisdiction had run its course. The parties to the proceedings were bound by the decision. Others 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

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12 (1985) 157 CLR 351 at 385-389.

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. Different considerations may apply where a stranger to proceedings complains that a court or tribunal has exercised, or is threatening to exercise, power in excess of jurisdiction. But there is no claim here that Sundberg J exceeded jurisdiction. The complaint is simply that he made an error of law in the due exercise of his jurisdiction.

23 This Court is asked, by people who were not parties to the action in the Federal Court, to quash the decision of Sundberg J on the ground that it was wrong. People who were not parties to litigation do not have a claim of right to have judicial decisions quashed because they are erroneous. Suppose, for example, a taxpayer became involved in litigation against the revenue authorities, in the Federal Court, and the litigation raised a question as to the interpretation of a certain provision of the Act, under which tax is assessed. That question might affect many other taxpayers as well. Suppose a Federal Court judge answers the question adversely to the taxpayer, who accepts the decision and does not appeal. It does not follow that some other taxpayer, affected by the same issue, could have the decision quashed. The second taxpayer's adverse opinion of the correctness of the judge's reasoning does not give rise to a justiciable issue between the second taxpayer and the judge; and the judge has made no determination of the second taxpayer's rights, even though, in a precedential sense, the decision may affect the assertion of those rights. Or suppose the taxpayer succeeds in the Federal Court, on a basis that points the way to the success of some arrangement to minimise tax, and the revenue authorities do not appeal. Concerned citizens, opposed to tax minimisation, do not thereby find themselves legally at issue with the judge, or the taxpayer, or the revenue authorities.

24 A similar problem could arise in relation to litigation which is settled following a decision at first instance. In the United States, it has been held that if, pending an appeal, a case is settled and the judgment becomes moot, federal judicial power may not be exercised by appellate consideration of the merits, but extends only to orders for the proper disposition of the proceedings[13].

25 Whether the outcome of the Federal Court action was correct or erroneous, the rights of Dr McBain in relation to the effect of s 8 of the Victorian

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13 *Walling v Reuter Co* 321 US 671 at 677 (1944); *US Bancorp Mortgage Co v Bonner Mall Partnership* 513 US 18 (1994). See Chemerinsky, *Federal Jurisdiction,* 3rd ed (1999) at 126-129.

Act upon his medical practice have been declared by an exercise of the judicial power of the Commonwealth. The parties bound by that declaration include the State of Victoria and the Authority charged with the responsibility of administering the Victorian Act. There is no justiciable issue between the Bishops and Dr McBain, or the Attorney-General of the Commonwealth and Dr McBain, as to those rights. And there is no justiciable issue between the Bishops or the Attorney-General of the Commonwealth and Sundberg J.

26 No law of the Commonwealth has been declared to be invalid. No attempt to administer or apply a law of the Commonwealth has been impeded. The moving parties in the proceedings in this Court contend that, contrary to what was held by Sundberg J, a law of Victoria is valid. The contention may or may not be correct, but it cannot be determined by this Court as an abstract or hypothetical question divorced from any attempt to administer the law in question. The Attorney-General of the Commonwealth is not attempting to administer or enforce the law of Victoria[14]. The Victorian authorities accept the decision of the Federal Court. The Bishops, who support the policy of the law, who are dismayed that Dr McBain has been held to be entitled to ignore it with impunity, and who are no doubt concerned that the practical consequence of the decision of Sundberg J will be that the Victorian authorities, medical practitioners, and others, will disregard the law as invalid, contend that the judge made an erroneous decision in favour of Dr McBain. But for one citizen to say that a judge wrongly decided a case in favour of another citizen does not give rise to a matter. Nor does a complaint by the Attorney-General of the Commonwealth that a law of the State of Victoria has been held invalid, by a decision which is accepted by, and binds, the State of Victoria, in circumstances such as the present, give rise to a matter.

27 There is no subsisting matter to found the jurisdiction that has been invoked.

28 Both applications should be dismissed with costs.

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14 cf *R v Hughes* (2000) 202 CLR 535 at 554 [36].

29 GAUDRON AND GUMMOW JJ. In order to appreciate the issues which arise in these two applications in the original jurisdiction of this Court, it is necessary to describe what transpired in certain concluded litigation in the Federal Court. It then will be convenient to demonstrate that the claims made by the applicants to certiorari for non-jurisdictional error of law on the face of the Federal Court record give rise to no "matter" within the meaning of Ch III of the Constitution, and thus must fail.

30 Paragraph (b) of s 39B(1A) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") confers original jurisdiction on the Federal Court of Australia "in any matter … arising under the Constitution or involving its interpretation". This jurisdiction was invoked in an application (No V673 of 1999) made to the Federal Court on 3 December 1999 in which declaratory relief was sought. The applicant was Dr John McBain. There were four respondents: the State of Victoria, the Minister for Health of the State of Victoria, the Infertility Treatment Authority and Ms Lisa Meldrum, respectively. The second respondent ("the Minister") was charged with the administration of the *Infertility Treatment Act* 1995 (Vic) ("the State Act"). The third respondent ("the Authority") is a body corporate established by s 121 of the State Act, and having various powers, functions, duties and consultation requirements detailed in s 122 thereof.

31 Dr McBain is a gynaecologist specialising in reproductive technology and in-vitro fertilisation ("IVF") techniques. Ms Meldrum wished to obtain IVF treatment and consulted Dr McBain. He concluded that a treatment procedure ought to be provided to her but told her that, since she was neither married nor living with a man in a de facto relationship, the State Act precluded her from undergoing that treatment procedure. In particular, Ms Meldrum did not fall within the description of persons in s 8 of the State Act who may undergo treatment procedures.

32 Dr McBain is approved by the Authority under Div 3 of Pt 8 (ss 101, 102) of the State Act to carry out fertilisation procedures under that statute. It would be an offence under s 6 of the State Act for Dr McBain to carry out such a procedure unless he was satisfied that the woman undergoing the procedure complied with the requirements of s 8 of the State Act.

33 In his application, Dr McBain sought a declaration to the effect that s 8 of the State Act is rendered invalid by s 109 of the Constitution for inconsistency with s 22 of the *Sex Discrimination Act* 1984 (Cth) ("the Commonwealth Act"). Section 22 of the Commonwealth Act renders it unlawful for a person who provides goods or services or makes facilities available to discriminate against another person on the ground, among other things, of the marital status of that other person, by refusing to provide the other person with those goods or services or to make those facilities available to the other person.

34 At the hearing before Sundberg J, Dr McBain, the State, the Minister and Ms Meldrum appeared by counsel. Counsel for Ms Meldrum adopted the submissions made on behalf of Dr McBain. The Authority in effect filed submitting appearance. Counsel for the State and the Minister took what they identified as a "neutral position", neither asserting nor conceding an inconsistency between the State and federal laws.

35 The Federal Court acceded to an application by counsel on behalf of the Australian Catholic Bishops Conference ("the Bishops") and the Australian Episcopal Conference of the Roman Catholic Church ("the Episcopal Conference") that they be heard as amici curiae. The first amicus has a membership comprising 42 archbishops and bishops exercising office in one of the 32 Roman Catholic dioceses in Australia; the second body is a company limited by guarantee which is a corporate trustee of the first. Counsel for the amici submitted that, upon the proper construction of s 22 of the Commonwealth Act, s 22 did not apply to the provision of that treatment sought by Ms Meldrum and that there was no inconsistency with the State Act; accordingly, the requirements of s 8 of the State Act applied to Ms Meldrum.

36 The order by Sundberg J granting the Bishops and the Episcopal Conference leave to intervene as amici curiae was made upon their motion which sought, in the alternative, that those bodies be joined as fifth and sixth respondents. That application was not proceeded with. One consequence of that election was that the amici had no standing to appeal the decision of Sundberg J.

37 Notices of the Federal Court proceeding were given to the Attorneys-General as required under s 78B of the Judiciary Act; there was no intervention in response to those notices. Section 78A(1) provides for intervention by Commonwealth, State, Australian Capital Territory and Northern Territory Attorneys-General "on behalf of" the respective polities in proceedings that "relate to a matter arising under the Constitution or involving its interpretation". Where there is such an intervention then, for the purposes of the institution and prosecution of an appeal, the Attorney-General "shall be taken to be a party to the proceedings" (s 78A(3)). It should be observed that it is the Attorney, not the Commonwealth or other polity, who receives the status of a party. That is significant for arguments considered later in these reasons.

38 It also should be added that, at any stage before final judgment in the Federal Court, the cause pending in that Court might have been removed into the High Court upon application by any of the Attorneys-General and by order of the High Court made "as of course": Judiciary Act, s 40(1). No such application under s 40 was made.

39 On 28 July 2000, Sundberg J delivered reasons for judgment[15] and pronounced orders. However, the orders were not entered until 9 August 2001. Sundberg J made an order in the following terms for declaratory relief:

> "1. [Section] 8(1) of [the State Act], to the extent to which it restricts the application of any treatment procedure regulated by it to a woman who –
>
> (a) is married and living with her husband on a genuine domestic basis; or
>
> (b) is living with a man in a de facto relationship as defined in s 3(1) of the State Act
>
> ('the marriage requirement'), is inconsistent with s 22 of [the Commonwealth Act] and inoperative by reason of s 109 of [the Constitution].
>
> 2. The sections of the State Act referred to in the attached Schedule[16], to the extent that they are dependent upon the marriage requirement, are inconsistent with s 22 of [the Commonwealth Act] and inoperative by reason of s 109 of the Constitution.
>
> 3. The applicant may lawfully carry out a treatment procedure in respect of the fourth respondent notwithstanding that she does not satisfy the marriage requirement."

Paragraph 3 was properly made as an application of pars 1 and 2 to the circumstances of the applicant; his peril of contravention of the State Act had supplied his standing[17]. His Honour ordered that the State and the Minister pay the costs of Dr McBain.

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15 *McBain v Victoria* (2000) 99 FCR 116.

16 The Schedule identifies ss 8(2) and (3), 9(1)(b), 10(1)(a) and (b), 10(2), 11(1) and (2), 18(1)(a) and (c), 20(1), (2) and (3), 21, 62(2)(d), 63(2)(c), 66(c), 67(1) and (4)(a), 71(1), (2), (3), (6), (7), (8) and (9), 72(1), (3), (4), (5), (7) and (8). The Schedule was included in response to submissions respecting the consequential effects of the declaration in par 1 of the Order, that s 8 was inoperative.

17 cf *Croome v Tasmania* (1997) 191 CLR 119 at 126-127, 138.

40 The Federal Court is created by the *Federal Court of Australia Act* 1976 (Cth) as a superior court of record (s 5(2)). Sections 24 and 25 of that Act provide for appeals to a Full Court and s 33 provides for appeals (by special leave) to this Court. The orders of the Federal Court remain effective and binding upon the parties to the proceeding in which they were made until they are set aside on appeal or by relief granted in the original jurisdiction of this Court pursuant to s 75(v) of the Constitution for jurisdictional error; Sundberg J, as a judge of the Federal Court, is an officer of the Commonwealth for the purposes of par (v) of s 75. Further, *Re Macks; Ex parte Saint*[18] establishes that the authority of the Federal Court to make a determination which is binding in this way extends to the situation where there is a question whether the Federal Court had jurisdiction in the matter.

41 However, no suggestion has been made that the Federal Court lacked jurisdiction or exceeded its jurisdiction in making the orders in question. Plainly it acted within the jurisdiction conferred by par (b) of s 39B(1A) of the Judiciary Act. Further, in this Court, no party to the Federal Court litigation has asserted that in any respect the Federal Court fell into error of any description. No appeal has been instituted. No party to the determination by the Federal Court seeks relief under s 75(v) in this Court. The exercise of the judicial power of the Commonwealth in the disposition of the matter of which Sundberg J was seized is at an end.

42 Yet, in the present two proceedings in the original jurisdiction of this Court (No C22/2000 and No C6/2001), the applicants, who were not parties to the litigation in the Federal Court, move this Court in the first instance for orders absolute which would quash the decision of Sundberg J. The application in C22 was commenced in October 2000, that is to say within six months of the pronouncement of the Federal Court orders. However, the application in C6 was commenced on 17 August 2001 well outside that period.

43 Order 55 r 17 of the High Court Rules provides that an order nisi for a writ of certiorari should not be granted unless the application is made not later than six months from the date of the order of the court or tribunal in question. Although the second and relator application, C6, is out of time, it is accepted that there is a power to extend the period specified in O 55 r 17[19].

44 The applicants in C22 are the Bishops and the Episcopal Conference. The applicant in C6 is the Attorney-General of the Commonwealth on the relation of

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18 (2000) 204 CLR 158.

19 Order 64 r 2.

the Episcopal Conference. That may be thought to obviate any dispute as to the standing of the applicants in C22 and to render C22 otiose. However, C6 was instituted out of time and, as will appear, the relator and the Attorney-General are at odds respecting some of the grounds upon which relief is sought. To each application Sundberg J is the first respondent and Dr McBain (the applicant in the Federal Court proceeding) is the second respondent. None of the four respondents to the Federal Court proceeding was joined as respondent in this Court. They were given notice of the present proceedings.

45 The Court granted applications for intervention by the Women's Electoral Lobby (Victoria) Inc, the Human Rights and Equal Opportunity Commission, and the Australian Family Association. The first two interveners oppose the grant of relief in C6 and C22, and the third supports it.

46 In each application, one ground for relief is the absence of inconsistency between s 8 of the State Act and s 22 of the Commonwealth Act. In other respects, to which reference will be made, the grounds do not coincide. However, in each application the primary relief sought is the same. In the written submissions it was formulated as follows:

> "An order that a writ of certiorari issue quashing the decision of [Sundberg J] in Matter V623 of 1999 in the Federal Court of Australia made on 28 July 2000 and entered on 9 August 2001."

No relief (for example, by way of prohibition) is sought against Dr McBain, but it is submitted that he is joined appropriately in respect of the certiorari application.

47 If the application for extension of time in the relator proceeding, C6, is unsuccessful then in the earlier matter, C22, the applicants, the Bishops and the Episcopal Conference, would press a motion that "the Attorney-General of the Commonwealth of Australia (Ex relatione [the Episcopal Conference]) be joined as an applicant/prosecutor in these proceedings". The Attorney-General, if so joined, would put submissions partly at odds with those of the relator. The Attorney also asserts a right of intervention under s 78A of the Judiciary Act which extends to putting submissions contrary to those of the applicants he otherwise supports.

48 The involvement of the Attorney-General as an applicant arises from the grant of two fiats, the first on 10 August 2001 and the second on 29 August 2001. It is the later fiat to which attention should be devoted. It was expressed as a grant to the Episcopal Conference of the Attorney's fiat:

> "to seek relief in the original jurisdiction of the High Court in relation to the judgment of the Honourable Justice Sundberg of the Federal Court of Australia in *McBain v State of Victoria* (2000) 99 FCR 116.
>
> The grant of the fiat is limited to an application for relief on the basis that the [Commonwealth Act] does not, as a matter of construction, apply to infertility treatment the subject of the [State Act] and is not inconsistent with the [State Act] for the purpose of section 109 of the Constitution …
>
> The fiat is granted on the basis that any proceeding commenced or maintained in reliance on the fiat is at the sole risk and cost of the relators."

49 For their part, the Bishops and the Episcopal Conference rely upon further grounds. In particular, they refer to sub-ss (4) and (10) of s 9 of the Commonwealth Act. These provisions require that s 22 of that statute be read so that it has "effect in relation to discrimination against women, to the extent that the provisions [of s 22] give effect to [the Convention on the Elimination of All Forms of Discrimination Against Women ('the Convention')]". A copy of the English text of the Convention is set out in the Schedule to the Commonwealth Act. The effect of s 9 is to require s 22 to be read in a particular fashion and not otherwise. The Bishops and the Episcopal Conference contend that, to the extent that s 22 of the Commonwealth Act has the operation and scope propounded by Sundberg J in his reasons for judgment, it is not, within the limitation upon s 22 imposed by s 9, a provision which has as its purpose or object the implementation of the Convention.

50 These submissions as to the construction of the Commonwealth Act turn upon the application of s 9 and thus indirectly upon the provisions of the Convention. However, the applicants, in our view correctly, accept that the issues presented are of construction, not validity, of the Commonwealth Act; in particular, no question arises respecting the scope of the external affairs power (s 51(xxix))[20].

51 On the other hand, the Attorney-General submits that s 22 does have as its purpose or object the implementation of the Convention. The Attorney's concurrence with the Bishops and the Episcopal Conference is, as the terms of the fiat indicate, limited to the proposition that on the proper construction of s 22 there is no inconsistency between the State Act and the Commonwealth Act, and that Sundberg J erred in law in deciding the contrary.

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20 cf *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315 at 327-328.

52 From this procedural imbroglio, in which the relator and the Attorney are partly at odds and seek to have the Court resolve their differences, various questions arise. They include the standing of the Bishops and the Episcopal Conference in the absence of the fiat, the effect of the grant of the fiat upon the conduct of the litigation on the relation of the Episcopal Conference, and the advancement by the Attorney-General, purportedly as an intervener "on behalf of the Commonwealth" under s 78A of the Judiciary Act, of submissions contrary to those by counsel in the proceeding initiated by the Attorney on relation. It has been observed above that, nevertheless, s 78A(3) renders the Attorney, not the Commonwealth, a party. In argument, the question was raised of the applicability for the present litigation in this Court of what was said by Lord Cottenham LC of the High Court of Chancery[21]:

> "[O]n an information, the Attorney-General was the party prosecuting the cause, and was the only party whom the Court could recognise in that character; and, therefore, that his Lordship could not hear the Attorney-General against the relator, or the relator against the Attorney-General."

53 What has been said to date in this Court respecting relator actions in constitutional litigation is that the actions are "none the less the Attorney-General's action"[22] and the actions are "as competent or incompetent as if [they] were brought *ex officio* by him"[23]. Those statements and basic principles flowing from *In re Judiciary and Navigation Acts*[24] would suggest that the sense of the Lord Chancellor's ruling applies to the present litigation and that, upon its true construction, s 78A of the Judiciary Act does not authorise the Attorney to intervene in a proceeding which already is the Attorney's action, albeit on relation of private interests. Any other reading of s 78A may imperil its validity.

54 However, the provision of answers to all these questions may be put aside at this stage to concentrate upon the primary and essential issue. This is the identification of the "matter" in respect of which it is said this Court is seized of jurisdiction in each of C22 and C6. The contention is that each is a matter arising

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21 *The Attorney-General v The Ironmongers' Company* (1841) Cr & Ph 208 at 218 [41 ER 469 at 474]. See also *Tudor on Charities*, 8th ed (1995) at 347-348; Picarda, *The Law and Practice Relating to Charities*, 3rd ed (1999) at 697-701.

22 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 275.

23 *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533 at 560; cf *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 4.

24 (1921) 29 CLR 257.

under the Constitution or involving its interpretation, thereby founding the original jurisdiction of this Court under s 76(i) of the Constitution as implemented by s 30(a) of the Judiciary Act. No reliance is placed upon s 75(v) of the Constitution; the applicants do not assert any jurisdictional error by the Federal Court. They accept that the errors of which they complain, if made, were errors within jurisdiction and there is no remedy under s 75(v) to which certiorari might be appended.

55 Rather, it appears that certiorari, for error of law on the face of the record in the Federal Court is relied upon as a remedy founded in the general terms of s 32 of the Judiciary Act. This confers power to grant remedies in order to "completely and finally determin[e]" the matter arising under the Constitution or involving its interpretation. Section 32 states:

> "The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed into it from another Court, shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided."

56 In his reasons for judgment, Hayne J refers to the affinity between s 32 and the All Writs Act (being s 14 of the *United States Judiciary Act of 1789*). The tenor of the decisions upon the All Writs Act is that, save to test the jurisdiction of the inferior court or tribunal in question, certiorari should not be granted in any case (including for error of law on the face of the record) where there is an adequate remedy by way of appeal or writ of error.

57 In respect of the litigation tried by Sundberg J, there were adequate appellate avenues to the Full Court and thence by special leave to this Court. The circumstance that appellate standing was limited to parties to the Federal Court litigation cannot render those appellate processes inadequate because strangers lack the standing to meddle in concluded litigation.

58 Different considerations would, for example, arise in respect of an alleged non-jurisdictional error of law by a federal court which was not created as a superior court of record and from whose decisions there was no appeal and, in particular, a law complying with s 73 of the Constitution precluded any appeal to this Court. In such a situation, where a party to the decision could frame the complaint within one or more of the species of "matter" in respect of which this

Court had original jurisdiction under s 75 of the Constitution, or a law made under s 76, then a remedy under s 32 of the Judiciary Act in the nature of certiorari might well be appropriate. But that is not this case.

59 What is the nature and content of the alleged "matter" where the Bishops, the Episcopal Conference and the Attorney-General of the Commonwealth seek the issue of certiorari to quash the decision of Sundberg J, to which none of them was a party?

60 In *Attorney-General (Vict) v The Commonwealth*, Dixon J referred to the "traditional duty of the Attorney-General to protect public rights and to complain of excesses of a power bestowed by law" and to the adaptation of that duty to the federal system[25]. His Honour also observed[26]:

> "We cannot allow the validity of Acts of Parliament to be submitted to our decision as abstract questions. The Court pronounces upon the validity of a law only when called upon to do so in determining a cause or matter within the Court's jurisdiction. Speaking broadly, it must arise in a proceeding in which a right or immunity is asserted or a wrong or threatened wrong is complained of."

The reference to "abstract questions" is a reminder of the relationship between (i) judicial power, (ii) the judicial power of the Commonwealth and (iii) federal jurisdiction.

61 In *Gould v Brown*[27], McHugh J said of *In re Judiciary and Navigation Acts* that:

> "that case holds that the content of the judicial power of the Commonwealth is narrower than the content of judicial power[28]. In *In re Judiciary and Navigation Acts* this Court did not reject the conferring of non-judicial power on federal courts. That was not the issue that arose for decision. Rather, the Court rejected the conferring of judicial power that was not the judicial power of the Commonwealth. All members of the

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25 (1945) 71 CLR 237 at 272. See also *Tasmania v Victoria* (1935) 52 CLR 157 at 171, 186.

26 (1945) 71 CLR 237 at 272.

27 (1998) 193 CLR 346 at 421 [118]. See also at 440 [178] and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 542 [10], 544 [17].

28 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 325.

> Court accepted[29] that Pt XII of the [Judiciary Act] purported to invest this Court with a 'judicial function'. What the majority denied was that this Court could be invested with a judicial function that did not involve the determination of a 'matter' within the meaning of ss 75 and 76 of the Constitution."

That questions of federal jurisdiction, which are bound up with the meaning of "matter", and of "the judicial power of the Commonwealth" identified in s 71 of the Constitution, may overlap is illustrated by the following passage from the judgment of Gaudron J in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[30]:

> "Although the constitutional meaning of 'matter' is to be derived, in significant part, from the concept of 'judicial power', it is not necessary in this case to attempt any exhaustive exposition of that concept. It is sufficient to describe judicial power as that power exercised by courts in making final and binding adjudications as to rights, duties or obligations put in issue by the parties[31]. Similarly, it is sufficient to note that the constitutional meaning of 'matter' involves the existence of a controversy as to 'some immediate right, duty or liability to be established by the determination of the Court'[32]."

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29 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264, 270.

30 (2000) 200 CLR 591 at 610-611 [43].

31 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 211-212 per Starke J; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666; *Harris v Caladine* (1991) 172 CLR 84 at 147 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 per Gaudron J; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 256-259 per Mason CJ, Brennan and Toohey JJ, 267-269 per Deane, Dawson, Gaudron and McHugh JJ; *Nicholas v The Queen* (1998) 193 CLR 173 at 207 [70] per Gaudron J; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 555 [118] per Gaudron J.

32 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Fencott v Muller* (1983) 152 CLR 570 at 603 per Mason, Murphy, Brennan and Deane JJ; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 316-317 per Brennan J; *Abebe v The Commonwealth*

(Footnote continues on next page)

62 These statements suggest that the task of identification of the "matter" said to be the subject of the present litigation is to be approached as a tripartite inquiry: first, the identification of the subject-matter for determination in each of C22 and C6[33]; secondly, the identification of the right, duty or liability to be established in each proceeding[34]; thirdly, the identification of the controversy between the parties to C22 and C6 for the quelling of which the judicial power of the Commonwealth is invoked[35]. Whilst each of these inquiries may be pursued separately, all are related aspects of the basal question, "is there a 'matter' in the sense required by Ch III of the Constitution?" In our view, there is no such "matter", and this is so whether the moving party here is seen either as the Attorney-General or the ecclesiastical authorities.

63 There is no controversy apparent between the applicants and the respondents, Sundberg J and Dr McBain. The latter has the protections against action against him by the State of Victoria of the declaration made in his favour, in particular par 3 thereof. 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. His Honour has acted within the jurisdiction conferred by par (b) of s 39B(1A) of the Judiciary Act and there has been no enlivening of the appellate processes of the Federal Court.

64 The subject-matter for determination in each proceeding is whether there is an error of law on the face of the record of the Federal Court, represented by the outcome of the proceeding before Sundberg J, and the purging of that record by administration of a remedy in the nature of certiorari. None of the applicants presents a claim for declaratory relief to reflect a particular view of the construction of the Commonwealth Act and the State Act and the operation of s 109 of the Constitution. Rather, the whole of the relief the applicants seek is directed to the outcome of the particular proceeding which was disposed of in the Federal Court.

(1999) 197 CLR 510 at 555 [117]-[119] per Gaudron J, 570 [164] per Gummow and Hayne JJ, 585 [215] per Kirby J; cf 524 [24]-[25] per Gleeson CJ and McHugh J.

33 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

34 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *James v South Australia* (1927) 40 CLR 1 at 40; *Croome v Tasmania* (1997) 191 CLR 119 at 124-125.

35 *Fencott v Muller* (1983) 152 CLR 570 at 608.

65 This understanding assists the identification of the right, duty or liability which the applicants seek to establish in each proceeding based on s 76(i) of the Constitution. *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[36] is authority that the means available to the Parliament under s 76(ii) of the Constitution to enforce by new remedies compliance with legislative norms of conduct are not limited by a requirement for reciprocity or mutuality of right and liability between plaintiff and defendant.

66 In *Truth About Motorways*, Gaudron J said[37]:

> "Absent the availability of relief related to the wrong which the plaintiff alleges, no immediate right, duty or liability is established by the Court's determination. Similarly, if there is no available remedy, there is no administration of the relevant law. Thus, as Gleeson CJ and McHugh J pointed out in *Abebe v The Commonwealth*[38], '[i]f there is no legal remedy for a "wrong", there can be no "matter".'"

However, it would be to invert the reasoning in *Truth About Motorways* to say that, if there is no "wrong", nevertheless there is a "matter" so long as there is an available remedy.

67 More broadly, there is no general proposition respecting Ch III that the "immediate right, duty or liability to be established by the determination of the Court", spoken of in *In re Judiciary and Navigation Acts*[39], must be a right, duty or liability in which the opposing parties have correlative interests. Thus, the prosecutor of an offence against a law of the Commonwealth and the defendant do not have correlative interests. Nevertheless, the proceeding seeks to vindicate and enforce the duty or liability of the defendant to observe the criminal law of the Commonwealth.

68 It is here that the present applications founder. Where is the right, title, privilege or immunity under the Constitution which is asserted by the applicants? The jurisdiction of this Court in respect of each proceeding is said to be attracted by s 76(i) of the Constitution as implemented by s 30(a) of the Judiciary Act. In such a case, the right, duty or liability to be established in the proceeding is identified in the manner described by Gavan Duffy, Rich and Starke JJ in *James*

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36 (2000) 200 CLR 591.

37 (2000) 200 CLR 591 at 612 [49].

38 (1999) 197 CLR 510 at 527 [31].

39 (1921) 29 CLR 257 at 265.

v South Australia[40]. Their Honours said, in a passage adopted by Brennan CJ, Dawson and Toohey JJ in *Croome v Tasmania*[41]:

> "Matters arising under the Constitution or involving its interpretation are those in which the right, title, privilege or immunity is claimed under that instrument, or matters which present necessarily and directly and not incidentally an issue upon its interpretation."

69 Where reliance is placed upon s 109 of the Constitution by a private litigant, the claim under the Constitution usually will be to a privilege or immunity from the requirement to observe the State law in question. The citizen is "entitled to know" whether that law is binding[42]. *Croome v Tasmania*[43] is a recent illustration. The litigation instituted by Dr McBain and disposed of by Sundberg J is another.

70 We turn to consider first the position of the ecclesiastical authorities, then that of the Attorney-General. The evidence is that in some dioceses the bishop is directly responsible for Roman Catholic hospitals, and in other dioceses the bishops are ultimately responsible for the conduct of agencies which care for women seeking to bear children, and provide adoption services and "natural family planning services" to married couples. However, neither the Bishops nor the Episcopal Conference seek to dispute the valid operation of the State law; they support the law and have no interest in relief from the obligation to observe its requirements, such as those in s 8.

71 The Bishops and the Episcopal Conference may have a sharp difference in opinion with those such as the interveners who favour the provision of treatment to persons in the position of Ms Meldrum and who advocate the removal of the restrictions imposed by s 8 of the State Act. The concern of the Bishops and the Episcopal Conference is that the decision of Sundberg J provides a precedent which would influence the outcome of future litigation in which they or others seek relief upholding the validity of s 8 and allied provisions of the State Act. Hence the subject-matter of this litigation is the purging, by order of this Court, of the record of the Federal Court.

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40 (1927) 40 CLR 1 at 40; cf as to s 76(ii) of the Constitution the judgment of this Court in *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

41 (1997) 191 CLR 119 at 126.

42 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 457-458.

43 (1997) 191 CLR 119.

72 However, those concerns and objectives of the ecclesiastical authorities do not represent a claim by them in this present litigation of a right, title, privilege or immunity under the Constitution; nor do they present, necessarily and directly rather than incidentally, an issue upon the interpretation of the Constitution. In short, the controversy between these parties and the respondents to these applications is not one which comprises a "matter" described in s 76(i) of the Constitution.

73 Reference has been made earlier in these reasons to authority in this Court that the Attorneys-General stand in a somewhat special position respecting matters which arise under the Constitution. The State of Victoria was a party to the proceeding in the Federal Court in which the Commonwealth Attorney might, by statute, have intervened or whose removal into this Court might have been obtained, again by statute. Where (on relation or otherwise) an Attorney initiates an action respecting validity, it usually has been against the Commonwealth or a State or States, as the case may be[44]. The result will be a declaration binding the other polity or polities and an effective exercise of judicial power. That is not the result where, as here, relief is sought, not against the State whose law is in question, but a federal judicial officer.

74 If the Attorney had intervened in the Federal Court proceeding or caused its removal into this Court, the Attorney may have been maintaining a "particular right, power, or immunity in which [he was] concerned"[45]. The decision in *Mellifont v Attorney-General (Q)*[46] provides an analogy. There, the Attorney-General appealed from answers to questions of law referred to the Queensland Court of Appeal by way of a procedure designed to secure a reversal of a ruling at trial and thereby secure a correct statement of the law, but "without exposing the accused to double jeopardy" and "without infringing the common law rule that the Crown cannot appeal against a verdict of acquittal"[47]. The decision of the Court of Criminal Appeal was held to involve the exercise of judicial power by that Court because the procedure was directed to correcting errors in a

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44 See, for example, *The Commonwealth v State of Queensland* (1920) 29 CLR 1; *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533; *Tasmania v Victoria* (1935) 52 CLR 157; *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529; *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559.

45 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331.

46 (1991) 173 CLR 289.

47 (1991) 173 CLR 289 at 305.

criminal trial. Thus, the decision fell within the words "judgments, decrees, orders" in s 73 of the Constitution and this Court had jurisdiction to entertain an appeal from it.

75 It also may be said that the Attorney would have been maintaining a particular right, power or immunity in which he was concerned if he had instituted a proceeding in which declaratory relief had been sought respecting the operation of s 109 of the Constitution upon the State Act. But even then it is not easy to see how this would be so where the relief sought by the Commonwealth Attorney would affirm the operation of a State law in the face of s 109. Normally it would be for the State Attorney-General to represent the interest of the public of that State in vindicating the laws of that State[48]. The "particular right" of each Attorney lies in the enlisting of the judicial power of the Commonwealth to ensure observance by the other polities of the requirements of the federal compact expressed in the Constitution.

76 However, in any event, the "very special practice" respecting Attorneys-General which Dixon J described in *Australian Railways Union v Victorian Railways Commissioners*[49] does not extend to the advancement of what the Executive Government considers to be the desirable interaction between particular State and federal laws, by the Attorney-General pursuing the course he has in this litigation. Here the Attorney (both as an intervener and on the relation of the Episcopal Conference) seeks to re-open closed litigation between other parties and to purge the record of the Federal Court of an order which is at odds with an allegedly desirable state of constitutional affairs. The point may be expressed as a reflection of the limits of the judicial power of the Commonwealth or of the absence of any claim by the Attorney-General to a right, title, privilege or immunity under the Constitution which is necessary to give rise to a "matter" under s 76(i). Whether acting on relation or otherwise, the Attorney-General, consistently with Ch III, cannot have a roving commission to initiate litigation to disrupt settled outcomes in earlier cases, so as to rid the law reports of what are considered unsatisfactory decisions respecting constitutional law.

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48 *Attorney-General for NSW v Brewery Employés Union of NSW* ("the *Union Label Case*") (1908) 6 CLR 469 at 491-492, 498-500, 520, 552-553, 597-599; *The Commonwealth v State of Queensland* (1920) 29 CLR 1 at 7, 11-12; *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533 at 556; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 247-248, 264, 266, 272-273, 275-276, 277.

49 (1930) 44 CLR 319 at 331.

77 There is also in this litigation the issue respecting the construction of s 22 of the Commonwealth Act in the light of the limitation in s 9. As already mentioned, this does not give rise to a "matter" under s 76(i). This is because the interpretation of one or more provisions of the Constitution (in particular the external affairs power) is not "essential or relevant" to the question of statutory construction[50].

78 Observations by Griffith CJ in the *Union Label Case* remain pertinent after a century. The Chief Justice said[51]:

> "The first condition of any litigation in a Court of Justice is that there should be a competent plaintiff, *ie*, a person who has a direct material interest in the determination of the question sought to be decided. The Court will not decide abstract questions, nor will it decide any question except when raised by some person entitled by reason of his interest to claim a decision. This doctrine should certainly not be relaxed for the purpose of bringing in question the validity of Statutes passed either by the Commonwealth Parliament or by a State legislature."

79 For these reasons, taken together, the conclusion should be reached that each application fails. The extension of time sought in C6 and the motion for joinder of the Attorney-General in C22 should be refused as to grant leave would be to encourage a futility. The application C22 should be dismissed as incompetent. The applicants together (including the Attorney-General) should bear the costs of Dr McBain. The joinder of the Attorney in the adverse costs order reflects the attenuation of the litigation by the particular submissions made on his behalf.

80 We should add that, even if either or both applications had generated a "matter" to found the exercise of original jurisdiction by this Court, we would not regard either application as an appropriate occasion for the exercise of the power conferred by s 32 of the Judiciary Act to grant a remedy in the nature of certiorari. We agree generally with what is said by Hayne J under the heading in his reasons, "Certiorari and discretion".

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50 *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315 at 326-328.

51 (1908) 6 CLR 469 at 491.

81 McHUGH J. Involved in these applications for writs of *certiorari* are important questions. Do the applicants in Matter No C22 of 2000 have standing to bring the application? Do the proceedings in Matter No C22 of 2000 and Matter No C6 of 2001 constitute a "matter" within the meaning of ss 75 and 76 of the Constitution? Will the writ of *certiorari* issue to the Federal Court for non-jurisdictional error of law? Does Ch III of the Constitution permit the Attorney-General of the Commonwealth to intervene in proceedings after he has given his fiat to a private party to commence those proceedings in his name? Did Sundberg J err in law in the Federal Court when he declared that certain sections of the *Infertility Treatment Act* 1995 (Vic) are inconsistent with s 22 of the *Sex Discrimination Act* 1984 (Cth) and, to the extent of that inconsistency, rendered invalid by s 109 of the Constitution?

82 In the view that I take of these two cases, however, it is unnecessary to determine all these questions. I think that the applicants are right in contending that both proceedings give rise to a "matter" within the meaning of Ch III of the Constitution. But even if the remaining questions were answered favourably to the applicants, the proper exercise of the Court's discretion requires that the applications for the issue of *certiorari* to quash the orders of the Federal Court should be refused.

83 The history of the applications and the relevant legislation are set out in other judgments. I need not repeat them.

84 The applicants accept that the Federal Court neither exceeded its jurisdiction nor lacked the jurisdiction to make the order that it did. No doubt because that is so, they do not seek the issue of any of the writs mentioned in s 75(v) of the Constitution – mandamus, prohibition or injunction – even though the order made by Sundberg J was made by a Commonwealth officer within the meaning of s 75(v). Instead, the applicants seek the issue of a writ of *certiorari* from this Court to quash the order made by his Honour in the Federal Court on 28 July 2000. They contend that this Court has original jurisdiction to issue *certiorari* because their claims for *certiorari* give rise to a matter arising under the Constitution or involving its interpretation and because s 32 of the *Judiciary Act* 1903 (Cth) authorises the issue of that writ. That section declares that, in proceedings in the original jurisdiction, the Court "shall grant … all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them". Section 32 goes on to say that the Court shall do so "so that as far as possible all matters in controversy between the parties … may be completely and finally determined". As the judgment of Hayne J shows, decisions of federal courts – including the Supreme Court – in the United States have held that s 14 of the *Judiciary Act* 1789 (the US equivalent of s 32) authorises the writ of *certiorari* in appropriate

cases[52]. Similarly, this Court should hold that the broad grant of power conferred by s 32 authorises the issue of *certiorari* in appropriate cases.

85 If the applicants are right in contending that their claims for the issue of a writ of *certiorari* give rise to a "matter", they are right in contending that the "matter" arises under the Constitution or involves its interpretation. On its face, the order of the Federal Court arises under the Constitution. In terms, it declares that s 8(1) and other sections of the *Infertility Treatment Act* are inconsistent with s 22 of the *Sex Discrimination Act* "by reason of s 109 of the Constitution of the Commonwealth of Australia."

Matter

86 The history of the writ of *certiorari* shows that the applicants are right in contending that there is a "matter" within the meaning of Ch III of the Constitution. Immediately before Federation, the writ of *certiorari* meant the process by which the Queen's Bench Division in England and the Supreme Courts of the Colonies required the judges or officers of inferior jurisdictions to certify or send proceedings before them to the Queen's Bench or Supreme Courts. The proceedings were removed "for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below"[53]. If the lower court or tribunal had exceeded its jurisdiction or failed to exercise it or if its record disclosed an error of law on its face, then, subject to the effect of any statute, the applicant could apply to the Queen's Bench or Supreme Court to quash the record of the proceedings. Under the old procedure, removal and quashing were two distinct steps although in modern times both steps are usually dealt with on the application for an order absolute for *certiorari*[54]. In some cases, quashing the order certified by the record would be the only relief required. In other cases, quashing the order would often be a condition precedent for the issue of other processes. For example, if the prosecutor wished to have a decision set aside and the proceedings re-heard, it would be necessary to use *certiorari* to quash the decision before mandamus could issue. Many of the technicalities concerning the issue of *certiorari* have disappeared. But the basic principles concerning its issue have remained constant, although arguably the reach of the writ is greater today than it was perceived to be when the Constitution and the *Judiciary Act* were enacted.

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52 Reasons of Hayne J at [270].

53 Short and Mellor, *Crown Practice*, (1890) at 89.

54 *R v A Judge of District Courts and Shelley; Ex parte Attorney-General* [1991] 1 Qd R 170 at 176.

87 When a person claims that the writ of *certiorari* should issue to quash an order or decision of a lower court, tribunal or public authority, the claim gives rise to a "matter" within the meaning of Ch III of the Constitution. The claim asserts that the *record* of the court, embodying the order, is defective and that the order is of no force and effect. It gives rise to a controversy – concerning "some immediate right, duty or liability to be established by the determination of the Court"[55] – with the maker of, and any party supporting, the order or decision. If the order or decision is that of a court, it is irrelevant that it may have settled a controversy between parties who are strangers to the applicant for *certiorari*. As Isaacs and Rich JJ pointed out in *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd*[56], "[t]he mere circumstance that a Court is *functus officio* is no bar to certiorari where all other conditions for its applicability exist." A claim for *certiorari* gives rise to a new and different controversy from that involved in the proceedings that gave rise to the order. It gives rise to a separate "matter". The contrary view could only be maintained if the dissenting view in *Abebe v The Commonwealth*[57] had prevailed.

88 Determining the claim for *certiorari* does not always determine the underlying rights of the parties to the order, although sometimes it may do so. The determination may show, for example, that the Court had no jurisdiction to make the order because a party was denied natural justice or that the record contains an error of law. If so, *certiorari* may issue. But its issue will not affect the underlying rights, duties and liabilities of the parties to the order.

89 A stranger to the proceedings that gives rise to the relevant *record* may apply for *certiorari* to quash an order or judgment contained in the record. The judgment of Blackburn J in *R v Justices of Surrey*[58] is frequently cited[59] for this proposition, although earlier cases had also recognised the right of a stranger to obtain *certiorari*. The rule that a stranger to the proceedings can apply for *certiorari* to quash an order, made without jurisdiction, has the same historical basis as the rule that a stranger can apply for prohibition to quash such an order[60]. Permitting strangers to apply for *certiorari* helps to ensure that "the prescribed

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55 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

56 (1924) 34 CLR 482 at 516.

57 (1999) 197 CLR 510.

58 (1870) LR 5 QB 466.

59 cf *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482 at 517.

60 *R v Justices of Surrey* (1870) LR 5 QB 466 at 472-473.

order of the administration of justice" is not disobeyed. In *Worthington v Jeffries*[61] in a passage cited in this Court[62], Brett J said:

> "[T]he ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all."

90 Perhaps a better reason – particularly in a federal system where cases deal with questions of constitutional validity – is that, if the losing party does not appeal, a judgment or order made without jurisdiction will become a precedent[63]. Hence, the public interest may be enhanced by allowing a stranger to apply for *certiorari* to quash such a judgment or order. As Barwick CJ pointed out in *R v Federal Court of Australia; Ex parte WA National Football League*[64], such considerations "apply with equal, if not greater, force with respect to matters where jurisdiction depends on constitutional competence". In similar vein, Professor Wade has written[65] that *certiorari* "is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers". These statements of Barwick CJ and Professor Wade apply with equal force to *records* of curial proceedings, made within jurisdiction, but which on their face demonstrate an error of law.

91 Given that a stranger may apply for *certiorari*, it is not surprising that the Attorney-General, when representing the Crown in cases within the Attorney's jurisdiction, always has standing to apply for the issue of *certiorari* even though he or she was not a party to the proceedings in the lower court or tribunal. That is because the Crown, as guardian of the public interest, has an interest in seeing

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61 (1875) LR 10 CP 379 at 382.

62 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 at 263 [40].

63 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 204.

64 (1979) 143 CLR 190 at 204.

65 "Unlawful Administrative Action: Void or Voidable? Part I", (1967) 83 *Law Quarterly Review* 499 at 503.

that tribunals stay within their jurisdiction and that they do justice according to law[66].

These cases give rise to "matters"

92 Accordingly, in my opinion, both applications for *certiorari* give rise to a matter in the original jurisdiction of this Court. In both proceedings, the applicants contend that the record of the Federal Court should be quashed because it shows an error of law on its face. The controversy between the applicants and the respondents is whether the order of the Federal Court does show an error of law on its face and whether the applicants are entitled to have *certiorari* issue to quash the order. Other controversies between the parties – such as standing – are incidental to those issues. In some cases, the existence of a matter may depend on the plaintiff or applicant having standing[67]. But "neither the concept of 'judicial power' nor the constitutional meaning of 'matter' dictates that a person who institutes proceedings must have a direct or special interest in the subject matter of those proceedings"[68]. True it is that no matter exists for constitutional purposes unless "there is a remedy available at the suit of the person instituting the proceedings in question"[69]. Here there is a remedy available to the applicants. Subject to the exercise of the Court's discretion, even a stranger may obtain *certiorari* even though he or she is not a person aggrieved by the order made in the proceedings.

93 The fact that the applicants were not parties to the proceedings in the Federal Court is irrelevant, as is the fact that the Federal Court order settled a controversy between the respondents. A stranger has the right to assert that the record of a court is defective for want of jurisdiction or for error of law on the face of the record. That claim of right gives rise to a justiciable controversy against the maker of the record and those who were parties to its making.

94 Finally, as I earlier pointed out, the controversy between the parties arises under the Constitution and is therefore a "matter" within the meaning of the Constitution.

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66 *Attorney-General for NSW v Dawes* [1976] 1 NSWLR 242.

67 *Truth About Motorways v Macquarie Infrastructure Investment Management* (2000) 200 CLR 591 at 611 [44].

68 *Truth About Motorways v Macquarie Infrastructure Investment Management* (2000) 200 CLR 591 at 611 [45].

69 *Truth About Motorways v Macquarie Infrastructure Investment Management* (2000) 200 CLR 591 at 612 [48].

Certiorari is a discretionary remedy

95 *Certiorari* to quash is not granted as of right. Its grant lies in the discretion of the Court. And that is so, whether the applicant is a stranger, a person aggrieved or an Attorney-General. In *R v Justices of Surrey*[70], the Queen's Bench held that residents of a parish were entitled to *certiorari* to quash a decision of two justices, made on the application of a highway board, that certain roads in the parish were unnecessary and should cease to be repaired. Blackburn J said that, in granting *certiorari*, a distinction was drawn "between an application by a party aggrieved and by one who comes merely as a stranger to inform the Court"[71]. Where the application is by a party aggrieved, the application was treated "as ex debito justitiae"[72]. But, said Blackburn J, where the applicant merely came forward as one of the general public with no particular interest in the matter, the case was different. In that situation, "the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person"[73]. In *R v A Judge of District Courts and Shelley; Ex parte Attorney-General*[74], Connolly J accepted these statements of Blackburn J as correctly stating the law. In *Baldwin & Francis Ltd v Patents Appeal Tribunal*[75], Lord Denning said that *certiorari* was a discretionary remedy unless the applicant is a party aggrieved and has no other remedy. In *Yirrell v Yirrell*[76], this Court held that, where lack of jurisdiction appeared on the face of the record, a person aggrieved was entitled to prohibition as of right. And similar statements were made by members of this Court in *R v Federal Court of Australia; Ex parte WA National Football League*[77]. However, in *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd*, Isaacs and Rich JJ did not accept the statement of Blackburn J in *R v Justices of Surrey*[78] that "a party aggrieved" is virtually

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70 (1870) LR 5 QB 466.

71 (1870) LR 5 QB 466 at 472-473.

72 (1870) LR 5 QB 466 at 473.

73 (1870) LR 5 QB 466 at 473.

74 [1991] 1 Qd R 170 at 178.

75 [1959] AC 663 at 695-696.

76 (1939) 62 CLR 287 at 301, 304, 309, 313.

77 (1979) 143 CLR 190 at 201-202, 216, 240-241.

78 (1870) LR 5 QB 466.

entitled to the writ as of right on establishing a defect in the proceedings[79]. They said that the Court has a discretion whether or not to grant *certiorari* even when the applicant is "a party aggrieved"[80]. The distinction between lack of jurisdiction appearing on the face of the record and lack of jurisdiction *dehors* the record reflects the thinking of a more formalistic legal period. To say that the Court has a discretion when the lack of jurisdiction is proved by evidence but none when the lack of jurisdiction appears on the face of the record represents the triumph of form over substance. If the Court has a discretion in the former case, it should have it in the latter case. I think that we should hold that neither prohibition nor *certiorari* issue as of right.

96 Although the Court, in the exercise of discretion, may refuse to issue *certiorari*, it will not do so merely because the applicant was not a party to the proceedings that gives rise to the record. In *R v Town and Country Planning Commissioner; Ex parte Scott*[81], the Supreme Court of Tasmania held that residents, who should have received notice of an appeal against the refusal of a development application, were entitled to *certiorari* to quash the order allowing the appeal although they were not parties to the appeal. Similarly in *Brack v Wills (or Wells)*[82], the Supreme Court of New South Wales held that Brack, an applicant for a liquor licence for a particular area, was entitled to *certiorari* to quash a decision granting a licence for that area to Wills whose application should have been heard after Brack's application.

97 Many statements can be found in the books to the effect that an Attorney-General, when representing the Crown, is entitled as of right to the writ once the Attorney shows that a court or tribunal has exceeded its jurisdiction or that its record discloses an error of law on its face. Such statements represent the law as laid down in the 17th and 18th centuries; they were made in deciding legal issues in a social and legal environment very different from the present. It would undermine the rights and settled expectations of parties to litigation to an intolerable degree if an Attorney-General was still entitled as of right to obtain *certiorari* to quash *whenever* the Attorney could establish legal error or lack of jurisdiction in a court or tribunal. And as Brooking J pointed out in *R v Judge Mullaly*[83], it would have serious consequences for the criminal justice system if an Attorney-General was entitled as of right to quash adverse rulings in criminal

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79 (1924) 34 CLR 482 at 519.

80 (1924) 34 CLR 482 at 519.

81 [1970] Tas SR 154.

82 [1977] 1 NSWLR 456.

83 [1984] VR 745 at 750.

trials. Pushed to its logical extent, that proposition would entitle the Attorney to quash a judgment of acquittal although the received doctrine is that *certiorari* will not be granted to quash a verdict of not guilty of a criminal charge[84]. To show why an Attorney-General is not entitled to the issue of *certiorari* as of right in proceedings for judicial review even when representing the Crown, it is necessary to refer briefly to the historical development of the writ.

The historical development of *certiorari*

98 The discretionary nature of the writ of *certiorari* is the product of its historical development. Although the common law courts had developed the writ by the early part of the 14th century, they did not use the writ to quash proceedings until well into the 17th century[85]. Historically, the function of the writ was to call up the records of proceedings in inferior courts and tribunals and any records in the custody of an administrative officer where a question had arisen concerning the correctness of the record or proceedings. In early times, the writ was also frequently used to remove indictments from lower courts – the Commissioners of Sewers, the Court of Admiralty and the Courts of the Forests, for example[86] – so that they could be tried in the King's Bench. When such a case reached the King's Bench, the defendant could go to trial in that Court or make objections to the proceedings in the lower court. Edith Henderson has pointed out[87]:

> "(1) He could object that the base court did not have jurisdiction to require him to answer the charge, or that the record did not fully make out their jurisdiction …
>
> (2) He could object to the form or matter of the indictment. But he could also traverse the indictment and go to trial instead, and in the course of trial he could raise any other questions of fact or law that became relevant.
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> The point to be noted is that at this stage of the case nothing about the lower court's proceedings had any relevance to the defendant's fate in

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84 *R v Simpson* [1914] 1 KB 66 at 75; *R v Middlesex Quarter Sessions (Chairman); Ex parte Director of Public Prosecutions* [1952] 2 QB 758 at 769.

85 Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 95.

86 *De Smith's Judicial Review of Administrative Action*, 4th ed (1980) at 588.

87 *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 92.

> King's Bench – no issues of law were presented – except its jurisdiction and the text of the indictment or presentment, the record sent up. But every issue of fact or law could be tried de novo if the defendant chose to traverse instead of demurring."

99 Professor Sawer has pointed out[88] that, in all the reported cases decided between 1300-1640, no suggestion was made that the writ could be used to prevent inferior courts and tribunals from exceeding their jurisdiction, or to quash their decisions because they had made an error of law. Instead, *certiorari* was used to remove the record "for some purpose *controlled by a proceeding other than the certiorari*"[89]. In 1642 in *Commins v Massam*[90], however, Heath J expressed the view that the King's Bench could use *certiorari* not merely to remove proceedings but also to review the merits of the proceedings. Thereafter, "the new removal procedure quickly became popular"[91]. Once the King's Bench permitted *certiorari* to be used to quash proceedings in the lower courts, the demand for its use brought about a change in practice that "eliminated, in most cases, the possibility of a trial at bar [in the King's Bench] after certiorari for orders"[92]. By 1702, *certiorari* to quash rather than *certiorari* to remove had become the primary use of the writ[93].

100 In the period immediately before the decision in *Commins v Massam*[94], *certiorari* may have been a discretionary remedy[95]. It is unlikely that a defendant could have obtained the removal of proceedings into the King's Bench, as of

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88 Sawer, "Error of Law on the Face of An Administrative Record", (1954-1956) 3 *University of Western Australia Annual Law Review* 24 at 26.

89 Sawer, "Error of Law on the Face of An Administrative Record", (1954-1956) 3 *University of Western Australia Annual Law Review* 24 at 26.

90 (1642) March NC 196 at 197 [82 ER 473 at 473].

91 Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 106.

92 Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 107.

93 cf Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 107-108.

94 (1642) March NC 196 at 197 [82 ER 473 at 473].

95 Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 110.

right. But whether this was or was not so, by the middle of the 17th century, the King's Bench frequently exercised a discretion to refuse to issue *certiorari* to quash. If the existence of that discretion was not generated by the enactment of legislation that significantly increased the jurisdiction of lower courts and tribunals in that century, it undoubtedly confirmed its utility. By the mid-17th century, a text book writer could declare that, while the King's Bench had jurisdiction to quash, "this Quashing is but by favour of the Court, for the Court is not tyed Ex Officio to do it, but may leave the party to plead unto them, as in many cases they use to do"[96].

101 However, the writ still issued as of right to the Crown. So far as the removal of indictments was concerned, the removal was justified on the theory that the Crown was entitled to select the court that should hear the charge that was the subject of the indictment. In *R v Clace*[97], Lord Mansfield CJ said:

> "I believe there is a distinction … between an indictment only in the name of the Crown, (as all indictments must be;) and an indictment actually prosecuted by the officer of the Crown. In the latter case, the King has undoubtedly a right to prosecute in what Court he pleases."

Indeed, Lord Mansfield CJ said that the King could choose his court whenever any right of the Crown was in issue[98]. A private person prosecuting an indictment also appears to have obtained the writ as of right[99]. But otherwise, the King's Bench might in the exercise of its discretion refuse to quash an order, judgment or conviction when a private litigant was the applicant[100].

102 Statements to the effect that the Crown is entitled to the writ as of right can no longer be automatically applied to applications for judicial review. As I have indicated, the proposition that the Crown is entitled to the writ as of right arose in cases where the Crown was seeking the removal of cases *into* the King's

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96 Style, *Practical Register*, (1657) at 272, cited in Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963) at 107.

97 (1769) 4 Burr 2456 at 2458 [98 ER 288 at 289].

98 (1769) 4 Burr 2456 at 2458 [98 ER 288 at 289].

99 (1769) 4 Burr 2456 at 2458 [98 ER 288 at 289].

100 *R v Newborough* (1869) LR 4 QB 585 at 589; *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 450; *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482 at 519.

Bench. Those statements are not directly applicable to, and they should not be applied to, the *issue* of the writ to quash.

103 It is true that in 1967 in *Re Cook; Ex parte Attorney-General*[101], the Court of Appeal of New South Wales declared that the Crown was entitled to *certiorari* as of right once the Crown proved jurisdictional error or error on the face of the record. The Court of Appeal quashed an order by a magistrate overruling a claim of Crown privilege.

104 Similarly, in 1973 a Full Court of the Supreme Court of Victoria held in *R v Judge Martin; Ex parte Attorney-General*[102] that, on application to quash a lower court order, the Attorney-General was entitled to *certiorari* as of right. In *Martin*, the Full Court issued *certiorari* to quash the order of a County Court judge who had wrongly respited the recognizance of bail of the accused. In *R v Judge Mullaly*[103], however, Brooking J pointed out that to apply the rule in *Martin* to all criminal cases could have serious consequences for the administration of criminal justice. In *Mullaly*, his Honour refused to grant the Crown an order *nisi* for *certiorari* to quash a ruling of a trial judge that admissible evidence should be excluded in the exercise of his discretion. He held that the Crown had not made out a case for the issue of the writ. In the course of doing so, he commented on an argument of the Crown that asserted that the Crown was entitled to the writ as of right, once it established a case for its issue. After referring to *Martin*, Brooking J said that if the "Attorney-General cannot be refused an order *nisi* for certiorari as a matter of discretion" when a judge has erroneously rejected or admitted evidence "the potential consequences for the proper conduct of criminal trials are too obvious to require mention.[104]" Brooking J concluded that as "the errors alleged in this case do not attract certiorari or prohibition, I do not pursue this question."

105 In *R v A Judge of the District Courts and Shelley; Ex parte Attorney-General*[105], the Full Court of the Supreme Court of Queensland also held that it had no discretion to refuse *certiorari* to the Attorney-General once the Attorney had established a fundamental defect in the hearing of a criminal charge[106]. In

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101 (1967) 69 SR (NSW) 247 at 268.

102 [1973] VR 339 at 361.

103 [1984] VR 745 at 750.

104 [1984] VR 745 at 750.

105 [1991] 1 Qd R 170.

106 *R v A Judge of the District Courts and Shelley; Ex parte Attorney-General* [1991] 1 Qd R 170 at 177.

that case, the Full Court quashed all proceedings in the trial subsequent to a plea of not guilty. It did so because the trial judge had erroneously upheld the accused's claim that, because of his religious beliefs, he could challenge women jurors "for cause". Connolly J said that, error having been established, the Attorney was entitled as of right to *certiorari* to quash[107].

106 In my opinion, however, the Crown is bound by the same discretionary rules as apply to any ordinary applicant for issue of the writ of *certiorari* to quash. Equal justice before the law demands no less. The 20th century saw a progressive abolition or restriction of Crown privileges in a number of legal areas – Crown immunity from suit, Crown privilege concerning evidence and the presumption that the Crown is not bound by statute being prominent examples. To equate the rights of the Crown with those of the ordinary citizen applying for *certiorari* to quash is simply to give effect to this historical trend. Even if the Crown remains entitled as of right to remove proceedings, orders or decisions into the superior courts, it does not follow that it ought to have *certiorari* to quash as of right. The privileged position of the Crown in relation to *certiorari* arose in a different social setting from that which exists today. Historically, the privilege concerned the right of removal, not the quashing of orders. Its privileged right in respect of *certiorari* should be confined to the removal of proceedings into the superior courts.

107 The Supreme Court of Canada agrees that the Crown is now subject to the discretionary rules in respect of *certiorari* to quash. In *PPG Industries v Attorney-General (Canada)*[108], the Supreme Court set aside the issue of *certiorari* granted to the Attorney-General on the ground that the Attorney had delayed for two years before applying for the writ. Giving the judgment of the Court, Laskin CJ said "discretionary bars are as applicable to the Attorney General on motions to quash as they admittedly are on motions by him for prohibition or in actions for declaratory orders"[109]. His Lordship distinguished the position of the Crown in bringing proceedings before the superior court and its position in quashing the orders of the lower court. In respect of the former, it acted as of right; in respect of the latter, it was subject to discretionary bars.

108 No doubt in some respects, the Crown's position is still superior to that of a private litigant applying for the issue of *certiorari*. First, the Crown is not disbarred from *applying* for the issue of the writ although, in similar circumstances, the Court would refuse an order *nisi* for the issue of the writ on

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107 [1991] 1 Qd R 170 at 177.

108 [1976] 2 SCR 739.

109 [1976] 2 SCR 739 at 749.

the application of a private litigant. Thus, absent an express direction, the Crown is not bound to apply for *certiorari* within any time limit imposed by Rules of Court or statute[110]. But as *PPG Industries*[111] shows, its delay may be a discretionary ground for refusing to issue the writ to quash.

109 Second, although a stranger to the proceedings may apply for *certiorari* or prohibition to issue[112], a stranger's lack of standing will frequently result in the Court refusing to issue either writ on discretionary grounds. If the applicant is not a person aggrieved, the court will consider "whether the interest of the applicant is so small, or his grievance so like that of the rest of Her Majesty's subjects, as to leave no sufficient ground for the issue of the writ"[113]. However, the Attorney-General, when representing the Crown, always has standing to apply for the issue of *certiorari* in respect of orders, judgments and decisions made with the Attorney's jurisdiction. That is because the Crown, as guardian of the public interest, has an interest in seeing that courts, tribunals and public authorities stay within their jurisdiction and that they do justice according to law[114]. Because that is so, the Crown can never be regarded as a stranger to the proceedings in the sense that a private applicant can be so regarded.

110 Third, O 55 r 1(3) of the Rules of the High Court provides that "[i]n the case of an application by a Law Officer *ex officio* for a writ of *certiorari* ... the order shall, if so sought, be absolute in the first instance." This sub-rule is to be contrasted with O 55 r 1(4) which states that "[t]he Court or Justice may, in its or his discretion, in a case in which it appears necessary for the advancement of justice, grant an order absolute in the first instance for a writ of *habeas corpus*, *certiorari*, *mandamus* or prohibition ...". It is also to be contrasted with O 55 r 1(2) which states that "[s]ubject to subrules (3) and (4) of this rule, the application shall, in the first instance, be for an order calling on the proposed respondent to shew cause why the writ or order should not be issued or made ...".

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110 *R v Amendt* [1915] 2 KB 276; *In Re an Application by Her Majesty's Attorney-General for Northern Ireland for a Writ of Certiorari* [1965] NI 67.

111 [1976] 2 SCR 739.

112 *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482 at 516-518; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 204; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund* (1998) 194 CLR 247 at 263 [40].

113 *R v Nicholson* [1899] 2 QB 455 at 472.

114 *Attorney-General for New South Wales v Dawes* [1976] 1 NSWLR 242.

111 It is a possible construction of O 55 r 1(3) that it takes away from the Court any discretion to refuse an order absolute in the first instance when the Law Officer *ex officio* has made out an arguable case and asks that the order be made "absolute in the first instance"[115]. This would then require the respondent to move to set aside the order upon being served with the order absolute.

112 Such a construction assumes that the order will be made without hearing the respondent. In *Liquor Commission of the Northern Territory v Gaye Pty Ltd*[116], the Full Court of the Federal Court held that the Northern Territory equivalent of O 55 r 1(4) did not permit the applicant to have the writ made absolute without hearing the respondents. That holding seems equally applicable to O 55 r 1(3). On that hypothesis, O 55 r 1(3) simply gives the Attorney-General *ex officio* the advantage over a private applicant for *certiorari* of not having to go through the two stages of an order nisi application and an order absolute hearing. That is to say, at the Attorney-General's option, the Attorney can ask for an order absolute, and not an order nisi, at first instance. On this hypothesis, the Court still retains its discretion to refuse the application even though the Attorney has established jurisdictional error or error of law on the face of the record.

113 It is unnecessary to express any view as to whether O 55 r 1(3) is valid having regard to the terms of s 64 of the *Judiciary Act*.

The application by the Episcopal Conference should be refused

114 Although the claim of the Episcopal Conference for the issue of a writ of *certiorari* gives rise to a "matter" within the meaning of Ch III of the Constitution, the sound exercise of judicial discretion requires that the application be refused. The Episcopal Conference is not "a person aggrieved" by the order made by Sundberg J in the Federal Court. The order does not affect the legal rights, duties or interests of the Conference members. Nor does the order pose any risk to their economic interests or cause any injury or detriment to them that the law recognises as a "special interest" for the purpose of granting *certiorari*.

115 The interest of the Conference lies in its opposition to the effect of the order of Sundberg J, an effect that is contrary to the religious beliefs and teachings of the members of the Conference. According to the submissions of the Episcopal Conference, the order made by Sundberg J permits services to be provided to unmarried women that "violate the most basic beliefs of Catholics

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115 Order 55 r 1(3).

116 (1986) 10 FCR 394.

about the dignity of marriage and family, and the rights of children". But these beliefs and the effect of the order on these beliefs do not give the Conference a "special interest" in the outcome of proceedings. A person does not have a "special interest" "unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance"[117]. The relationship of the Conference to the order made in this case is far more attenuated than the relationship that existed between the ministers of religion and the subject matter of the proceedings in *Ogle v Strickland*[118] where the ministers were held to be "persons aggrieved". Whether that case was rightly decided is debatable. But right or wrong, it does not support the claim of the Conference for standing in this case.

116 Consequently, the Conference is not "a person aggrieved". In these proceedings, it is a stranger even though it appeared as *amicus curiae* before Sundberg J. That the Conference is not "a person aggrieved" and has no "special interest" in the proceedings does not prevent it from obtaining the grant of *certiorari*[119]. But in the constitutional, litigious and social setting of the case, it makes it impossible, as a matter of discretion, to grant the Conference's application.

117 The only matter that can be put forward in support of its application is the assumption – that I will make in its favour – that the order of the Federal Court manifests legal error in that it wrongly declares that various sections of the *Infertility Treatment Act* are invalid. That is a matter of considerable importance. If the Episcopal Conference were "a person aggrieved" and no circumstance otherwise disentitled the Conference to the relief claimed, it would make an unanswerable case for granting its application. But the Conference is not "a person aggrieved", and the significance and consequences of the assumed legally erroneous order must be weighed against three other factors.

118 The first factor is that the declaration made by Sundberg J authorises IVF treatment for single women. It also effectively prevents the prosecution of persons providing IVF treatment to single women. Convictions for breaches of the *Infertility Treatment Act* can result in penalties of up to four years imprisonment. Annexure A to the affidavit of Mr Warwick Neville, filed in

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117 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530.

118 (1987) 13 FCR 306.

119 *Truth About Motorways v Macquarie Infrastructure Investment Management* (2000) 200 CLR 591 at 670 [211].

support of the present application, indicates that the Infertility Treatment Authority of Victoria – a party to the proceedings in the Federal Court – has relied on the order made by Sundberg J. Through its newsletter, it has informed interested persons that IVF services are available to single women. It is possible – perhaps probable – that, as a result of the order made by Sundberg J and the statements by the Authority, IVF practitioners have carried out IVF treatments contrary to the terms of the *Infertility Treatment Act*. If his Honour's order were quashed, persons who acted in good faith on the basis of that order would now find themselves exposed to the risk of prosecution. Because that is so, only some special feature of the case ought to persuade this Court to issue *certiorari* on the application of a person who has no standing or special interest in the order made by Sundberg J. At the very least, the Conference would need to show, so far as it was reasonably possible to do so, that in fact no single women in Victoria had received IVF treatment since his Honour made the order in question. The Conference made no attempt to discharge this evidentiary burden. Indeed, another annexure to Mr Neville's affidavit indicates that the woman at the centre of the Federal Court proceedings may have subsequently had IVF treatment in Melbourne after the failure of IVF treatment in Albury. The potential effect on third parties, if the order is quashed, weighs heavily against exercising the discretion in favour of the Conference.

119 The second factor against exercising the discretion in favour of the Conference is that it elected not to seek leave to be joined as a party in the proceedings before Sundberg J. If it had, Sundberg J may have found that, in the absence of another contradictor, its joinder was necessary to ensure that all matters in dispute could be "effectually" and completely determined[120]. If leave had been granted, the Conference would have had a right of appeal against the order made by his Honour. As a result of its election, the Conference forfeited its chance of appealing against the order made by his Honour. Once the time for appealing against his Honour's order had expired, the providers of IVF treatment in Victoria were entitled to act on the basis that federal law now permitted them to make such services available to unmarried women. It would defeat the settled and legitimate expectations of the providers and unmarried women to allow a person with no "special interest" in the proceedings to have the order quashed. For all we know, quashing the order might impose on an IVF practitioner the moral dilemma of choosing between breaking the law or stopping a course of treatment begun but not finished.

120 If the Conference had been joined as a party with a right of appeal, its application for *certiorari* would have been refused on the ground that appeal was an alternative, and superior, remedy[121]. Because that is so, the Conference's

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120 Federal Court Rules, O 6 r 8.

121 *R v Elliott* (1974) 8 SASR 329.

failure to seek to become a party cannot put it in a better position than it would be in if it had been a party.

121 The third factor against the exercise of the discretion in favour of the Conference is that the State of Victoria, the political entity that enacted that legislation, is content with the declarations made by Sundberg J. Obviously, it is not concerned that the declarations made by his Honour undermine a social policy that the Victorian government regards as important enough to litigate. Given that government's attitude before Sundberg J – it neither supported nor opposed the validity of the legislation – and its failure to appeal against his Honour's orders, it may be doubted whether it would enforce its legislation even if there was no declaration of invalidity. In *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund*[122], I pointed out that "Attorneys-General have long taken the view that the institution of legal proceedings is not justified simply because there is prima facie evidence of a breach of the law"[123]. I went on to say that the "decision when and in what circumstances to enforce public law frequently calls for a fine judgment as to what the public interest truly requires" and that such a decision "is arguably best made by the Attorney-General who must answer to the people"[124].

122 One must assume that the Victorian government thinks that it is in the public interest of that State to accept the correctness of the order made by Sundberg J. The Victorian government could, if it wished, seek to repeal or amend the parts of the *Infertility Treatment Act* declared to be inconsistent with the federal statute. If it did, the order of Sundberg J would become irrelevant. But to repeal or amend the legislation might well bring about a division of opinion in the community that the Victorian government believes is not in the public interest of that State. This Court cannot shut its eyes to the fact that sections of the community hold widely differing views as to the justice and morality of the order made by Sundberg J.

123 The Member for Barton in his speech on the Third Reading of the Sex Discrimination Amendment Bill (No 1) (2000)[125] (the purpose of which was to reverse the effect of the order of Sundberg J), referred to such views. He said that the issues raised by that order give rise to "intensely held views by many sectors of the community". He went on to say that in "any political party, these

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122 (1998) 194 CLR 247.

123 (1998) 194 CLR 247 at 277 [85].

124 (1998) 194 CLR 247 at 278 [86].

125 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 29 March 2001 at 26019.

issues on moral, ethical, social and economic questions are going to be intensely held"[126]. The speeches of other members of Parliament also indicated how deeply divided is public opinion on the issue of providing IVF treatment to single women.

124 In determining whether this Court should exercise its discretion in favour of a person who has no "special interest" in the making of the order, the attitude of the Victorian government is a matter that cannot be dismissed as irrelevant. However, that attitude would not be relevant if the Conference was a "person aggrieved". But the Conference is not "a person aggrieved". It has to be treated as a "stranger" to the proceedings. The attitude of the Victorian government is therefore a factor – although one of moderate weight – that indicates that the discretion should be exercised against the Conference.

125 The combined weight of these three factors is so substantial that it would not be just or reasonable for this Court to exercise its discretion in favour of the Episcopal Conference. As I have said, the assumed error of law on the face of the order made by Sundberg J is the only factor that supports the exercise of the discretion in favour of the Conference. The effect on the religious beliefs of its members is no more relevant to the exercise of the discretion than the social or political beliefs and convictions of those who support the order as a vindication of the human rights of single women.

The Attorney-General's application for an extension of time for relator action should be refused

126 The Attorney-General's relator action is barred by O 55 r 17 of the Court's Rules unless the Court grants the Attorney's application for an extension of time. In determining whether an extension should be granted, it is relevant to consider the prospect of success if the application for extension of time were granted[127]. In my opinion, *certiorari* would be refused as a matter of discretion, even if the application for extension were granted. Because that is so, the application to extend time should be refused.

127 In one respect, the Attorney-General in the relator action – Matter No C6 of 2001 – would have a stronger case for the exercise of the discretion in his favour than the Episcopal Conference. The Attorney has standing to sue. So he is not a "stranger" to the order made by Sundberg J. As the first Law Officer of the Commonwealth with the right – perhaps the duty – to take proceedings that

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126 Australia, House of Representative, *Parliamentary Debates* (Hansard), 29 March 2001 at 26019.

127 *Gallo v Dawson* (1990) 64 ALJR 458; 93 ALR 479.

will ensure that Federal Courts do not act contrary to law, the Attorney has a special interest in the subject matter of the order. But there are two matters that weigh so heavily that they would overcome the discretionary factors in favour of the Attorney's relator action even if it was not out of time, as it is.

128 First, the Rules of this Court require that "[a]n order *nisi* for a writ of *certiorari* to remove a[n] … order…, for the purpose of its being quashed … shall not be granted unless the application for the order is made not later than six months after the date of the … order"[128]. The Attorney's application was not commenced until long after the six months period had elapsed. If the Attorney was representing the Crown in right of the Commonwealth in this application, he would not be bound by this time limit[129]. On that hypothesis, he would have no need to make an application to extend the time for applying for the writ although the delay would be relevant on the issue of discretion to quash. In *R v A Judge of the District Courts and Shelley; Ex parte Attorney-General*[130], Connolly J was of the view that no distinction should be drawn between cases where the Attorney represents the Crown and those cases where the action is "brought by him on the relation of persons who undertake to make themselves liable for the costs of the proceedings." But it is one thing to give the Attorney a privilege when representing the Crown; it is another matter to give the Attorney the same privilege in a relator action. It would violate the principle of equality before the law, and should not be countenanced in the first decade of the 21st century. As long ago as the 19th century, Fitzgerald J confined the privileged position of the Attorney-General to "his official capacity, on behalf of the Crown"[131]. So should this Court. I would hold therefore that the terms of O 55 r 17(1) apply to the present relator action. In making the application for extension, the Attorney appears to have accepted that that rule applies to this relator action.

129 The undoubted policy behind the time limit in O 55 r 17(1) of the Rules of this Court is that after six months the decision of an inferior court or tribunal should be regarded as settling the rights and duties of the parties to the decision and become unchallengeable. As I indicated in dealing with the application by the Episcopal Conference, the expiration of the time for appealing against his Honour's order gave rise to a number of expectations by the providers of IVF treatment in Victoria. They were entitled to act on the basis that henceforth

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128 Order 55 r 17(1).

129 *R v Amendt* [1915] 2 KB 276; *In Re an Application by Her Majesty's Attorney-General for Northern Ireland for a Writ of Certiorari* [1965] NI 67; *PPG Industries v Attorney-General (Canada)* [1976] 2 SCR 739.

130 [1991] 1 Qd R 170 at 177-178.

131 *In re Lord Listowel's Fishery at Beale* (1875) Ir R 9 CL 46 at 49.

federal law permitted them to make such treatment available to single women. To now quash the order made by Sundberg J, after so much delay by the Attorney, would defeat the settled and legitimate expectations of the providers and the unmarried women who may have acted on the basis of that order. Worse still, it might expose some of them to the risk of prosecution for criminal offences. And as each day passed after the time for appeal expired, the number of persons whose interests may be in jeopardy has probably increased. The delay of the Attorney is a weighty matter that tells against a favourable exercise of discretion, if an extension of time were granted.

130 Second, the Attorney-General could have intervened in the proceedings in the Federal Court and become a party to the proceedings. If he had, he could have appealed against the order of Sundberg J. But the Attorney elected not to do so. If he had become a party with a right of appeal, his application for *certiorari* would have been refused on the ground that appeal was an alternative, and superior, remedy[132]. Because that is so, the Attorney's failure to intervene and become a party cannot put him in a better position than he would have been in if he had intervened in the proceedings in the Federal Court. His failure to become a party is another weighty matter against a favourable exercise of discretion.

131 The two matters to which I have referred indicate that the proper exercise of the Court's discretion would result in *certiorari* to quash not being granted even if the extension of time were granted. Because that is so, the application for extension must be refused.

Orders

132 Both applications should be refused with costs.

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132 *R v Elliott* (1974) 8 SASR 329.

133 KIRBY J. These proceedings, in the original jurisdiction of this Court, follow a decision of a judge of the Federal Court of Australia (Sundberg J)[133]. The declarations and orders giving effect to that decision ("the order") were not the subject of appeal to the Full Court of the Federal Court by any of the parties to the proceedings.

134 None of the parties in the Federal Court (the State of Victoria, the Minister for Health of the State of Victoria, the Infertility Treatment Authority of Victoria ("the Authority"), Ms Leesa Meldrum and Dr John McBain) were original parties to the proceedings in this Court. Instead, two bodies associated with the Roman Catholic Church in Australia, namely the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church ("the moving parties"), commenced what amounted to a collateral attack upon the order of Sundberg J. Initially, in this Court, Sundberg J alone was named as the respondent.

The proceedings in the Federal Court

135 In the Federal Court, the moving parties had been permitted to appear as *amici curiae*. They were represented by senior counsel. They declined an opportunity to be joined as an intervener. However, they became, in effect, the contradictor to Dr McBain's application for relief. Notice of the proceedings under the *Judiciary Act* 1903 (Cth), ("the Judiciary Act") s 78B was duly given. None of the law officers, including the Attorney-General of the Commonwealth, elected to intervene.

136 Dr McBain's suit in the Federal Court was for a declaration that s 8 of the *Infertility Treatment Act* 1995 (Vic) ("the State Act") was inoperative on the ground that it was inconsistent with s 22 of the *Sex Discrimination Act* 1984 (Cth) ("the federal Act")[134]. In the Federal Court Ms Meldrum, Dr McBain's patient, was named as a respondent. She adopted Dr McBain's submissions. The State, the then State Minister and the Authority, took what was described as a "neutral" position on the issue of the constitutional validity of the State Act. They "neither asserted there is no inconsistency nor conceded an inconsistency"[135].

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133 *McBain v The State of Victoria* (2000) 99 FCR 116 ("*McBain*").

134 *McBain* (2000) 99 FCR 116 at 117 [1].

135 *McBain* (2000) 99 FCR 116 at 117 [3].

137 Dr McBain is a qualified medical practitioner. He is a specialist gynaecologist, with expertise in reproductive technology, including the use of in-vitro fertilisation ("IVF"). At the relevant time, he was licensed to perform fertilisation procedures in Victoria as provided by the State Act. In August 1999, Ms Meldrum consulted him for the purpose of obtaining IVF treatment. At that time, and at all material times, Ms Meldrum was a single woman. She was desirous of becoming pregnant. Despite earlier attempts, she had not succeeded in achieving a pregnancy. She did not rule out the possibility of a future long-term relationship with a man or marriage. However, at all material times she was unmarried.

138 Dr McBain formed the opinion that IVF treatment was the appropriate medical therapy for Ms Meldrum. He was in a position to provide such treatment at the Royal Women's Hospital or at a private hospital in Melbourne near where Ms Meldrum lived and where he carried on his practice. However, when, in the initial consultation, it was made plain that Ms Meldrum was a single woman, Dr McBain informed her that the provisions of the State Act precluded him from offering her IVF treatment because the provisions of that Act limited such procedures to married women or women in a de facto married relationship, as defined by the State Act ("the marriage requirement")[136]. Dr McBain advised Ms Meldrum that an option open to her was to undergo a course of treatment at a clinic in Albury, New South Wales. In that State, there is no legal restriction limiting the provision of fertilisation procedures in terms of a marriage requirement.

139 Dr McBain also told Ms Meldrum of the possibility that he might institute proceedings to challenge the constitutional validity of the State Act. She agreed to waive her entitlement to medical confidentiality, in effect, so that hers could become a test case to present the issue of the validity of the State Act for judicial determination. She indicated that she would be prepared to await the outcome of such a proceeding before pursuing further treatment by Dr McBain.

140 These were the circumstances in which Dr McBain commenced the proceedings in the Federal Court that came before Sundberg J. His Honour upheld Dr McBain's submissions that the IVF treatment proposed by him for Ms Meldrum was a "service" to which s 22 of the federal Act applied, prohibiting discrimination on the ground of sex or marital status[137]. He found that the exception from the ambit of the federal Act provided by s 32 (in relation to services which of their "nature … can only be provided to members of one sex")

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136 State Act, ss 3(1), 8(1).

137 *McBain* (2000) 99 FCR 116 at 119-120 [10].

did not apply[138]. He held that the State Act, s 8(1), required the provider of a "service" to treat a single woman less favourably than a married woman or a woman in a de facto relationship and was therefore directly inconsistent with s 22 of the federal Act[139]. He concluded, accordingly, that by the operation of s 109 of the Constitution, the State Act was, to the extent of the inconsistency, invalid. The federal Act prevailed[140].

141 In this conclusion, Sundberg J arrived at a result similar to that of the Full Court of the Supreme Court of South Australia[141] in respect of the *Reproductive Technology Act* 1988 (SA). The South Australian Act had contained a marriage requirement similar to that of s 8 of the Victorian State Act. The South Australian Supreme Court held that such provision was inconsistent with the federal law and thus invalid under the Constitution.

The proceedings in the High Court

142 The decision of Sundberg J was announced on 28 July 2000. His Honour's order was entered by the Federal Court on 9 August 2001. The order followed short minutes that were handed up after counsel had had time to consider the published reasons.

143 The first declaration in the order was to the effect that s 8(1) of the State Act, to the extent that it restricted the application of any treatment procedure regulated by it in accordance with the marriage requirement (defined by reference to s 3(1) of the State Act) was inconsistent with s 22 of the federal Act and inoperative by reason of s 109 of the Constitution. The second declaration provided that a number of sections of the State Act, referred to in a schedule to the order, "to the extent that they are dependent upon the marriage requirement" were inconsistent with s 22 of the federal Act and inoperative for the same reason. A third declaration was added, going beyond the reasons published by Sundberg J, indeed beyond the terms of the applicant's original claim. It appears to have been included by Sundberg J at the request of Dr McBain to make clear what was implicit in the first two declarations. It declared that Dr McBain could "lawfully carry out a treatment procedure in respect of [Ms Meldrum] notwithstanding that she does not satisfy the marriage requirement". The State

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138 *McBain* (2000) 99 FCR 116 at 121 [14]-[15].

139 *McBain* (2000) 99 FCR 116 at 123 [19].

140 *McBain* (2000) 99 FCR 116 at 123 [19].

141 *Pearce v SA Health Commission* (1996) 66 SASR 486.

and the State Minister were ordered to pay Dr McBain's costs of the proceedings in the Federal Court.

144 Dr McBain and Ms Meldrum were content with these orders. They were what (or even more than) they had sought by the application to the Federal Court. An appeal by them was therefore out of the question. The State, the State Minister and the Authority were also content. Despite a supervening change of government of the State, no appeal to the Full Court of the Federal Court was brought by any of the parties. So far as the parties were concerned, the legal controversy between them (so far as one had ever existed) was finally quelled by the order of Sundberg J. The legal holding, inherent in the order, decided, in effect, that reproductive technology and IVF techniques would be available to single women in Victoria in the same way as such procedures are available in other Australian States, either by virtue of State legislation[142] or pursuant to a court decision[143].

145 However, the moving parties of the Church were not content with Sundberg J's decision and order. Instead of applying to the Federal Court for an order *nunc pro tunc* joining them as parties to the proceedings (assuming that course to have been available) and seeking to appeal from the order to the Full Court of the Federal Court[144], those bodies as applicants/prosecutors ("the prosecutors") applied to this Court for writs of mandamus and certiorari addressed to Sundberg J, as sole respondent. The affidavit in support of this application described it as one made "pursuant to section 75(v) of the Constitution".

146 On the first hearing of the application, Callinan J directed that the prosecutors move a Full Court for the relief sought. Subsequently, the application was listed before Gummow J for directions. Pursuant to those directions, Dr McBain was joined as a party (as the second respondent). To the relief sought against him was added an application for a writ of prohibition to prohibit him from acting upon the decision of the first respondent.

147 Pursuant to the Judiciary Act, s 78B, notices of constitutional matters were again given. On this occasion, in response to such notices, the Federal Attorney-

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142 *Human Tissue Act* 1983 (NSW). The other relevant Australian legislation is the *Human Reproductive Technology Act* 1991 (WA).

143 eg *Pearce v SA Health Commission* (1996) 66 SASR 486.

144 cf Federal Court Rules, O 52, r 14. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 293.

General, on behalf of the Commonwealth, intervened. No other law officer did so. Notably, the Attorney-General for Victoria did not intervene to seek to uphold the validity of the State Act; nor to contest the actions and arguments of the Federal Attorney-General, shortly to be described.

148 By further procedural orders, Gummow J granted leave to two bodies which indicated an intention to contradict the submissions of the prosecutors and to test their right to initiate the proceedings in this Court. These were the Women's Electoral Lobby (Vic) Inc ("WEL") and the Human Rights and Equal Opportunity Commission ("the Commission")[145]. The Sex Discrimination Commissioner, appointed pursuant to the federal Act[146], is a member of the Commission.

149 At the same time, the Australian Family Association was also allowed to intervene. Its interests partly, but not wholly, coincided with those of the prosecutors. According to its written submissions, a major concern of the Association appeared to be that the order of Sundberg J would permit the performance of fertilisation procedures and IVF therapy not only upon single women like Ms Meldrum (who deposed to a number of male partners and to possible future contemplation of marriage) but also to homosexual women involved in same-sex relationships desirous of taking advantage of artificial fertility treatment. This prospect alarmed the Association[147].

The grant of the Attorney-General's fiat

150 On 10 August 2001, the Federal Attorney-General granted a fiat to one of the prosecutors, namely the Australian Episcopal Conference of the Roman Catholic Church ("the relator") to permit it to bring proceedings in his name. According to its terms, the fiat was limited in three ways. First, it was granted to the relator to permit it "to seek relief under section 75(v) of the Constitution in relation to the judgment of the Honourable Justice Sundberg … in *McBain v*

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145 Established by the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), s 7.

146 s 96.

147 Counsel for the Association withdrew submissions annexed to its application for intervention which contained extreme assertions concerning the alleged sexual activities of homosexual people. However, the Association did not resile from its submission that it was open to the Parliament of Victoria to limit availability of infertility treatment, as the State Act did, and that the federal Act was not inconsistent with such limitation.

State of Victoria …". Subsequently, on 29 August 2001, an amended fiat was granted deleting the limitation of relief to that available under s 75(v) of the Constitution. Secondly, the fiat was limited "to an application for relief on the basis that the [federal Act] does not, as a matter of construction, apply to infertility treatment the subject of the [State Act] and is not inconsistent with the [State Act] for the purpose of section 109 of the Constitution". The third limitation was that the costs of the proceedings should be borne by the "relator".

151 Upon receipt of this fiat, the relator commenced the second proceeding in the name of the Federal Attorney-General. The two respondents in the earlier proceedings (Sundberg J and Dr McBain) were named as the respondents to the relator proceedings. The proceedings were consolidated with those brought by the prosecutors. To bring the second proceeding an extension of time was required. Application was made for that purpose.

152 The basic object of the fiat, granted by the Attorney-General, was to permit the relator to challenge the supposed inconsistency between the federal and State Acts, otherwise than on one basis propounded by the prosecutors, namely the alleged constitutional invalidity of provisions of the federal Act. The Attorney-General sought to uphold the validity of the federal Act and forbade the relator from challenging that validity. If, however, upon a true construction of the federal Act, it did not apply to the provision of "services" as contemplated by the State Act, there would be no intersection between the two laws. There would therefore be no inconsistency. There would be no invalidity under s 109 of the Constitution.

153 The Attorney-General's fiat was also designed to remove from contention in this Court the possible impediments to the proceedings based upon the lack of standing of the prosecutors. It attempted to do this by affording standing to the relator so as to permit that part of the case to be agitated without such a technical impediment.

154 The limited fiat granted had certain advantages from the Federal Attorney-General's point of view. Before this Court it secured the support by a party of the construction argument which, in any case, the Attorney-General wished himself to advance as intervener. It allowed the relator, as a party, and in the Attorney-General's name, to argue points of law that were regarded as important to the relator, to many bodies and members of the Church for which it wished to speak and doubtless to other persons of a like mind.

155 On the other hand, the grant of the limited fiat produced a number of curious procedural consequences. One of these was that, upon some aspects of the proceedings before this Court, the Attorney-General, by the relator, made one submission whereas on other aspects of the proceedings he made other submissions, contrary to those put by the relator in its capacity as prosecutor.

Conventionally, following the issue of a fiat, an Attorney-General will not be heard to argue against a relator and a relator will not be heard against the Attorney-General[148].

156 In Australia, relator proceedings in constitutional litigation are comparatively rare[149]. This Court was informed that the last fiat granted by a Federal Attorney-General in such proceedings was given more than a decade ago. The spectacle of the Attorney-General appearing, in partly contradictory interests, in connected proceedings before the Court, is rarer still. No precedent could be cited where this had previously happened.

157 The oddity of the emerging alignment of the parties and interveners in these proceedings was increased by the stand taken by Dr McBain. As is conventional, Sundberg J submitted to the orders of this Court. But Dr McBain appeared, complaining that he had only been added as a respondent eight months after the proceedings had first been instituted in this Court. He indicated that he too would abide by the order of this Court. But he also asked to be removed from his unwished for, and belated, status as a respondent. He sought an order that the prosecutors pay his costs. For their part, the moving parties made it clear that they did not seek costs from Dr McBain. However, because he still had the "benefit of the orders in the Federal Court", they resisted a costs order in his favour.

158 If Sundberg J and Dr McBain were truly in the position of submitting parties (or in the case of Dr McBain if he were removed from this Court's record) the position would be arrived at that the Court had no party before it to contradict the assertions of the prosecutors or of the relator, speaking through the Attorney-General. As was the case in the proceedings before Sundberg J, the Court would then have to rely upon interveners to fill the adversarial void. In the past, this Court has been cautious about permitting intervention by non-governmental strangers to matters before it[150]. But in the present proceedings, the Court was

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148 *Attorney-General v Ironmongers' Company* (1840) 2 Beav 313 [48 ER 1201]; *Attorney-General v Barker* (1838) 4 My & Cr 262 [41 ER 103]; *Attorney-General for Ireland v Governors of Smith's Schools* [1910] 1 IR 325.

149 But see eg *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559.

150 *Levy v Victoria* (1997) 189 CLR 579 at 600-605, 650-652; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 359; *Garcia v National Australia Bank Limited* (1998) 194 CLR 395 at 398-399; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 134-137 [102]-[108]; Kenny, "Interveners and

(Footnote continues on next page)

virtually obliged to permit interventions, as it did, to allow a legal controversy to be defined, argued and resolved[151].

159 These unconventional procedural features of the two proceedings made it inevitable that much of the argument before this Court should be addressed to unprecedented questions. They arise at the threshold. Unless they are answered in favour of the prosecutors or the moving parties, the substantive issues which those parties sought to present for decision would not arise.

The issues

160 There were three main issues in this Court:

(1) *The jurisdiction and power issue*: Whether, in the circumstances that have occurred, this Court has the jurisdiction and power, in either of the proceedings before it, to grant to the prosecutors and/or to the Attorney-General on behalf of the relator, the constitutional writs of prohibition and mandamus and a writ of certiorari. This issue raises questions as to whether, in the absence of proceedings by way of appeal, it is competent for this Court to provide any such relief; whether such relief is available under s 75(v) or 76(i) of the Constitution, together with the Judiciary Act[152]; whether either of the proceedings involves a "matter", essential to engage the original jurisdiction of this Court; whether either of the proceedings presents a justiciable issue for decision by the Court; and whether the Attorney-General's fiat validly affords the relator the right to claim relief from this Court in the circumstances of the case;

(2) *The discretionary issue:* Whether, if this Court has the jurisdiction and power to provide relief to the prosecutors or to the Attorney-General on behalf of the relator, such relief should be granted in the circumstances of this case? Or whether this Court should withhold relief on discretionary grounds[153];

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amici curiae in the High Court", (1998) 20 *Adelaide Law Review* 159; Neville, "Abortion Before the High Court - What Next?, Caveat Interventus: A Note on *Superclinics Australia Pty Ltd v CES*", (1998) 20 *Adelaide Law Review* 183.

151 One applicant for leave to intervene, Ms D E Purcell, was refused leave. She wished to argue that the State Act was invalid by reason of the Constitution, s 117. All other applicants were granted leave.

152 ss 30(a), 32 and 33(2).

153 cf *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194.

(3) *The invalidity issue*: Whether, in the event that issues (1) and (2) are determined in favour of the prosecutors or relator, the substantive issue of the suggested invalidity of the State Act, on the grounds of its inconsistency with the federal Act, was correctly decided by Sundberg J and, if not, whether, upon error in his Honour's orders being shown, relief should be granted to set aside the judgment of the Federal Court or otherwise to prohibit action upon it and to correct any legal error found to be inherent in it.

The jurisdiction and power issue

161 *Constitutional foundations*: The prosecutors, and the Attorney-General for the relator, severally invoked the original jurisdiction of this Court. WEL submitted that neither the prosecutors in their proceedings nor the Attorney-General in the relator proceedings, had validly engaged that jurisdiction. If WEL's submission were made good, its consequence would be that this Court had no power to afford relief of any kind.

162 According to WEL the way, and the only way, that the Constitution envisaged that the order of Sundberg J would come under the scrutiny of this Court for an error that was made within his Honour's jurisdiction, was in the exercise of its appellate jurisdiction[154], ie in the determination of an appeal from a judgment or order of the Federal Court, following a decision of the Full Court of that Court and a grant of special leave by this Court[155]. According to WEL's argument, the attempt of the moving parties to bypass the appellate arrangement envisaged in the Constitution, represented an impermissible endeavour to subvert the structure of Ch III of the Constitution which draws a distinction between the appellate and original jurisdiction of this Court.

163 WEL submitted that the only relevant jurisdiction and power of this Court was pursuant to an appeal. That procedure had not been followed. The consequential imperfections of the proceedings, and the necessity to rely upon interveners to afford, and sharpen, the controversy, was the inevitable outcome of bypassing the established constitutional arrangement for review of the subject order in an appeal. Collateral attack on that order was, so it was put, unprecedented. It should not be permitted on this occasion, although interveners had, in the event, appeared. If the precedent were now set, it might be followed

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154 s 73.

155 *Federal Court of Australia Act* 1976 (Cth), ss 24, 25, 33(3); cf *Judiciary Act* 1903 (Cth), ss 35, 35AA.

in other cases where such interventions were not assured. Months or years after a final judgment was entered by a federal court, concluding a controversy between the parties, a powerful, well resourced stranger to the litigation could invoke the original jurisdiction of this Court to attack the legality of the judgment or order that had determined the controversy with apparent finality.

164 The question on the first issue is not, of course, whether a collateral attack on a judgment or order made by a judge of a federal court is desirable or would, if allowed, succeed or fail. The only question is whether the procedure initiated by the prosecutors or the relator is lawful, having regard to the language and structure of the Constitution and any relevant federal legislation. In deciding the question of lawfulness, it is necessary, there being no direct authority on the point, to take into account any decisions that have considered analogous questions.

165 *Jurisdiction under s 75(v)*: In England, the prerogative writs of mandamus, prohibition and certiorari were not available to provide relief against a judgment or orders of a judge of a superior court[156]. When s 75(v) of the Constitution was adopted, the writs referred to in that paragraph were, relevantly, those of mandamus and prohibition. The writ of certiorari was not included. This omission was possibly because certiorari was traditionally directed to inferior courts (and tribunals) in order to quash their judgments or orders for non-jurisdictional error of law on the face of the record or for jurisdictional error or denial of procedural fairness that could be proved, whether on the face of the record or otherwise. The omission from s 75(v) of the writ of certiorari is significant. It may have followed a belief that the facility of appeal, envisaged by the Constitution, would, in any case, provide adequate remedies for non-jurisdictional error by judges and courts, at least so far as federal courts were concerned.

166 By legislative provisions Australian courts, including federal courts (such as the Federal Court of Australia), may be designated "superior courts"[157]. In its early days, this Court might have held that the expression "officer of the Commonwealth", appearing in s 75(v) of the Constitution, was to be read down so as to exclude a judge of a federal court (at least if that Court were declared by legislation to be a superior court of record). Such an approach to the language and structure of Ch III of the Constitution would not have been surprising, having regard to the facility of appeal from the judgments and orders of such a judge, ordinarily available pursuant to s 73 of the Constitution.

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156 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 387.

157 eg *Federal Court of Australia Act* 1976 (Cth), s 5(2).

167 Instead, this Court took the widest possible view of the meaning of the phrase "officer of the Commonwealth" in s 75(v). It accepted the availability of the constitutional writs there mentioned against a federal judge, as an officer of the Commonwealth, where otherwise those writs might not have been available. It did so notwithstanding the status of the judge as a judicial officer of the Commonwealth and even as a member of a court declared to be a superior court. In *Whybrow's Case*[158], reaffirmed in *The Tramways Case [No 1]*[159], this Court upheld its jurisdiction under s 75(v) to grant prohibition to the President of the Commonwealth Court of Conciliation and Arbitration, then designated to be a federal judge. The writ was available if he acted beyond his lawful power or outside his lawful jurisdiction. That line of authority has been followed ever since. The constitutional writs, and the writ of certiorari to perfect them, have repeatedly been issued to judges of federal courts[160].

168 The entitlement of this Court in its original jurisdiction to provide such remedies, directed to the judges of federal courts under s 75(v) of the Constitution, and addressed to their judgments and orders and the records of their proceedings, must now be taken as part of the settled law of the Commonwealth Constitution[161]. It was not challenged in these proceedings. It rests upon the express language of s 75(v). That provision is of cardinal importance. It affords an assurance of conformity to the requirements of the Constitution and to the laws validly made under it. It restricts the enactment of "exceptions" and "regulations" such as the Parliament can prescribe to limit the appellate jurisdiction of this Court. These considerations present cogent reasons why it is inappropriate to reconsider, or qualify, this long line of the Court's authority now[162] .

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158 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1.

159 *The Tramways Case [No 1]* (1914) 18 CLR 54. See also *R v The Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

160 eg *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201 (Federal Court of Australia); *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25 (Family Court of Australia).

161 cf *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [17].

162 s 73. *Abebe v The Commonwealth* (1999) 197 CLR 510 at 533-534 [47], 589-590 [229], 605 [281].

169 Once it is accepted that collateral attack upon the official acts (including judgments and orders of federal judges) of "officers of the Commonwealth" is possible under s 75(v) of the Constitution, notwithstanding the concurrent facility of appeal ordinarily available pursuant to s 73, it is impossible logically to maintain the strict dichotomy between the exercise of *appellate* jurisdiction in respect of those judgments and orders and the exercise of *original* jurisdiction in respect of the same judgments and orders. If the other constitutional requirements are satisfied, there is nothing in the language or structure of Ch III of the Constitution that confines this Court's intervention in the judgments and orders of federal judges and federal courts to the exercise of appellate jurisdiction.

170 If jurisdiction and power can exist in relation to such judgments and orders pursuant to s 75(v) of the Constitution, there appears no reason of principle why such jurisdiction and power should not exist elsewhere in the original jurisdiction of this Court, whether that conferred by the Constitution itself[163] or that conferred by the Parliament pursuant to the Constitution[164]. No other ground being argued as relevant to enliven the original jurisdiction of this Court conferred by the Constitution itself[165], the question becomes whether the Parliament has made a law conferring original jurisdiction on this Court in a relevant matter either "arising under [the] Constitution, or involving its interpretation"[166].

171 As a foundation for this Court's jurisdiction, and to support their proceedings, the moving parties maintained their reliance on s 75(v) of the Constitution. They pointed to the presence before the Court of Sundberg J, an undoubted "officer of the Commonwealth". However, in case that reliance failed, they also relied upon the Judiciary Act, specifically, ss 30(a)[167], 32[168] and 33(2)[169].

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163 s 75.

164 s 76.

165 Note however s 75(iii) of the Constitution and the fact that the Attorney-General became a party to the relator proceedings argued in the original proceedings. He intervened "on behalf of the Commonwealth" in accordance with the Judiciary Act, s 78A(1).

166 Constitution, s 76(i).

167 The Judiciary Act, s 30(a) provides: "In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction: (a) in all matters arising under the Constitution or involving its interpretation …".

172 In the present proceedings it was conceded for the moving parties that the error that they asserted against Sundberg J, reflected in the order which he had pronounced in Dr McBain's case, was not one involving jurisdictional error. It did not involve his proceeding without jurisdiction to dispose of the matter or actually or constructively failing to enter upon his jurisdiction as a judge of the Federal Court.

173 The unsatisfactory distinction between an "error within jurisdiction", "jurisdictional error" (including a constructive failure to exercise jurisdiction) and "non-jurisdictional error" has been noted in many cases[170]. The distinction, always elusive to judges, has been abolished in England[171]. However, it has not been discarded by this Court[172]. The given explanation for its retention in this Court's doctrine is the separation, envisaged by the Constitution, between federal judicial power and other governmental powers conferred by or under the

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168 The Judiciary Act, s 32 provides, relevantly: "The High Court in the exercise of its original jurisdiction in any cause or matter pending before it … shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies, whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action … may be completely and finally determined …". See reasons of McHugh J at [84]; reasons of Hayne J at [267].

169 The Judiciary Act, s 33(2) provides: "This section shall not be taken to limit by implication the power of the High Court to make any order or direct the issue of any writ."

170 See eg *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union, Australian Section* (1953) 89 CLR 636 at 647; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371-372; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132 at 141; *Craig v South Australia* (1995) 184 CLR 163 at 176-180; *Coal and Allied Operations v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 226-229 [78]-[85].

171 *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147 at 194-195; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 927-928 [211]-[212]; 179 ALR 238 at 290-291; Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000), at 166-172.

172 *Craig v South Australia* (1995) 184 CLR 163 at 179.

Constitution[173] and hence the suggested need to preserve the concept of "jurisdictional error".

174 Whilst the nomination of Sundberg J as a respondent to both proceedings ensured, so far as s 75(v) of the Constitution was concerned, that there was an "officer of the Commonwealth" before this Court, amenable to a constitutional order of the Court under s 75(v), the answerability of his Honour to such an order said nothing about whether such an order could, or should, be made in the circumstances.

175 I have expressed reservations about the importation into the constitutional writs provided by s 75(v) of all the artificial technicalities and distinctions that have gathered around the prerogative writs of the same name in England[174]. However, it is prudent for me to approach the invocation of s 75(v) of the Constitution in these proceedings on the footing that this provision, on current doctrine, restricts the availability of constitutional relief to cases of jurisdictional error. As such error was not asserted either by the prosecutors or the relator or anyone else it follows that constitutional relief under s 75(v) is not available.

176 This conclusion notwithstanding, the moving parties urged that relief by way of a writ of certiorari might be granted despite the unavailability of other relief[175]. This Court, however, has repeatedly held that certiorari is not available in the exercise of its jurisdiction under s 75(v) of the Constitution, except as ancillary to the Court's jurisdiction and power to grant one or more of the constitutional remedies there mentioned[176]. It is true that, very rarely, where relief has been sought under s 75(v), and it is shown that the respondent has exceeded jurisdiction and that the moving party would be entitled to a

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173 *Craig v South Australia* (1995) 184 CLR 163 at 179.

174 cf *Coal and Allied Operations v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 227-228 [82]-[83]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 136-137 [147]-[149].

175 Pursuant to the High Court Rules, eg O 55 r 17.

176 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14], 135 [142], 137-138 [151]-[152], 156-157 [218]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 411 [29]-[31]; 168 ALR 407 at 415-416; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 604, 617-618, 645; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 348; *R v Bowen; Ex parte Federated Clerks Union* (1984) 154 CLR 207 at 211; *R v The District Court of Queensland Northern District; Ex parte Thompson* (1968) 118 CLR 488 at 491, 495, 499, 501.

constitutional writ, the Court has granted certiorari although not issuing a constitutional writ[177]. However, although the grant of a writ of certiorari might be justified in an exceptional case, this is not such a case given the concession that Sundberg J's order was made within jurisdiction[178].

177 It follows that certiorari is not available to the moving parties under s 75(v) of the Constitution against Sundberg J, whether to quash his Honour's impugned order or otherwise[179]. If such relief were to be issued, an alternative source for its validity would have to be found. It would have to be discovered consistently with the concession mentioned. It would have to be compatible with this Court's decisions on the point.

178 *Jurisdiction under s 76(i)*: The moving parties therefore shifted their claim for the issue of a writ of certiorari, to rest it upon s 76(i) of the Constitution[180]. With the support upon this point of the Attorney-General on behalf of the Commonwealth, they submitted that this Court had jurisdiction under s 76(i) and the Judiciary Act, s 30(a) to provide the relief claimed. Such relief would include the issue of a writ of mandamus, prohibition or certiorari, as appropriate, to afford a party, otherwise able to establish an entitlement to such relief on legal grounds, a complete remedy "so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined"[181].

179 The possibility of providing such remedies within the original jurisdiction of this Court under s 76(i) and the Judiciary Act, including the possibility of issuing a writ of certiorari on that basis, has been contemplated in earlier

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177 eg *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 411 [29]-[31]; 168 ALR 407 at 415-416; *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

178 cf Aitken, "Certiorari and jurisdictional error in the Federal Courts", (1995) 69 *Australian Law Journal* 784.

179 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25-26, 29, 32-34; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 395-396.

180 The Constitution, s 76(i) states: "The Parliament may make laws conferring original jurisdiction on the High Court in any matter: (i) arising under this Constitution, or involving its interpretation."

181 Judiciary Act, s 32.

decisions of this Court[182] and elsewhere[183]. There is no binding decision of the Court upholding the availability of a relief of this character pursuant to s 76(i) of the Constitution. On the other hand, there is no binding authority that denies its availability.

180 In *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)*[184], Toohey, McHugh and Gummow JJ remarked:

> "[A]s to the proceedings initiated in this Court for prerogative relief in reliance upon s 75(v) of the Constitution, the presence in that controversy of a matter involving the interpretation of the Constitution would appear to attract the jurisdiction of this Court on an additional footing, namely s 76(i) of the Constitution as implemented by s 30 of the *Judiciary Act* 1903 (Cth). This, together with s 32 of that statute, would provide a foundation for the issue of certiorari, if that remedy were otherwise appropriate."

181 It was this reasoning that the moving parties and the Attorney-General embraced; but WEL disputed. It is therefore necessary to evaluate the applicable arguments of constitutional principle.

182 *Arguments against jurisdiction under s 76(i)*: The arguments against upholding the availability of relief by way of writs of mandamus, prohibition and certiorari, pursuant to s 76(i) of the Constitution, against persons who include an officer of the Commonwealth are, principally, as follows:

183 First, the express mention of "officers of the Commonwealth" in s 75(v), and the specification of particular forms of relief as being available specially against them, suggests (so it was put) that this was the *only* form of relief contemplated by the Constitution in the case of such persons. Otherwise, the express limitations in the available relief mentioned in s 75(v) would be easily circumvented. This could occur by the simple expedient of invoking another basis for jurisdiction in combination with legislation expressed in language of generality clearly not intended to "undermine" such an important constitutional provision as s 75(v)[185]. Upon this argument, the general requirement of the

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182 *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 26 per Gibbs J, 33 per Aickin J.

183 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 780.

184 (1995) 184 CLR 620 at 651-652. Footnote omitted.

185 cf *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25; *R v Bowen; Ex parte Federated Clerks Union* (1984) 154 CLR 207 at 211; *Re McJannet; Ex parte*

(Footnote continues on next page)

Judiciary Act to provide complete relief should be read as subject to the Constitution. It thus excluded relief against designated persons in designated terms for which the Constitution made express provision[186].

184 Secondly, this Court was urged to follow the reasoning of Deane J in *R v Gray; Ex parte Marsh*[187] so far as the availability of certiorari to the Federal Court was concerned. In that case, Deane J concluded that prohibition would lie to a superior court judge for jurisdictional error (and by inference mandamus to command the exercise of jurisdiction). Certiorari would, in such a case be available to perfect the constitutional writ and ensure its effectiveness. However, a writ of certiorari for non-jurisdictional error, alleged to have occurred in the actual exercise of such a court's jurisdiction was, according to Deane J, inadmissible. This was because it would involve "intermeddling" by this Court in the lawful exercise of the jurisdiction of a court that was a superior court. In the opinion of Deane J, the status of the Federal Court, which the Parliament had declared to be a "superior court of record"[188], was such as to be inconsistent with the issue to it by this Court of the writ of certiorari, save as adjunct to constitutional relief founded on jurisdictional error.

185 Thirdly, it was argued that the issue to Sundberg J of a writ of certiorari, in respect of any error made in a judgment or order within jurisdiction would amount, effectively, to the provision of a "new form of appeal" from orders of the Federal Court. However, it would be an "appeal" open to a non-party which had bypassed the statutory procedures requiring parties to an appeal first to take such appeal to a Full Court and then, if still dissatisfied, to secure special leave from this Court before their contentions would be heard[189]. The course proposed would effectively deprive this Court of the advantage of a reasoned opinion of the Full Court. It would therefore undermine the scheme of the Constitution and federal legislation validly made under it[190]. It would necessarily diminish the

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Minister for Employment, Training and Industrial Relations (Q) (1995) 184 CLR 620 at 651-652.

186 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 477, 489.

187 (1985) 157 CLR 351 at 386.

188 *Federal Court of Australia Act* 1976 (Cth), s 5(2).

189 *Federal Court of Australia Act* 1976 (Cth), s 33(3); Judiciary Act, s 35.

190 *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 214.

standing of the Federal Court. It would disrupt the finality of the orders of every judge of that Court and of all other federal judicial officers.

186 *Jurisdiction under s 76(i) is available*: Obviously these arguments are not meritless. They raise important considerations. However, relief in the nature of mandamus[191], prohibition[192] and certiorari[193] is available against the judgment and orders of a judge of the Federal Court. In my opinion it is available pursuant to the Constitution, s 76(i) and the provisions of the Judiciary Act conferring original jurisdiction on this Court in a matter "arising under the Constitution, or involving its interpretation"[194].

187 First, this conclusion is required by the explicit language of the Constitution and the provisions of the Judiciary Act in question. The Constitution permits the Parliament to make laws conferring original jurisdiction on this Court in any matter arising under the Constitution or involving its interpretation (s 76(i)). The Parliament has duly conferred such jurisdiction on this Court. It has done so in the Judiciary Act in general language which follows exactly the terms of the Constitution. It has therefore made it clear that this grant of jurisdiction is to be "[i]n addition to the matters in which original jurisdiction is conferred … by the Constitution" itself[195]. It would be contrary to principle for this Court to reject or curtail the jurisdiction so conferred, given its provenance.

188 Secondly, the proper approach to the interpretation of constitutional language reinforces the understanding of the constitutional and statutory provisions in question conferring ample original jurisdiction on this Court, in matters arising under the Constitution, as it is possible to achieve by law. It would be an erroneous approach to the interpretation of the power afforded by s 76(i) of the Constitution, and the original jurisdiction afforded to this Court by s 30(a) of the Judiciary Act, to read either provision down in a way that would defeat the generality of the language used[196]. Grants of power in a document

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191 Constitution, s 76(i); Judiciary Act, s 33(1)(c) and (e).

192 Constitution, s 76(i); Judiciary Act, s 33(2).

193 Constitution, s 76(i); Judiciary Act, s 33(2).

194 Judiciary Act, s 30(a); Constitution, s 76(i).

195 Judiciary Act, s 30(a).

196 *Attorney-General for Ontario v Attorney-General for Canada* [1912] AC 571 at 583-584 (PC).

such as the Australian Constitution, insusceptible to easy amendment, must not be construed narrowly[197].

189 Thirdly, there is a particular reason why the source of jurisdiction in s 76(i) of the Constitution, and the grant of power in s 30(a) of the Judiciary Act, should be afforded a broad ambit. This is because the provision in question contemplates the grant of jurisdiction to a court[198]. Indeed, it contemplates the grant of original jurisdiction to this Court which, by the Constitution, is the "Federal Supreme Court"[199] of the Australian Commonwealth. Where jurisdiction and power are contemplated, and granted, to a superior court, conventional canons of construction require that the grant of jurisdiction (and the definition of the circumstances of its exercise) must be afforded a large operation. This is out of recognition of the fact that such a repository of jurisdiction and power is unlikely to abuse it. Moreover, it is undesirable to circumscribe the grant of jurisdiction and power, given that its exercise is likely, over time, to arise in a very wide variety of circumstances, many of them unforeseeable even to the imaginative[200].

190 Fourthly, to the complaint that such an approach to the meaning of s 76(i) of the Constitution would undermine the express grant of original jurisdiction of this Court in s 75(v) of the Constitution, there are several answers. When s 75(v) was originally proposed, some of those participating in the constitutional conventions thought that it was not necessary. Appropriate powers could be provided to this Court by the Parliament. However, the great work done by s 75(v) of the Constitution is to put the grant of original jurisdiction, in the respects there specifically mentioned, beyond the power of the Parliament to curtail or limit. Powers of curtailment and limitation exist in respect of the Court's appellate jurisdiction by reason of the entitlement of the Parliament to

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197 *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 611-612; *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 332.

198 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178 at 205; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 61-62 [125]-[127]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423 [110]; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 479 [134].

199 Constitution, s 71.

200 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423-424 [110]-[113].

provide "exceptions" and "regulations" to govern that jurisdiction[201]. Likewise, conferral of original jurisdiction, under s 76 of the Constitution, is within the gift of the Parliament. What it gives, it may take away. But, where, as here, by the plain terms of the Judiciary Act, original jurisdiction has been conferred on this Court, without relevant limitation and with a statutory injunction to grant "complete relief"[202], there is no reason for this Court to read down such a grant. There is every reason for the Court to construe the grant, according to its terms, in a broad and ample way.

191 Fifthly, there is nothing in that grant of jurisdiction, read in this way, that imports from s 75(v) of the Constitution, an implied limitation on the provision of remedies such as mandamus, prohibition and certiorari addressed to a judge of the Federal Court. It is incorrect to say that s 75(v) was intended, for all time, to exhaust the writs that would be available in the original jurisdiction of this Court. Had that been so, it would mean that this Court would be powerless to grant the writ of habeas corpus[203] or a writ in the nature of quo warranto[204] or a writ directed to a person who was not an officer of the Commonwealth, but was invalidly purporting to exercise federal jurisdiction, or a writ to restrain a person (or a court) from the exercise of federal jurisdiction when it was beyond power[205]. It is erroneous to read constitutional grants of power in such a narrow, compartmentalised way[206]. Whilst the provisions of Ch III, indeed of the entire Constitution, must be read as a whole, taking into account their language and structure, each grant of power must be given full force and effect. This must occur unless to do so would destroy the operation of another part of the Constitution, as for example where a head of power is subject to an express qualification[207].

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201 Constitution, s 73; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 587 [223].

202 Judiciary Act, s 32.

203 Judiciary Act, s 33(1)(f).

204 cf Judiciary Act, s 33(1)(d).

205 cf Judiciary Act, s 33(1)(a) and (b).

206 cf *Gould v Brown* (1998) 193 CLR 346 at 374 [7]-[8], 476-482 [276]; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 600-601 [188]-[191], 604-607 [197]-[203].

207 Such as the requirement to accord just terms for the acquisition of property under s 51(xxxi) of the Constitution: *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372.

192 Sixthly, with all respect to the opinion of Deane J in *Ex parte Marsh*[208], I cannot agree that a statutory designation of the Federal Court as a superior court, alters in the slightest the original jurisdiction conferred upon this Court pursuant to s 76(i) of the Constitution and picked up in the Judiciary Act. This Court's power and duty in the exercise of the jurisdiction afforded to it in terms as wide as the Constitution, is to issue writs, including where appropriate the writ of certiorari, including to the Federal Court for errors made within jurisdiction.

193 In constitutional construction, it is a mistake to import into the specification of the jurisdiction and powers of this Court all of the limitations that developed in England around the prerogative writs. In Australia, there are no federal courts of unlimited jurisdiction. All federal courts ultimately derive their jurisdiction and powers from the Constitution and from federal legislation creating and defining such powers[209]. Federalism cultivates a habit of mind of requiring all those answerable to the Constitution to conform to its requirements or to other requirements imposed by valid laws made pursuant to the Constitution. The rule developed in England to exempt judges of superior courts from the prerogative writs, including certiorari, therefore needs adaptation to the Australian circumstances of a federal constitution necessarily envisaging courts and tribunals of limited powers.

194 In that context, the provision of the constitutional writs (and certiorari, when necessary to make them effective) is well established because of the interpretation that this Court has given to s 75(v) of the Constitution. But where there is an alternative source of jurisdiction and power to uphold the grant of relief, for example under s 76(i), it should not be read narrowly. If it is afforded to this Court by the Constitution and by a valid law enacted by the Parliament, it is given for the high purpose of upholding compliance with the Constitution throughout this land. The Constitution is a higher law. It ought to be obeyed. Where it is not obeyed, that fact will commonly have serious consequences.

195 It would therefore be contrary to principle to narrow the interpretation of s 76(i) of the Constitution and the jurisdiction conferred on this Court by s 30(a) of the Judiciary Act. The purposes of these provisions include the maintenance of the supreme law. The grant of relief, pursuant to the Constitution, s 76(i) and the Judiciary Act is discretionary[210]. To provide that relief under that grant of

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208 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 385.

209 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 643-644, 652-653.

210 cf *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194.

power, whether to redress an unlawful decision made outside jurisdiction not otherwise amenable to relief under s 75(v) of the Constitution, or to provide relief for non-jurisdictional error, does not amount to "intermeddling" in the exercise of the Federal Court's jurisdiction. It amounts to no more than ensuring that, in all matters arising under the Constitution or involving its interpretation, the Federal Court and its judges conform to their constitutional and legal duties.

196 Seventhly, it is erroneous to suggest that this approach to the meaning of s 76(i) of the Constitution, and the provisions of the Judiciary Act giving it effect, represent a subversion of the constitutional provisions governing the appellate jurisdiction of this Court, as WEL hinted. That argument cannot stand with the provision by this Court, for almost a century, of relief directed to federal judges, pursuant to the original jurisdiction expressly conferred on it by s 75(v) of the Constitution and parallel to the availability of appeal. Our Constitution already permits, in such cases, collateral attacks upon judgments and orders of federal courts despite the fact that they are susceptible to appeal. It is much too late to attempt to restore the strict dichotomy between this Court's appellate and original jurisdiction.

197 Far from being inconvenient, the existence of parallel sources of challenge in this Court has often proved advantageous. In important and urgent cases, it allows the immediate invocation of this Court's jurisdiction. It has circumvented attempts to limit this Court's powers by legislative restrictions upon its appellate jurisdiction. It may sometimes afford remedies outside the appellate system which justice requires but which the procedures of appeal cannot, in the circumstances, deliver[211]. Whether all of the constitutional writs mentioned in s 75(v) of the Constitution are truly discretionary or not[212], this Court is able to protect itself from meritless, premature or vexatious invocation of its original jurisdiction. It is therefore erroneous to characterise the jurisdiction invoked by the moving parties in these proceedings as a "new form of appeal". It was no more so than the jurisdiction long exercised by this Court under s 75(v) of the Constitution.

198 There are, in addition, reasons of principle and practicality that support, in a proper case, the availability of this alternative stream of legal redress. The relevant principle involves, ultimately, upholding the public law of the Constitution. The practicalities require acceptance that, sometimes, the appellate process for challenging the judgment or order of a federal judge may fail. This

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211 See eg *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 927 [209]; 179 ALR 238 at 290.

212 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194.

might happen through oversight, through a party becoming out of time, through a lack of interest on the part of the parties to challenge the judgment or order in question or even the acquiescence of those most closely involved in what they know is a breach of the Constitution and of federal law.

199 In such circumstances, there is no reason to curtail the facility of access to the original jurisdiction of this Court which the Constitution contemplated in s 76(i) and which the Parliament has conferred by the Judiciary Act. On the contrary, there are very good reasons why such access should be available.

200 Eighthly, to the suggestion that this construction was unnecessary because it would be available to the Attorney-General or a party with standing to commence fresh proceedings in this Court for a declaration or to bring new proceedings in the Federal Court (in effect to have the judgment of Sundberg J overruled in another case) there are three answers. The availability of alternative relief in other cases does not deny the validity of the relief sought by this. Any proceedings in the Federal Court would be likely to require both a trial (at which a judge would almost certainly follow the decision of Sundberg J out of comity) and an appeal. It would put the parties to needless cost, inconvenience and delay. Very good reason would be necessary to require that outcome.

201 Finally, once it is accepted that new proceedings might be brought, the arguments of legal principle, said to stand in the way of this Court's intervention, are knocked away. All that are left are arguments of a discretionary character, which this Court is perfectly capable of judging in the present proceedings, or any others of a like kind, without obliging the parties to start fresh proceedings in the courts below.

202 It follows that, subject to the remaining considerations, the proceedings brought by the moving parties validly invoke the original jurisdiction of this Court. I would reject the argument that it was not competent to them, in the circumstances, to claim relief within the original jurisdiction. The argument that, for constitutional reasons, such relief, and specifically the writ of certiorari, were outside the original jurisdiction of this Court should be rejected.

203 *Matter and justiciability*: This conclusion takes the moving parties most of the way towards the consideration by this Court of the issue of substance which they argued. However, it is appropriate to refer to three additional constitutional considerations which WEL raised in objection to the validity of the proceedings. These considerations are related.[213]

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213 Reasons of Hayne J at [241].

204 The first was that there was no "matter" before this Court to engage its original jurisdiction. The requirement of a "matter" is a constitutional one. The word is common both to the grant of original jurisdiction in s 75 of the Constitution and to the provision for the conferral of original jurisdiction pursuant to s 76. So much has been written, including recently, on the requirement of a "matter" that I hesitate to add to it in these proceedings. The word supposes "some immediate right, duty or liability to be established by the determination of the Court … [not] abstract questions of law without the right or duty of any body or person being involved … [but] a settlement of existing claims of right under the law of the Commonwealth[214]". Accordingly, no federal court may entertain, or be given jurisdiction by the Parliament to hear and determine, an abstract question of law as to the validity of a federal statute. Specifically, it may not do so simply because a litigant desires a ruling on such constitutionality, although no affected parties are before the Court.

205 For the purposes of these reasons, I am prepared to accept that the prosecutors did not have standing to apply for relief in the proceedings, save to the extent of the fiat granted by the Attorney-General to the relator. I will make that assumption although I am not wholly convinced that the interest asserted by the prosecutors was "merely intellectual or emotional"[215]. By evidence, they demonstrated their involvement in, and responsibility for, welfare agencies and hospitals throughout Australia, including in the State of Victoria. They do not presently provide IVF services to unmarried persons in or through such bodies. They contend that, to do so, would violate the beliefs of their religion. They therefore seek elucidation of the law, maintaining that a true understanding of the Constitution and of the applicable federal and State laws does not, in Victoria, impose any legal duty on their interests, or anyone else, to provide fertilisation procedures to single women such as Ms Meldrum.

206 In contemporary circumstances, this Court should adopt a broader view of what constitutes "standing", sufficient to secure a decision of a court on a constitutional or other legal point of importance to it. The criterion for standing

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214 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265, 267; cf *Abebe v The Commonwealth* (1999) 197 CLR 510 at 584-586 [213]-[219]; *Truth About Motorways v Macquarie Infrastructure Investment Management* (2000) 200 CLR 591 at 610 [42], 631 [104], 646 [147], 660-661 [183]-[184].

215 cf *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530-531, 547-548; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 37; *Davis v The Commonwealth* (1986) 61 ALJR 32 at 35; 168 ALR 18 at 23; *Croome v Tasmania* (1997) 191 CLR 119 at 138.

is now wider than was commonly accepted in the past[216]. This Court has remarked on the importance of adopting a degree of flexibility in respect of standing to sue. It has cautioned against the adoption of over-precise or rigid formulae[217].

207 Nevertheless, the suggestion that the moving parties had not presented a "matter" engaging the original jurisdiction of this Court (or, putting it another way, that the issues which they presented for decision were not justiciable[218]) can be side-stepped in these proceedings. This was so because of the belated provision to the relator of the Attorney-General's fiat. At least in the relator proceedings (if it be valid and effective) the fiat disposed of the objection that might otherwise have been raised concerning the standing of the relator. The grant of the fiat permitted the relator to bring the proceedings in the name of the Attorney-General, for the determination of the matter stated in the fiat[219].

208 It is not to the point to complain that the "matter" so resulting is different from, or in some ways overlaps, the "matter" which Dr McBain, Ms Meldrum and others had previously litigated in the Federal Court before Sundberg J. That was, indeed, their "matter". But the relator, in the name of the Attorney-General, has now presented another, different (although not unconnected) "matter" of its own. It has done so in proceedings that are validly constituted by the presence of Sundberg J and Dr McBain as respondents. Whatever might otherwise have been the position, the intervention of WEL and the Commission presented this Court with a live legal controversy in which those parties, in effect, took the constitutional and legal arguments that Dr McBain might have done, to support the order of Sundberg J that Dr McBain had originally sought, and by inference

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216 cf *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526.

217 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd ("Bateman's Bay")* (1998) 194 CLR 247 at 262-263 [38]-[39]. I am not convinced that it is true today (if ever it was) that citizens or courts in the Australian Judicature can, or should, have to rely on the Executive Government to enforce the Constitution and the laws; cf *Bateman's Bay* (1998) 194 CLR 247 at 276 [82] per McHugh J. See also *Allan v Transurban City Link* (2001) 75 ALJR 1551 at 1564-1566 [69]-[75]; 183 ALR 380 at 397-399.

218 *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336; *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 117, 119, 120, 178.

219 See these reasons above at [150]. cf *Stockport District Waterworks Co v The Mayor of Manchester* (1862) 9 Jur (NS) 266 at 267; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 481; *Bateman's Bay* (1998) 194 CLR 247 at 261 [35].

might have continued to support had doing so not exposed him to the risk of substantial costs which, not unnaturally, he desired to avoid.

209 *Validity and operation of the fiat*: A question then arose as to whether the fiat granted by the Attorney-General did, as a matter of law, repair the procedural defects that might otherwise have deprived the moving parties of standing sufficient to present a "matter" that engaged the jurisdiction of this Court. This point can be considered at three levels of argument.

210 First, there is a question, so far unresolved, as to whether, in the Australian constitutional setting, the Attorney-General enjoys the right, which the Attorney-General in England traditionally did, to grant a fiat permitting a litigant to bring proceedings in the Attorney-General's name[220]. It is true that this Court has repeatedly allowed that course to be taken. No party appears to have questioned it[221]. More recently, however, the Court itself has raised the question of whether, in Australia, the Attorney-General has precisely the same powers and functions as have hitherto been assumed to have been inherited from England[222]. The notion of a Minister in the Executive Government intervening in proceedings before this Court or another federal court, to allow or terminate[223] litigation (and to control its conduct by others[224]) does not sit comfortably with many of the assumptions upon which Ch III of the Constitution is based.

211 Secondly, as already mentioned, in charity cases in England, where the fiat was often provided, it is clear law that the Attorney-General will not be heard against the relator and the relator will not be heard against the Attorney-General[225]. In these proceedings, the Attorney-General's limited fiat led to a

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220 *Attorney-General v Ironmongers' Company* (1840) 2 Beav 313 [48 ER 1201]; *Attorney-General v Haberdashers' Company* (1852) 15 Beav 397 at 401-403 [51 ER 591 at 593]; *London County Council v Attorney-General* [1902] AC 165 at 168-169.

221 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

222 *Bateman's Bay* (1998) 194 CLR 247 at 261-262 [37]-[38].

223 *Attorney-General v Ironmongers' Company* (1840) 2 Beav 313 [48 ER 1201].

224 *Attorney-General v Haberdashers' Company* (1852) 15 Beav 397 at 401-403 [51 ER 591 at 593].

225 *Attorney-General v Ironmongers' Company* (1841) Cr and Ph 208 at 218 [41 ER 469 at 474] (on appeal); *London County Council v Attorney-General* [1902] AC 165 at 168; *Attorney-General for NSW v Brewery Employés Union of NSW* (1908) 6 CLR 469 at 598; *Bateman's Bay* (1998) 194 CLR 247 at 259 [29]-[31].

difference between the respective arguments advanced to the Court by the Attorney-General on behalf of the Commonwealth and by the Attorney-General on the relation of the relator.

212 Thirdly, there was another curiosity in the present proceedings. The Attorney-General's fiat to the relator did not extend, as such, to the attack which the relator, as a prosecutor, wished to make upon the constitutional validity of the federal legislation. Instead, it concerned only the interpretation respectively of the federal Act and the State Act. Thus, to some extent at least, the fiat purported to offer standing to the relator to argue in favour of the validity of a State law, rather than in relation only to the validity, or invalidity, of a federal law.

213 Whilst accepting that these questions are important and may one day need to be decided, I would assume in these proceedings that the Attorney-General's fiat was valid and effective for the purposes stated in it. No party sought to take the objection of a fundamental character as to the entitlement of the Attorney-General to exercise the power to grant such a fiat. It would, therefore, be inappropriate to determine that question in these proceedings. Least of all would it be appropriate, given the history of the fiat in Australia. Obviously, there will sometimes be reasons of convenience as to why such a facility should be available, albeit that, in practice, its provision has been so variable[226].

214 So far as the suggested oddity of the Attorney-General's appearing to be in conflict with the relator over some parts of the relator's submission, I see no difficulty. Cases involving charities are hardly analogous to the cases involving the Constitution of the Commonwealth and the interpretation of federal law. The Attorney-General's fiat in this case was limited. Within the relator proceedings, there was no possibility of conflict between the submissions of the Attorney-General in his different capacities. That possibility only arose in the earlier proceedings where the relator, as prosecutor, wished to argue the invalidity of the federal Act and the Attorney-General argued in favour of its validity.

215 It is true that the fiat granted by the Attorney-General had the effect of permitting the relator to make submissions upholding the validity of a State Act. Normally, this would be the concern of the relevant State Attorney-General. However, in the present case the latter elected to take no part in the proceedings. In cases involving alleged inconsistency between federal and State laws, it is usually necessary first to construe the respective laws involved. To that extent,

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226 Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985); Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to sue for public remedies*, Report No 78 (1996); *Truth About Motorways* (2000) 200 CLR 591 at 640 [131].

in cases of inconsistency, it is impossible to ignore, or avoid, the meaning and operation of the law of the other polity of the Commonwealth said to be inconsistent. It follows that, if, in Australia, a fiat may be granted in a case involving suggested constitutional inconsistency, this will necessarily involve argument by the recipient of the fiat, about the meaning and operation of the law of the other polity alleged to be in competition, whether federal or State.

216 These are the reasons why it is safe to proceed on the assumption that the fiat granted to the relator by the Attorney-General in these proceedings was valid and effective. As such, it cured any defect that otherwise existed in the standing of the moving parties. It did so to the extent of the limited terms in which it was expressed. I therefore put to one side, for the moment, the proceedings brought by the prosecutors. At least in respect of the proceedings brought by the Attorney-General for the relator, I am of the view that there was a "matter" before this Court. It presented a justiciable issue for decision. That matter was separate and different from (although connected with) the "matter" which Sundberg J had earlier determined by his order. Effectively, it was the relator's "matter". It validly engaged the original jurisdiction of this Court. It did so pursuant to s 76(i) of the Constitution and the provisions of the Judiciary Act permitting this Court to exercise original jurisdiction in all matters arising under the Constitution or involving its interpretation. By the Judiciary Act, this Court is required, where such jurisdiction is engaged, to grant complete relief so as to settle the matters in controversy between the parties[227] by the issue of a writ proper for that purpose.

217 The Rules of the High Court contemplate, in several places, the issue by the Court of the writ of certiorari[228]. They also contemplate the issue of the writ of prohibition[229]. On the face of things, these remedies would therefore be available, at least in the relator proceedings, if, in those proceedings, the argument could be made good that Sundberg J had made an error of law appearing on the face of the record. For the purposes of relief in the nature of certiorari, the record clearly includes the order made by the court or judge concerned[230]. If, as the Attorney-General submitted for the relator and for the Commonwealth, Sundberg J had erred in deciding that s 32 of the federal Act did not apply to the circumstances of this case, so as to save the validity of the State

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227 Judiciary Act, ss 30(a), 32 and 33(2).

228 Order 55 r 8(2); O 55 r 17 High Court Rules.

229 Order 55 rr 34 and 35 High Court Rules.

230 *Craig v South Australia* (1995) 184 CLR 163 at 182.

law, that error was apparent in the first declaration included in the order of Sundberg J[231].

218 *Conclusion: jurisdiction and power exist*: Subject to the remaining discretionary considerations, it follows that the relator at least would be entitled to relief if it could establish the substantive legal propositions advanced by it within the fiat granted to it by the Attorney-General. I must therefore proceed to the two other issues that I have identified.[232]

The discretionary issue

219 *Considerations favourable to relief*: Having come so far in this reasoning, and established, as I have attempted to do, a legal foundation for the exercise by this Court of its original jurisdiction, it would require substantial reasons of a discretionary kind to refuse relief.

220 In a sense, this proposition also reflects considerations of principle and practicality. As to principle, if a party can demonstrate an error in the interpretation of federal and State legislation that has resulted in an order by a federal judge, purporting to invalidate in large part a public statute of a State, the correction of that error in properly constituted proceedings is not merely a matter of interest to the immediate parties. It is also one that affects all of the people of the Commonwealth living under its Constitution and laws. By covering cl 5 of the Constitution, all courts, judges and people of every State and of every part of the Commonwealth are bound by the Constitution and laws made by the Federal Parliament[233]. If it could be shown that, erroneously, a State law has been held unconstitutional, the sooner that error is corrected, one might say, the better.

221 Furthermore, the issue presented by the substantive arguments of the moving parties, even if confined for present purposes to those of the relator in the second proceedings, are objectively important. They are important to Ms Meldrum and, by inference, to Dr McBain who originally initiated his test case before Sundberg J. They are important to other persons in the positions of Ms Meldrum and Dr McBain who might wish to be relieved of any doubt concerning the correctness of Sundberg J's decision, and the eventually binding force of the order which gave it effect. On the face of things, the prospect of

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231 Above at [143] in these reasons.

232 Above at [160] in these reasons.

233 *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 and 64 Vict c 12) s 5.

further and later unsettling litigation by well resourced parties should be removed if it can be by a decision on the substantive question, one way or the other.

222 As a matter of practicality, the relator or the prosecutors might not abandon their objection to the legal holding sustaining Sundberg J's decision. That objection is, so far as they are concerned, based upon moral and legal arguments that are very important to them. The matters of substance have been fully argued before this Court. The provision of a substantive decision in such circumstances would ordinarily, therefore, be appropriate.

223 *Considerations against relief*: As against these discretionary considerations, a number of others suggest that the relief sought should be denied.

224 The order crucial to the endeavour of the relator to overrule the decision of Sundberg J was an order quashing that decision as wrong in law. Such relief would only be available, ultimately, by the issue by this Court of a writ of certiorari. I leave aside the fact that such a writ would be addressed to the court in which the order in question has been entered, rather than to Sundberg J personally. I pass by the problem that the Federal Court, as such, has not been named as a party respondent to these proceedings. A writ of certiorari is discretionary. It is not available as of right[234]. This feature of the writ therefore addresses attention, whenever it is sought, to discretionary considerations. Ex hypothesi, those considerations are only enlivened when, save for their operation, the case would otherwise be one for the issue of the writ. It is thus essential that the discretionary considerations be addressed.

225 In these proceedings, when this is done, there are a number of important factors which, in my view, restrain the grant of a writ of certiorari.

226 First, the moving parties, when they were before Sundberg J, were afforded the opportunity to become interveners and parties to those proceedings. They declined to do so. They elected to remain *amici curiae*. Had they become interveners, they would have been entitled to orders allowing them to appeal from the order of Sundberg J to a Full Court of the Federal Court[235]. This would have afforded them the vehicle to take their objection to the judgment, in the normal way, in an appeal. Had that been done, it would have spared this Court

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234 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 218; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14], 106-109 [53]-[57], 135 [142], 136-137 [148]-[149], 137-138 [152], 144 [172].

235 Federal Court Rules, O 52 r 14(2). See also O 6 rr 8, 11.

the necessity of considering the present application in its original jurisdiction. It would have ensured the advantage of an opinion of the Full Court of the Federal Court on the substantive issue in contest between the parties. Indeed, the determination by the Full Court might have concluded the litigation. By electing to take the course that it did, the relator cannot place itself in a better position than it would have enjoyed had it pursued appellate rights that were earlier available to it. At least, its failure to take that course is a consideration to be assessed in deciding whether, in the exercise of its discretion, this Court should now issue a writ of certiorari addressed to Sundberg J and directed to the order that he made.

227 Similarly, when he received the notice of the Federal Court proceedings pursuant to the Judiciary Act, s 78B, the Federal Attorney-General could have intervened. He might have sought removal of the cause into this Court pursuant to the Judiciary Act, s 40. He might have granted his fiat to the moving parties at that stage. He might have sought other relief. Instead, he elected to take no part in the proceedings until it reached this Court. As he is now a party in the relator proceedings, this is another consideration of a discretionary character against the provision of relief.

228 Secondly, some of the arguments which the relator has advanced in these proceedings are different from those which it submitted before Sundberg J. At least in its capacity as a prosecutor, it wished to submit, if necessary, that the provisions of the federal Act, relating to discrimination on the ground of marital status, were invalid as beyond federal legislative power or, alternatively, should be construed as inapplicable to the case. This was not an argument advanced before Sundberg J. To the extent that it would require consideration in the relator proceedings or in the provision of relief, there would be sound discretionary reasons for declining to act on that argument for the first time in this Court.

229 Thirdly, all of the actual parties to the proceedings before Sundberg J were content with the outcome of those proceedings. None of them appealed. Initially, none of them was even named as a party to the proceedings in this Court. Dr McBain was only added as a party eight months after the original order was made. An extension of time was therefore required in the relator proceedings. It too necessitates attention to discretionary considerations. Parties who seek to invoke certiorari or constitutional or like relief, must act with due expedition[236]. To the extent that they delay, they raise discretionary considerations on that ground alone that must be taken into account in judging whether to provide relief.

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236 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 905 [96], 916 [150], 929-930 [223]-[224]; 179 ALR 238 at 260, 274, 294.

230 Fourthly, following the decision concluded by the order of Sundberg J, Dr McBain was entitled to act on the footing that the provision by him to Ms Meldrum, or to other single women in Victoria, of IVF treatment or other fertility therapy was lawful. In the event that now, nearly two years after Sundberg J's orders, they were quashed by this Court as legally erroneous, this would expose Dr McBain to possible investigation for breach of a law or of his professional obligations in Victoria. It would do so not only in respect of any treatment Dr McBain may have given to Ms Meldrum, in reliance upon the order. It would extend to any treatment given by him to other single patients. Moreover, such action by this Court would expose to possible investigation and disciplinary or other proceedings other medical practitioners who, although not parties to the proceedings before Sundberg J or beneficiaries of his order, relied upon the declarations as to the law, given effect by that order, and offered IVF treatment and reproductive therapy to single women in Victoria.

231 Because of the publicity that attended the decision in Dr McBain's case, it would also be reasonable to infer that other medical practitioners, in jurisdictions of Australia having statutory provisions akin to those operating in Victoria, would have come to know of the decision of Sundberg J. In default of an appeal against that decision, they likewise might have acted on the basis that his Honour's decision had correctly stated the applicable law. They would similarly be exposed to the possibility of investigation and disciplinary or other proceedings. Their patients would be subjected to the risk of upset and uncertainty.

232 Whilst, in a sense, these consequences simply follow the invocation of the original jurisdiction of this Court, which I have found to be available, the long delay in the initiation of the proceedings, and the even longer delay in their disposal, provide strong reasons of a discretionary kind for withholding relief in the particular circumstances of this case.

233 *Conclusion: relief refused*: I have thus concluded that discretionary considerations require that relief should be refused. If there had been an appeal, at least Ms Meldrum, Dr McBain, other gynaecologists in Victoria and elsewhere in Australia, their patients and the community generally would have known that the order of Sundberg J was subject to appeal. The operation of that order might have been stayed, pending the outcome of an appeal. Persons affected might then have awaited the decision of a Full Court before altering their conduct. If, now, new proceedings were brought for the purpose of challenging, in the Federal Court or elsewhere, through the appellate process or otherwise (and ultimately in this Court) the points raised by the relator, the persons affected would know where they stood. They would be on public notice that a fresh challenge was being brought, substantially for the purpose of contesting the correctness of the decision of Sundberg J.

234 In the exercise of the Court's discretion, relief by way of certiorari should therefore be refused. In these circumstances, there is no basis to provide other and different relief, including relief under s 75(v) against Sundberg J personally or relief in the original proceedings where similar discretionary considerations would apply.

The substantive inconsistency issue

235 It follows that my analysis does not require consideration of the third issue involving the substantive question[237] involving the correctness of the decision of Sundberg J.

236 Once it is decided that there is power for this Court to provide relief (as I would hold) but that such power should not be exercised in the circumstances, the applications for relief must fail. The provision of an opinion on the substantive issues would therefore be hypothetical. This Court has repeatedly said that it will not give such opinions. Accordingly, I decline to do so. This is an approach specially appropriate, given that the resubmission of the questions of substance, at some time in the future in different proceedings properly constituted, cannot be ruled out.

Orders

237 Both applications should be dismissed with costs.

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237 Above at [160] in these reasons.

238 HAYNE J. The applications that have been made to this Court, and the course of events that give rise to them, are described in the joint reasons of Gaudron and Gummow JJ. I do not repeat them.

239 Several issues were debated in the course of the oral argument. Should an order be made extending the time within which the proceedings instituted in the name of the Attorney-General of the Commonwealth could be brought? Do the Bishops or the Episcopal Conference have standing to seek the orders they do? Can the Attorney-General intervene, in proceedings instituted in the name of the Attorney, and be heard separately? If the Attorney can be heard separately, can the Attorney be heard to make submissions against those advanced in support of the relief claimed? Is s 8 of the *Infertility Treatment Act* 1995 (Vic) inconsistent with s 22 of the *Sex Discrimination Act* 1984 (Cth)? Beneath all of these questions lie more fundamental issues about Ch III of the Constitution and the federal judicature.

240 The role given to the federal judicature in the Constitution has often been examined. It has been necessary to consider what is meant in Ch III by a "matter"[238] and what negative implication follows from Ch III and its place in the Constitution[239]. These issues were revisited by the Court in *Abebe v The Commonwealth*[240] and *Re Wakim; Ex parte McNally*[241]. The Court has also, from time to time, had to consider the reach of the jurisdiction conferred on it by s 75(v) and the availability of the remedies there mentioned[242]. Attention has also had to be given to questions of standing[243].

241 All of these questions are related. None can be examined in isolation from the others. Questions of standing, for example, are not arid technical questions but are to be understood as rooted in fundamental conceptions about judicial power just as much as are questions of what is meant by a "matter". Similarly, questions about the availability of remedies like prohibition, mandamus and certiorari cannot be considered without identifying the place which they have in the judicial system and, in this case, in the federal judicature.

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238 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

239 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

240 (1999) 197 CLR 510.

241 (1999) 198 CLR 511.

242 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

243 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493.

"Matter"

242 At the heart of the constitutional conception of "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. That is why it was held, in *In re Judiciary and Navigation Acts*, that "matter" means more than legal proceeding[244] and that "there can be no matter within the meaning of [s 76] unless there is some immediate right, duty or liability to be established by the determination of the Court"[245]. Hypothetical questions give rise to no matter. Further, it has long been recognised that an important aspect of federal judicial power is that, by its exercise, a controversy between parties about some immediate right, duty or liability is quelled. As the majority in *Fencott v Muller*[246] said:

> "The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."

243 Questions of standing and availability of remedies can be understood only against this background. Because a "matter" involves the existence of a controversy about "some immediate right, duty or liability to be established by the determination of the Court" it will often be the case that an attempt by a person who has no more than a theoretical interest in the subject-matter to agitate a question about the rights, duties or liabilities of others will not give rise to any "matter". That conclusion can be, and often is, expressed in terms of the standing of the person who seeks to raise the matter for debate, but at the most fundamental level the conclusion recognises that there is no controversy about any immediate right, duty or liability which will be quelled by the disposition of the proceeding.

244 As was pointed out in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*[247] questions of standing are also intimately related to the nature of the relief that is claimed. As Aickin J said in *Australian Conservation Foundation v The Commonwealth*[248]:

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244 (1921) 29 CLR 257 at 265.

245 (1921) 29 CLR 257 at 265.

246 (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

247 (2000) 200 CLR 591.

248 (1980) 146 CLR 493 at 511.

> "it is an essential requirement for locus standi that it must be related to the relief claimed. The 'interest' of a plaintiff in the subject matter of an action must be such as to warrant the grant of the relief claimed. I do not mean that, where the relief is discretionary, locus standi depends on showing that the discretion must be exercised favourably. What is required is that the plaintiff's interest should be one related to the relief claimed."

Thus, if relief is not available that will relate to the wrong which the applicant for relief alleges, there is no immediate right, duty or liability which will be established by the court's determination. As Gleeson CJ and McHugh J pointed out in *Abebe*[249]: "If there is no legal remedy for a 'wrong', there can be no 'matter'."

245 Justiciable controversies concern the rights and duties of parties and the powers of those who hold public office including, in appropriate cases, those who hold judicial office. In the present case, the parties who seek relief ask for orders the effect of which would be to quash an order made by a judge of the Federal Court of Australia. It is not said that the judge did not have authority to make the decision which he did. That is, no allegation of want of jurisdiction or excess of jurisdiction is made and there is, therefore, no controversy, no "matter", concerning the authority of the judge to decide the issues that were decided. What is said is that the declarations made by the judge were founded on a wrong view of the law and, in particular, a wrong understanding of whether, within the meaning of s 109 of the Constitution, there was a relevant collision between the *Sex Discrimination Act* and the *Infertility Treatment Act* such as led to the conclusions he reached about the invalidity of parts of the latter Act. It is necessary, then, to bear steadily in mind that the controversy which it is sought to have explored in the present proceedings is a controversy about the rights and duties of Dr McBain and State of Victoria as they were reflected in the declarations that were made, not any power or duty of the judge.

246 Neither of those parties, however, seeks to impugn these declarations. Those who now apply for orders quashing them were not parties to the proceedings in the Federal Court. For that reason, they are not in any way bound by the outcome of those proceedings. Reduced to its essentials, the application to this Court is by a third party (here the Episcopal Conference and the Commonwealth Attorney-General) for orders that rights, duties and obligations declared to exist as between two other parties (Dr McBain and State of Victoria) are not as they were determined to be by Sundberg J. Understood in that way it is apparent that the claim gives rise to no "matter" except, of course, the controversy in this Court about whether there is a "matter". (It is desirable to add

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249 (1999) 197 CLR 510 at 527.

this qualification, if only to point out that that latter controversy unquestionably founds the jurisdiction of this Court to entertain the applications that have been made.) The applications will quell no controversy about any immediate right, duty or liability of the applicants for relief; each application seeks only to enliven the subject-matter of a controversy between others which has already been quelled by the application of judicial power.

247 This takes no account of the fact that the declarations that were made in the Federal Court depended upon the proper application of s 109 of the Constitution, and it takes no account of the fact that the second application is made by an Attorney-General.

248 Very early in the history of this Court it was held in *Attorney-General for NSW v Brewery Employés Union of NSW* ("the *Union Label Case*")[250] that a State Attorney-General had standing to bring proceedings in which the validity of a federal statute was challenged. Thereafter, proceedings for declarations of invalidity of legislation have often been brought in the name of an Attorney-General for a State[251]. It cannot now be doubted that such a claim can give rise to a "matter". It is, however, important to notice that the claim which is now made is a claim by the *Commonwealth* Attorney concerning the valid operation of a *State* statute. It is necessary, therefore, to consider issues of the kind touched on in *Australian Railways Union v Victorian Railways Commissioners*[252]. In this case, the Attorney-General of the Commonwealth contends that a State statute is not invalidated by s 109 of the Constitution. The Commonwealth Attorney does not thereby assert some particular right, power or immunity. At most, for the reasons given by Gaudron and Gummow JJ, the Attorney contends for what is thought "to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers"[253] which the Commonwealth may exercise.

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250 (1908) 6 CLR 469.

251 *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148; *Attorney-General (Vict) v The Commonwealth* (1935) 52 CLR 533; *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237; *Attorney-General (Vict) v The Commonwealth* ("the *Marriage Act Case*") (1962) 107 CLR 529; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492; *Attorney-General (NSW); Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527; *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) 146 CLR 559.

252 (1930) 44 CLR 319 at 331 per Dixon J.

253 (1930) 44 CLR 319 at 331 per Dixon J.

249 I agree that, for the reasons given by Gaudron and Gummow JJ, the claims made by the applicants give rise to no "matter" within the meaning of Ch III of the Constitution.

250 The conclusion that there is no "matter" is sufficient to dispose of the present applications. It is, however, desirable to say something further about the nature of the relief that is claimed and the circumstances in which it is claimed.

251 The application for mandamus was dependent upon the claim for certiorari. Having decided the proceedings brought by Dr McBain, and having done so within jurisdiction, unless the orders made by the judge were quashed, there was no basis for directing the issue of mandamus to the judge[254]. The judge had performed his duty and there was nothing further to be done. It was suggested that if the orders were quashed the proceedings instituted by Dr McBain would be undetermined and that mandamus might then go to compel their determination. There is at least some incongruity, however, in a stranger to the proceeding obtaining an order compelling the re-exercise of jurisdiction. If the applicant in the proceedings in the Federal Court does not seek to have the jurisdiction re-exercised, why should a stranger be entitled to compel that result? This question falls to be answered only if certiorari is ordered. It is convenient, therefore, to turn to that claim.

252 Although it is said that prohibition, certiorari and mandamus are now sought, certiorari to quash the orders of Sundberg J is the principal relief sought. Prohibition is now not sought against Dr McBain. Dr McBain not being an officer of the Commonwealth, it may be doubted whether prohibition could issue directed to him unless its issue were necessary to give effect to relief given against others[255]. The claim for prohibition to Dr McBain not being pursued, it is unnecessary to explore that question further.

Availability of certiorari

253 In *Craig v South Australia*[256], the Court considered the circumstances in which the Supreme Court of South Australia might make an order in the nature of certiorari to quash an order of a judge of the District Court of that State and make an order in the nature of mandamus requiring the judge to try a matter according to law. It was common ground, in that case, that the substantive

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254 cf *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTiernan JJ.

255 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

256 (1995) 184 CLR 163.

content of the Supreme Court's jurisdiction to make an order in the nature of certiorari corresponded, for all relevant purposes, with the Supreme Court's previous inherent jurisdiction to order the issue of a prerogative writ of certiorari[257]. That writ went only to an inferior court or to certain tribunals exercising governmental powers. As was said in the reasons of the Court in *Craig*[258]:

> "Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. *It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made.* Where the writ runs, it merely enables the quashing[259] of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error …, failure to observe some applicable requirement of procedural fairness[260], fraud[261] and 'error of law on the face of the record'". (footnote omitted and emphasis added)

254 This description of when the writ of certiorari will be available is a description apt to the supervisory role of a State Supreme Court. When the writ is sought, in the High Court, to quash the order of a federal superior court, in circumstances where the order could have been, but was not the subject of an appeal by a party, it is necessary to examine the issues in a different light. In order to do that, it is first desirable to say something about the development of the distinction between jurisdictional error and non-jurisdictional error of law on the face of the record and the availability of certiorari in relation to errors of the latter kind.

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257 (1995) 184 CLR 163 at 174 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

258 (1995) 184 CLR 163 at 175-176 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

259 The early form of certiorari to remove and hear, while of historical relevance to the nature and scope of certiorari, would now seem to be obsolete.

260 See, eg, *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

261 See, eg, *R v Wolverhampton Crown Court; Ex parte Crofts* [1983] 1 WLR 204 at 206; [1982] 3 All ER 702 at 704. And note that "fraud", in this context, is used in a broad sense which encompasses "bad faith": see, eg, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 171.

The development of the writ of certiorari in England

255 The position in England before the Judicature Acts had been that "the jurisdiction of the King's Bench to entertain proceedings in error from inferior Courts was part of the original or inherent jurisdiction of the Court to examine and correct all errors in inferior Courts"[262]. That jurisdiction was invoked by the writ of error.

256 The development of the law relating to the availability of the writ of certiorari does not readily reveal any underlying unifying principle. Certiorari to quash has been said to have evolved from the writ of certiorari for removal[263]. Certainly its development was influenced by the writ of error but it was also much affected by the growth of legislative privative clauses and procedural reforms such as the *Summary Jurisdiction Act* 1848 (UK)[264].

257 Of certiorari, D M Gordon QC wrote[265]:

> "There can be no doubt that the power to quash upon *certiorari* was developed by analogy from proceedings by writ of error, and is similar in its nature. As the former is the more informal remedy, there seems to be no reason for thinking that its scope is in any way narrower or the grounds for relief more contracted than under the writ of error." (footnotes omitted)

The reference to comparative informality is then taken up by the statement[266]:

> "The assignment of errors on a writ of error was a pleading which had to classify each one; but the grounds of complaint on *certiorari* could be assigned at large without classification, so practitioners regarded precedent rather than principle." (footnote omitted)

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262 *Darlow v Shuttleworth* [1902] 1 KB 721 at 726.

263 Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century*, (1963), Ch III.

264 11 & 12 Vict c 43.

265 "Certiorari and the Revival of Error in Fact", (1926) 42 *Law Quarterly Review* 521 at 524.

266 "Certiorari and the Revival of Error in Fact", (1926) 42 *Law Quarterly Review* 521 at 525.

258 Certiorari played a large part in criminal procedure before statutory forms of conviction were introduced by the *Summary Jurisdiction Act* 1848. D M Gordon writes that, at that time[267]:

> "convictions had to recite with great precision all steps taken from the beginning, and if any error in procedure had been made it could hardly escape being either clearly disclosed or negatived by the record. If disclosed, it was assigned as error in law; if negatived, it was without remedy." (footnotes omitted)

It may be from this procedure that there evolved the distinction between jurisdictional error and error of law which appears on the face of the record but is not jurisdictional in nature. The traditional view, put in *R v Moreley*, had been that[268]:

> "[a] certiorari does not go, to try the merits of the question, but to see whether the limited jurisdiction have exceeded their bounds." (footnote omitted)

259 Speaking of the 1848 statute, the Privy Council in *R v Nat Bell Liquors Ltd* said[269]:

> "When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer: it was the inscrutable face of a sphinx."

Their Lordships continued[270] by noting that, before the 1848 Act and other legislation known as Jervis's Acts had been passed, numerous statutes had created an inferior court and declared its decisions to be "final" and "without appeal" and that[271]:

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267 "Certiorari and the Revival of Error in Fact", (1926) 42 *Law Quarterly Review* 521 at 525.

268 (1760) 2 Burr 1040 at 1042 [97 ER 696 at 697].

269 [1922] 2 AC 128 at 159.

270 [1922] 2 AC 128 at 159-160.

271 [1922] 2 AC 128 at 160.

> "again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari. … The Summary Jurisdiction Act, 1848, was intended to produce and did produce its result by a simple change in procedure without unduly ousting the supervisory jurisdiction of the superior Court."

260 At least in cases where there was alleged to have been jurisdictional error, the writ was understood to be available not just to persons directly affected by that jurisdictional error but also to third parties. As H W R Wade said[272]:

> "[C]ertiorari is not confined by a narrow conception of *locus standi*. It contains an element of the *actio popularis*. This is because it looks beyond the personal rights of the applicant: it is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers." (footnote omitted)

Even in such a case, however, the writ was not available as of right. It was a discretionary remedy[273]. It is against this background then that account must be taken of the constitutional context in which certiorari is sought in the present case.

The Australian constitutional context

261 Prohibition and mandamus, the writs mentioned in s 75(v), go against officers of the Commonwealth in circumstances that were not contemplated by the Court of King's Bench[274]. Because they are mentioned in s 75(v), but the Constitution is silent about *when* they may be issued, as distinct from *against whom*, principles regulating their availability must be understood having due regard to the nature and structure of the Constitution as a whole. It is clear that prohibition and mandamus will lie to judges of federal superior courts.

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272 "Unlawful Administrative Action: Void or Voidable? Part I", (1967) 83 *Law Quarterly Review* 499 at 503.

273 See, for example, *Re Forster v Forster and Berridge* (1863) 4 B & S 187 [122 ER 430]; *R v Justices of Surrey* (1870) LR 5 QB 466; *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 246; *R v Thames Magistrates' Court; Ex parte Greenbaum* (1957) 55 LGR 129; H W R Wade, "Unlawful Administrative Action: Void or Voidable? Part I", (1967) 83 *Law Quarterly Review* 499 at 502-503.

274 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [22] per Gaudron and Gummow JJ.

Prohibition will go if there is want of jurisdiction, or if jurisdiction is exceeded. Prohibition will go if a federal superior court acts in breach of the rules of procedural fairness. Mandamus will lie if there has been a failure to exercise jurisdiction.

262 Certiorari is not a "constitutional writ". Does it follow that it is to be available only in circumstances of the kind in which it would have been available according to general law principles developed in a non-federal context? Why should the availability of certiorari be limited by general law principles developed in a different constitutional setting when, because of those constitutional differences, prohibition and mandamus have shed some of those limitations?

263 The specific reference in s 75(v) to the availability of the remedies there mentioned, against officers of the Commonwealth, serves to emphasise the constitutional purpose of this Court's jurisdiction in that respect. At the risk of over-simplifying the matter, this Court, with its central place in the Australian judicial system, must be able to ensure the rule of law by granting relief against Commonwealth officers who act without, or in excess of power, or who refuse to perform a public duty.

264 That being so, there are powerful reasons to consider that there are cases in which certiorari to quash an order will go even though the order is of a superior court of record. That is, if prohibition or mandamus lie to a federal superior court it may well be both appropriate and necessary to direct the issue of certiorari to quash in aid of relief of a kind mentioned in s 75(v). But the proposition advanced by the Episcopal Conference and on behalf of the Attorney-General of the Commonwealth as applicant for relief was different. It was that certiorari might go to any federal superior court in any case in which there was any error of law on the face of the record, whether jurisdictional error or not.

265 It does not follow from the considerations that I have mentioned that this Court must be able to grant certiorari to quash orders made by federal superior courts in any case in which there is a non-jurisdictional error on the face of the record. Neither the text nor the structure of the Constitution affirmatively requires that result. Nor is there any decision of this Court which holds that certiorari should go to a federal superior court for non-jurisdictional error on the face of the record. In both *R v Cook; Ex parte Twigg*[275] and *R v Ross-Jones; Ex parte Green*[276] orders were made for certiorari to quash orders of the Family Court. Each, however, can be understood as a case of excess of jurisdiction.

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275 (1980) 147 CLR 15.

276 (1984) 156 CLR 185.

266 In *R v Gray; Ex parte Marsh*[277], Deane J expressed the view that "as a matter of principle … the Court lacks jurisdiction to direct that the prerogative writ of certiorari issue to either" the Federal Court or the Family Court, at least in cases where the Federal or Family Court has acted within jurisdiction. If this Court does have jurisdiction (or, as I would rather put it, power) to direct the issue of certiorari to a federal superior court for non-jurisdictional error, the power to grant that remedy is discretionary[278]. That being so, it is not necessary to decide in these matters whether the view expressed by Deane J is right. Nonetheless, it is as well to notice some aspects of the arguments that touch that question and to begin by saying something about this Court's powers and the origins of the legislative provisions which deal with that subject.

This Court's powers

267 Section 33 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") provides that this Court may make orders or direct the issue of writs of various descriptions. None of these is apt to include certiorari. Further, s 32 of the Judiciary Act states that "[t]he High Court in the exercise of its original jurisdiction in any cause or matter pending before it … shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, *all such remedies whatsoever as any of the parties thereto are entitled to* in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter …" (emphasis added).

268 Section 14 of the United States *Judiciary Act of 1789* (known as "the All Writs Act") conferred on the courts of the United States generally the power to issue writs of *scire facias*, habeas corpus, "and all other writs not specially provided for by statute, which may be necessary for the exercise of their

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277 (1985) 157 CLR 351 at 388.

278 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89 [5] per Gleeson CJ, 106 [51]-[52] per Gaudron and Gummow JJ, 137 [149] per Kirby J, 144 [172] per Hayne J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at 907 [106] per Gaudron J, 916 [149]-[151] per McHugh J, 928 [217] per Kirby J; 179 ALR 238 at 262, 274, 292.

respective jurisdictions, and agreeable to the principles and usages of law"[279]. The leading commentary says of the All Writs Act[280]:

> "The limits of this open-ended authority have never been precisely defined. The Court has expanded the theoretical availability of extraordinary writs far beyond the limits that might have been found in nineteenth century opinions, but at the same time it has sharply curtailed actual use of the writs. …
>
> Statutory authority to issue extraordinary writs is limited by the constitutional constraints of Article III. Justiciability requirements must be met." (footnotes omitted)

269 The affinity will be apparent between the terms of s 14 of the 1789 statute, provisions a century later in the English Judicature legislation, and s 32 of the Judiciary Act.

270 The All Writs Act authorises the issue of writs of certiorari in proper cases. This was established by several authorities in the Supreme Court of the United States[281]. However, the courts of the United States owed their existence to Art III of the Constitution and the power whence the authority to issue certiorari was derived was conferred by a law of the Congress. This meant there were some distinctions between certiorari as understood in the United States decisions and as it had developed in England in the eighteenth and nineteenth centuries.

271 Of the position in the United States, the Supreme Court observed in *Ex parte Vallandigham*[282]:

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279 Provision in like terms is now found in the 1948 codification of the Judiciary and Judicial Procedure Code, 28 USCS §1651(a). The All Writs Act is to be distinguished from the statutory writ of certiorari which, by the *Judiciary Act of 1925*, controls the grant of appellate review by the Supreme Court of the United States after the abolition in 1928 of the writ of error and the severe restriction of direct appeals to that Court: *Moore's Federal Practice*, 3rd ed, vol 23, §510.02.

280 Wright, Miller and Cooper, *Federal Practice and Procedure*, 2nd ed (1996), vol 16B, §4005 at 97-99.

281 *American Construction Company v Jacksonville, Tampa and Key West Railway Company* 148 US 372 at 379-380 (1893); *In re Tampa Suburban Railroad Company* 168 US 583 at 587 (1897).

282 68 US 243 at 249 (1863).

> "Our first remark upon *the motion for a certiorari* is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England, the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a certiorari to have any indictment removed and brought before it; and where such certiorari is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress."

272 However, a decision of Lord Mansfield did prove influential in the development of certiorari in that United States constitutional and legislative framework. In *R v Whitbread*[283], the Court of King's Bench discharged an order nisi for certiorari to remove a conviction by the Commissioners of Excise for double duties on beer pursuant to statute[284]. There was a privative clause in respect of certiorari and statute provided for an appeal. The privative clause was upheld but successful reliance also was placed upon the decision in *Ball v Partridge*[285]. This was a case in which it had been held that, when a jurisdiction was vested by statute in the Commissioners of Excise, certiorari would not lie unless it appeared that the Commissioners had exceeded their jurisdiction. Lord Mansfield said[286]:

> "[T]he affidavits in support of the present application, do not proceed upon any alleged want of jurisdiction, but contain objections to the conviction on the merits, the Court would not grant the certiorari, if they had power to do it, for those objections are, more properly, the subject matter of an appeal, and the defendant has not chosen to resort to that remedy."

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283 (1780) 2 Dougl 549 [99 ER 347].

284 12 Car II, c 24, s 33.

285 (1667) 1 Sid 296 [82 ER 1116].

286 (1780) 2 Dougl 549 at 553 [99 ER 347 at 349].

273 That passage from *R v Whitbread* was then taken up in the United States in State courts[287], and then in the Supreme Court[288], as authority that certiorari should not be granted in any case where the moving party has a right of appeal, except for the purpose of testing the jurisdiction of the tribunal or court below.

274 The United States authorities speak of there being a "plain or adequate remedy" whether by way of appeal or "otherwise". It should be noted that in one of the earlier cases, *The People ex rel The Schuylerville and Upper Hudson Railroad Company v Betts*[289], decided by the New York Court of Appeals, the application for certiorari was a relator action; the respondents were Commissioners appointed to assess damages to the owner of certain real estate taken by the relator for the purposes of its railroad and the review sought was described as one by "a common-law certiorari". In delivering the judgment of the Court of Appeals, Folger J said[290]:

> "It is thus seen that the office of a common-law writ of certiorari, has been somewhat enlarged since the decision in [*People ex rel Huntting v Commissioners of Highways of East Hampton*[291]]. But it will also be seen, that it is in cases where the relator has no other available remedy, and where injustice would be done, if the writ was not permitted to do its work. The rule still remains unimpaired, at least in principle, that where there is a remedy by appeal, the writ will be confined to its original and more appropriate office[292]."

The reference to the enlargement of the writ of certiorari was to an earlier passage in which his Honour said[293]:

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287 See *Gaither v Watkins* 8 A 464 at 465-466 (1887).

288 *Harris v Barber* 129 US 366 at 371 (1889); *In re Tampa Suburban Railroad Company* 168 US 583 at 587-588 (1897); *In re The Huguley Manufacturing Company* 184 US 297 at 301 (1902).

289 55 NY 600 (1874).

290 55 NY 600 at 603 (1874).

291 30 NY 72 (1864).

292 *Storm v Odell* 2 Wend 287 (1829); see, also, *In the matter of Mount Morris Square* 2 Hill 14 at 27 (1841).

293 55 NY 600 at 602 (1874).

> "True, it has been sometimes intimated, and sometimes held, that in the absence of any other remedy, and to prevent a failure of justice, the party will be suffered by it to bring up not only the naked question of jurisdiction, but the evidence, as well as the ground or principles on which the inferior body acted, and the questions of law on which the relator relies." (footnote omitted)

275 The Supreme Court authorities were applied by the Court of Appeals for the District of Columbia in *United States ex rel Eure v Borden*[294]. That case also, as the title indicates, was brought on relation; the litigation first arose out of a suit in the municipal court of the District of Columbia in which the relator claimed damages against the respondent for negligence. The Court of Appeals said[295]:

> "Unquestionably the case stated in the declaration was within the jurisdiction of the municipal court. As was observed in the *Harris v Barber Case*[296], whether the municipal court erred in the exercise of its jurisdiction may not be questioned in this proceeding. Petition for writ of error was available to appellant."

276 H W R Wade has suggested[297] that:

> "When in the seventeenth century the remedy of certiorari was first used to control statutory powers, its primary object was to call up the record of the proceedings into the Court of King's Bench; and if the record displayed error, the decision was quashed. What is now an exception was then a primary rule, and it was not founded on any idea of jurisdiction or ultra vires. But if the applicant wanted to go outside the record, and bring other evidence to show some abuse of the power, the court would quash only where an excess of jurisdiction could be shown." (footnote omitted)

Whether or not error on the face of the record had such a central place in the development of the writ in England (and Henderson's work suggests that it may not be so) by the latter half of the nineteenth century, and until the decision of the English Court of Appeal in *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw*[298], certiorari was understood to go primarily, if not exclusively, in

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294 80 F (2d) 527 (1935).

295 80 F (2d) 527 at 528 (1935).

296 129 US 366 at 379 (1889).

297 *Administrative Law*, 6th ed (1988) at 304.

298 [1952] 1 KB 338.

cases of want or excess of jurisdiction[299]. Even since *Shaw's Case*, granting relief for error on the face of the record has been seen as anomalous.

277 The anomaly lies in the distinction (not always easy to draw) between jurisdictional and non-jurisdictional error. In the former kind of case, public power is exercised unlawfully, in the latter it is exercised mistakenly but lawfully. The constitutional writs and, save for certiorari to quash for error on the face of the record, all other prerogative and like remedies, are concerned with the former, not the latter. And if error of law can ground relief, why not error of fact? To allow certiorari as a remedy for the correction of some but not all errors is, therefore, anomalous. To do so in cases where there is a general power of appeal for the correction of *all* errors may be thought not just anomalous but unnecessary. It is, then, not surprising that the principles governing the grant of certiorari in the United States have developed as they have.

278 It is apparent from what has been said about the development of the law in the United States that, in considering the place to be given to the writ of certiorari, account must be taken of both s 73 of the Constitution with its provisions for the appellate jurisdiction of this Court and s 75 (particularly s 75(v)) with its provisions for original jurisdiction. To grant certiorari to quash the orders that were made in this matter and to grant that relief at the suit of persons not parties to the proceedings in which the orders were made would, of course, disturb the resolution of the controversy between the parties that was brought to an end by the orders made by Sundberg J. That will always be so whenever certiorari issues. Where the complaint is that an officer of the Commonwealth, judicial or other, has exceeded jurisdiction or has refused to exercise jurisdiction, the original jurisdiction of the Court can be invoked and constitutional writs ordered to prohibit action in excess of jurisdiction or compel its exercise. For the reasons given earlier, certiorari may go in aid of those writs.

279 But where, as here, certiorari is claimed on the basis that there was an error of law by a federal superior court *within* jurisdiction, but apparent on the face of its record, it is possible to contend that the application of federal judicial power in such a case is primarily, perhaps ultimately, governed by s 73 of the Constitution concerning the rights of parties to appeal to this Court. If that is so, the exercise of judicial power for the correction of errors by this Court would, as between the parties to the proceeding, be subject to exception and regulation as

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299 *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114. But cf *Overseers of the Poor of Walsall v London and North Western Railway Co* (1878) 4 App Cas 30 at 39 per Earl Cairns LC.

mentioned in s 73. Prerogative relief will therefore usually be refused in such cases[300].

280 It is consistent with that position to deny certiorari to a person not party to the proceeding in which the impugned order was made, at least where processes of appeal, ultimately to this Court, could be, but have not been, engaged by a party to the proceeding to correct the alleged error. The decision to deny certiorari in this kind of case could be reached at any of several different stages of the inquiry. Thus the decision to deny certiorari to a federal superior court, for error on the face of its record, could be based in a conclusion that the anomaly of the availability of the remedy for error on the face of the record of inferior courts should not be extended. Or, if the application is by a third party other than an Attorney-General, the denial of certiorari could be based in a decision about the standing of the applicant. Or, as these reasons later seek to show, the decision could be founded in the exercise against the applicants of the discretion to grant or withhold the remedy. But in the present cases, for the reasons given earlier, the basis for dismissing each application is more fundamental: there is, in neither case, a "matter". Nonetheless, it is convenient to add something about the question of discretion.

Certiorari and discretion

281 The historical matters that I have mentioned earlier bear not only on the question of power to order certiorari for error on the face of the record of a federal superior court, but also on whether, the grant of certiorari being discretionary, such an order should be made.

282 If the question were one for the exercise of discretion, I have no doubt that the discretion should be exercised against the making of an order in the present matters, whether at the suit of the Episcopal Conference or at the suit of the Attorney-General. In the case of the Attorney-General, there is no reason to extend the time for making application for certiorari. The Attorney-General had a right to be made a party to the proceedings, the result of which it is now sought to disturb. Further, at any time up to the making of orders, the Attorney-General could have applied for removal of the cause then pending in the Federal Court into this Court pursuant to s 40 of the Judiciary Act. No such application was made. In those circumstances, the Attorney-General not having chosen to take

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300 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 127 per Mason J; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 225-226 per Mason J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 375-376 per Mason J; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 654-655 [139] per Gummow J.

either of the steps available to him as of right to bring the matter before this Court, he should not now have an extension of time within which to apply for certiorari.

283 As for the Episcopal Conference, it may have had no right to be joined as a party in the proceedings in the Federal Court, but it did not pursue the application of which it had given notice for an order that it be joined. Whether that would be reason enough to deny the Episcopal Conference relief is a question I need not consider. Having chosen not to pursue the application to be made a party, the Episcopal Conference can be in no better position to seek the relief it now seeks than it would have been had it made and succeeded in an application for joinder. If certiorari is available to quash an order of a federal superior court made within jurisdiction for error on the face of the record, that relief would ordinarily be refused to a party to the proceeding who had a right to appeal against the order which it is sought to quash. Certiorari would be refused because of the availability of the alternative remedy.

284 A person not party to the proceedings giving rise to the impugned order has no right of appeal and it therefore has no alternative remedy to certiorari. But what is the interest which it has in having the order quashed? In cases in which there has been some excess or want of jurisdiction the interest which the applicant can be seen to seek to vindicate is an interest in the prevention of action beyond power. Moreover, leaving aside decisions of superior courts of record, the act of a public authority that is beyond its power is, as a general rule, of no legal effect[301]. But in the case of superior courts of record, other considerations intrude. Orders of a superior court, even if erroneous, bind the parties to them until set aside[302].

285 The only interest of the Episcopal Conference in the orders made by Sundberg J is an interest in the reasoning which led to their making as providing a precedent in the decision of *other* cases. The orders themselves are not of moment; the reasons are thought to be. Where the parties to the proceeding have chosen not to challenge its outcome, certiorari to quash the orders should not go at the suit of a person who has no interest greater than that asserted by the Episcopal Conference in this case. To grant the relief would subvert the orderly administration of justice. If the application by the Episcopal Conference gives rise to a "matter" and there is power to grant certiorari, it should be refused in

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301 H W R Wade, "Unlawful Administrative Action: Void or Voidable? Part I", (1967) 83 *Law Quarterly Review* 499 at 507.

302 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 178 [23] per Gleeson CJ, 185-187 [53]-[57] per Gaudron J, 235-236 [216] per Gummow J, 274-275 [328]-[329] per Hayne and Callinan JJ.

this case. Accordingly, the questions of validity of the *Infertility Treatment Act* which were explored in argument should neither be considered nor answered in the present proceedings.

The Attorney's application to intervene in the relator proceedings

286 The Attorney-General of the Commonwealth sought to intervene in both proceedings and to make submissions which, in part, were contrary to those advanced in his name in the application made at the relation of the Episcopal Conference. Although it was necessary and convenient to hear the submissions which the Attorney-General made as intervener against those which were advanced on his behalf as applicant, that necessity and convenience stemmed entirely from the fact that the Attorney was entitled to be heard on the application brought by the Episcopal Conference. It was not open to an Attorney who had granted a fiat for the institution of a proceeding thereafter to intervene in that proceeding or to make submissions either in support of or opposing the case advanced in the name of the Attorney as plaintiff or applicant in that proceeding.

287 It is essential to recognise that, in a relator action, it is the Attorney who is plaintiff or applicant. A relator is not a party unless separately joined as co-plaintiff or co-applicant. The Attorney has complete charge of the litigation at all times. So much has long been well established[303]. A decision to grant or withhold a fiat gives rise to no justiciable issue[304] and, it would follow, neither would a decision by the Attorney to withdraw a fiat that had previously been granted. It is because the Attorney has complete control of the proceeding, and can terminate it at any time, that entire responsibility for its conduct rests with the Attorney. Although it is said that by the fiat the Attorney "lends standing" to the relator, such metaphors must not obscure the fact that it is and remains the Attorney's proceeding. Nor may such metaphors be allowed to suggest that it is the relators who have standing in the suit if, without the fiat, they do not. If the

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303 *Attorney-General v The Ironmongers' Company* (1840) 2 Beav 313 [48 ER 1201]; *Attorney-General v Haberdashers' Company* (1852) 15 Beav 397 [51 ER 591]. See also *Attorney-General v Fellows* (1820) 1 Jac & W 254 [37 ER 372]; *Attorney-General v Barker* (1838) 4 My & Cr 262 [41 ER 103]; *Attorney-General v Brettingham* (1840) 3 Beav 91 [49 ER 35]; *Attorney-General, at the relation of W W and E P v Wyggeston's Hospital* (1852) 16 Beav 313 [51 ER 799]; *Attorney-General v The Mayor, Aldermen and Burgesses of Newark-Upon-Trent* (1842) 1 Hare 395 [66 ER 1086]; *Attorney-General v Governors of the Sherborne Grammar School* (1854) 18 Beav 256 [52 ER 101]; *Attorney-General for Ireland (Humphreys) v Erasmus Smith's Schools* (1910) 1 IR 325.

304 *Attorney-General v London County Council* [1901] 1 Ch 781; and, on appeal, *London County Council v Attorney-General* [1902] AC 165.

rules about standing are to be changed (and that is an altogether separate question recently considered in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[305]) the nature and extent of the change to be made should be considered directly. Change is not to be made indirectly, by giving to the relators in an action brought in the name of the Attorney a role greater than hitherto they have been afforded. To do so would deflect the proper attribution of responsibility for the decisions to institute and maintain the proceeding and for the decisions that are made about its conduct.

288 No doubt account must be taken of the fact that the rules about relator actions were developed in cases about the administration of charities and that the present litigation is about the proper interpretation of the Constitution. Account must also be taken of what has happened in earlier relator litigation in this Court, notably in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth*[306] and *Attorney-General (Vict); Ex rel Black v The Commonwealth*[307]. In the former case, the Commonwealth and certain officers of the Commonwealth were defendants in one of three proceedings in which demurrers were heard together. The Attorney-General of the Commonwealth did not seek to appear on both sides of the record.

289 As was pointed out in argument, when the Attorney-General of the Commonwealth intervenes pursuant to s 78A of the Judiciary Act the intervention is made "on behalf of the Commonwealth". This was said to suggest, even require, that the Attorney-General may appear to represent the interests of the Commonwealth in a relator action brought by the Attorney and that the result would not be materially different from what happened in *McKinlay* when the Attorney was plaintiff and the Commonwealth a defendant. A distinction is to be made between the Attorney-General of the Commonwealth and the Commonwealth. Nevertheless, account must be taken of s 78A(3) and its provision that where the Attorney intervenes "then, for the purposes of the institution and prosecution of an appeal from a judgment given in the proceedings, the Attorney-General of the Commonwealth … shall be taken to be a party to the proceedings". At least for that purpose, it is the Attorney who is a party, not the Commonwealth. In those circumstances, s 78A is not to be construed as permitting intervention by an Attorney-General whether of the Commonwealth or a State *against* the interests of that Attorney-General as plaintiff or applicant. To do so would permit the Attorney to appear on both sides of the record. More fundamentally, it would reveal that there was in fact no

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305 (1998) 194 CLR 247.

306 (1975) 135 CLR 1.

307 (1981) 146 CLR 559.

controversy between those who were parties to the suit, only a controversy between the relators, who are *not* parties, and the Attorney. There would be no "matter".

290 Nor does what happened in *Black* require the contrary conclusion. True it is the Solicitor-General for Victoria announced an appearance for the Attorney-General for that State (and the Attorneys-General for other States) as interveners in the proceeding[308]. There was argument about the standing of the Attorney-General for the State of Victoria as *plaintiff* in the action to make some of the claims that were made[309]. There was, however, no argument advanced about, and no consideration given to whether the *intervention* on behalf of the Attorney for Victoria was soundly based. That is hardly surprising when the same counsel appeared to intervene for the Attorneys for other States.

291 I would therefore refuse the application by the Attorney-General of the Commonwealth to intervene in the application brought in his name. He intervened in the other application as of right.

Conclusion

292 The application by the Episcopal Conference and the application by the Attorney-General of the Commonwealth should each be dismissed, in each case with costs.

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308 (1981) 146 CLR 559 at 573.

309 (1981) 146 CLR 559 at 564, 568-569, 571-574.

293 CALLINAN J. Subject to two reservations and one addition I agree with the reasons for judgment and orders proposed by McHugh J.

294 My first reservation is as to the correctness of the highly questionable assumption which was made by all who presented arguments in this case, that the *Sex Discrimination Act* 1984 (Cth) was a law with respect to external affairs.

295 My second reservation relates to another matter which was not argued, that the State of Victoria, which is to say the Executive of that State, may deliberately and selectively abstain from enforcing[310] an enactment, indeed a relatively recent enactment of the legislature of that State, whether it has or has not the capacity to persuade the legislature to change or repeal that enactment by a subsequent enactment: and whether in those circumstances some other person might be entitled to do so.

296 In addition, I wish to make some observations about the meaning of the word "matter". As long ago as 1921, its presence in Ch III of the Constitution gave rise to conflicting views whether this Court could provide advisory opinions[311]. It has also given rise to differing opinions as to the Court's jurisdiction to hear appeals on questions of law in criminal cases[312]; and whether the Parliament may or may not confer jurisdiction on a Federal Court over part of a "matter"[313]. More recently, this Court has been required to consider the question whether the Parliament can confer standing on persons who are not directly affected by a legal wrong[314]. For present purposes it is sufficient to point out that in *Mellifont v Attorney-General (Q)*[315], an "appeal" in a criminal case in which the decision of the Court of Criminal Appeal (and of this Court) would, in the circumstances play no part in the subsequent determination of the charge in the indictment, this Court (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ, Brennan J dissenting) held that an Attorney-General's reference

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310 cf *Gouriet v Union of Post Office Workers* [1978] AC 435; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 668-670 [206]-[211], 671 [215].

311 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

312 cf *Saffron v The Queen* (1953) 88 CLR 523; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289.

313 *Abebe v Commonwealth* (1999) 197 CLR 510.

314 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

315 (1991) 173 CLR 289.

under s 669A of *The Criminal Code* (Q) related to the subject matter of the legal proceedings at first instance, and was not therefore divorced from the ordinary administration of the law[316]. *Mellifont* may therefore provide a basis for a broad view of what is a "matter" and that perhaps, the absence of an "immediate" right, duty, privilege or liability may not of itself always be decisive.

297 Subject to what I have said I agree with the reasons and orders proposed by McHugh J.

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316 (1991) 173 CLR 289 at 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.