THE HIGH COURT'S POWER TO GRANT CERTIORARI – THE UNRESOLVED QUESTION

L. J. W. Aitken*

> Whether it is within the power of the court to grant certiorari, either at all or in a case such as this, is a more difficult question, and is one to which no definite answer has been supplied by any decision of the court.[1]

It is strange to think that the question whether the High Court of Australia can grant the writ of certiorari may still be characterised as "unresolved".[2] To judge from the treatment this issue has received from several commentators, it might be asseverated that the matter is "unresolved" because "unimportant".[3] This article will examine the heads of jurisdiction which might be invoked to sustain the granting of the writ by the High Court.

As well, it will be necessary to consider whether, as a matter of principle, certiorari can or should issue to a superior court of record such as the Federal Court of Australia. The decision in *Re Gray; ex parte Marsh*[4] casts doubt on the amenability of those tribunals to the writ at all. Since it has always been hitherto blithely assumed that Federal Court judges are susceptible to certiorari for the purpose of s 75(v), the dissentients' view of *Gray's* case,[5] if accepted, would require a fundamental rethink of the entire area.

The underpinning of the certiorari jurisdiction is likely to be of increasing practical importance. Pursuant to s 39B of the Judiciary Act 1903 (Cth)[6] the Federal Court has recently had conferred upon it jurisdiction conterminous with that of the High Court under s 75(v) of the Constitution.[7] It seems

---

*BA LLB (Hons) (ANU); BCL (Oxon); Barrister and Solicitor (ACT); Solicitor (NSW)

[1] Per Aickin J in *Re Toohey; ex parte Northern Land Council* (1981) 38ALR 439, 517.

[2] *Ibid* 519; H E Renfree, *The Federal Judicial System of Australia* (1984) 335-336 cites the authorities.

[3] Renfree *supra* n 2, 336-337: "In practice, the question whether the writ is available in the High Court has been of little importance as the High Court has granted prohibition in many cases where *certiorari* would have been an appropriate remedy, and has thereby extended the scope of prohibition beyond the generally accepted limits".

[4] (1985) 59 ALJR 804.

[5] Discussed below 380-384.

[6] Section 39B(1) of the Judiciary Act 1903 (Cth) is in the following terms: "The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth." An applicant may still, of course, proceed in the original jurisdiction of the High Court since the jurisdiction conferred by the Constitution is inalienable.

[7] Section 75 provides: "In all matters – (i) Arising under any treaty: (ii) Affecting consuls or other representatives of other countries: (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party: (iv) Between States, or between residents of different States, or between a State and a resident of another State: (v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction". See generally, P H Lane, "High Court's Jurisdiction to Issue Writs" (1967) 41 ALJ 130; "High Court's Jurisdiction – Certiorari" (1969) 43 ALJ 21; "High Court Jurisdiction Interpretation of the Constitution" (1971) 45 ALJ 34; L Katz, "Aspects of the High Court's Jurisdiction to Grant Prerogative Writs under s 75(iii) and s 75(v) of the Constitution" (1976) 5 University of Tasmania LR 188. As Northrop J observed

reasonable to predict that the conferral of this jurisdiction will result in the "certiorari" question becoming more important, if only because the Federal Court will prove more accessible than the High Court to aggrieved applicants seeking prerogative relief.[8]

Yet, on its face, s 75 (v) of the Constitution confers no jurisdiction upon the High Court to bring up and quash the decision of an officer of the Commonwealth by the writ of certiorari. The section, however, has occasionally been invoked as a source of the power to do so.[9] It will be submitted that, upon examination, the reasoning which has been relied upon in the majority of cases to grant the writ is unconvincing.

The High Court, itself, has expressed unease in its assumption of this jurisdiction. In three cases, *R* v *Cook; ex parte Twigg*,[10] *In re Student Assistance Tribunal; ex parte Emery*[11] and *Re Bowen; ex parte Federated Clerks Union*[12] it voiced doubts over its power. Speaking extra-curially, Sir Harry Gibbs has been less than adamant that the jurisdiction which the Court has exercised has been properly assumed.[13]

It is odd that s 75(v) of the Constitution does not mention certiorari expressly when it does mention prohibition, mandamus and injunctions. Quick and Garran tell us that the Constitutional Convention "was in considerable doubt as to whether this sub-section was necessary or not".[14] Indeed, when the Convention met in Melbourne it was omitted entirely, apparently on Barton's objection that the included remedies which had been mentioned might

---

in *Coward* v *Allen* (1984) 52 ALR 320, 324-325: "the similarity of the jurisdiction conferred upon the High Court by placitum 75(v) of the Constitution and the jurisdiction conferred upon the Federal Court by s 39B of the Judiciary Act is readily apparent. The difficulties that arise from the fact that the writ of certiorari is not mentioned in the Constitution or the Judiciary Act does not arise in this case. . . Counsel for the respondents made no submissions against absence of jurisdiction based on the absence of express reference to the writ of certiorari in either placitum s 75(v) of the Constitution or s 39B of the Judicial Act."

[8] It would appear from the Second Reading Speech on the Statute Law Bill (No 2) on 8 October 1983, 1291 that a matter originally commenced in the High Court under s 75 should be remitted under s 44 of the Judiciary Act to the Federal Court. See *Re Hassell; ex parte Pride* (1984) 52 ALR 181, 183 *per* Toohey J.

[9] In *Re McKenzie; ex parte Actors and Announcers Equity* (1982) 56 ALJR 221 and in *Re Clarkson; ex parte Australian Telephone and Phonogram Officers' Association* (1982) 56 ALJR 224 the writ was refused but no doubt was cast on the Court's jurisdiction to grant it.

[10] (1980) 31 ALR 353, 361 *per* Gibbs J; 363 *per* Stephen J; 364 *per* Mason J; 365-366 *per* Aickin J; 54 ALJR 515.

[11] (1981) 55 ALJR 387, 391-392 *per* Gibbs CJ, Mason, Murphy and Wilson JJ; 394 *per* Stephen J.

[12] (1984) 53 ALR 187, 189 *per* Mason, Murphy, Wilson, Brennan and Dawson JJ.

[13] Sir Harry Gibbs, "Developments in the Jurisdiction of Federal Courts" (1981) 12 University of Queensland LJ 1, 12: "In a number of cases, including *Pitfield* v *Franki*, the court has granted certiorari against an officer of the Commonwealth where prohibition was sought but could not appropriately be granted, notwithstanding that certiorari is not one of the remedies mentioned in s 75(v). A very recent case in which this course was followed was *R* v *Cook; ex parte Twigg* where the court left open for future consideration the correctness of *Pitfield* v *Franki*. If these decisions are followed they indicate that provided that prohibition is genuinely sought against an officer of the Commonwealth the Court has jurisdiction to grant certiorari notwithstanding that the application of prohibition fails. In other words, an associated remedy is granted to enable the Court effectively to exercise its jurisdiction."

[14] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 778.

be seen to exclude by implication any remedies which were not so enumerated.[15]

In early decisions of the Court the question was not the subject of direct comment.[16] *Waterside Workers' Federation of Australia* v *Gilchrist, Watt and Sanderson Ltd*[17] *(Gilchrist)* contains the first mention of the issue.

Gilchrist considered the High Court's power to issue prohibition to the President of the Commonwealth Court of Conciliation and Arbitration, assuming that the President had made an award without jurisdiction. Bavin, Attorney-General for New South Wales, who appeared for the prosecutor, argued that certiorari would lie in the exercise of the Court's original jurisdiction.[18] He relied on the combined operation of ss 76(i) of the Constitution[19] and s 30 of the Judiciary Act.[20] Owen Dixon KC (as he then was) argued *pro contra*, "Certiorari will not lie in this case. That remedy is not given by s 75 of the Constitution . . . Certiorari is not within s 30 or s 81[21] of the Judiciary Act".[22] The Court, at the start of its judgment, ought to have considered its jurisdiction to grant the relief sought. In their joint judgment, however, Knox CJ and Gavan Duffy J did not address the issue at all. To some extent, this judicial reticence is understandable.

The High Court had, in an early series of decisions,[23] substantially

---

[15] *Ibid.*

[16] The Court had chiefly concerned itself with the operation of the power to grant prohibition, *eg R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow* (1910) 11 CLR 1 where the majority (Griffith CJ, Barton and O'Connor JJ) held that prohibition would issue to the President of the Commonwealth Court of Conciliation and Arbitration in the Court's original, rather than appellate, jurisdiction.

[17] (1924) 34 CLR 482.

[18] *Ibid* 491.

[19] That is, as a matter invoking s 76(i) of the Constitution, "Arising under this Constitution, or involving its interpretation" with respect to which the Parliament had made a law "conferring original jurisdiction the High Court". This involves using s 30 of the Judiciary Act 1903 as the "law" upon which reliance is placed. P H Lane, "High Court Jurisdiction Interpretation of the Constitution" (1971) 45 ALJ 34 uses this argument to explain *Pitfield* v *Franki* (1970) 123 CLR 448. It is examined below at pp 379–380.

[20] Section 30 of the Judiciary Act 1903 (Cth) relevantly 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."

[21] Section 80 of the Judiciary Act 1903 (C'th) provides "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

[22] *Supra* n 17, 492.

[23] The key decision is *R* v *Hibble; ex parte The Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456 where a statutory majority (Knox CJ, Gavan Duffy and Starke JJ; Isaacs, Higgins and Rich JJ dissenting) held that prohibition would issue to a special Tribunal constituted under the Industrial Peace Act 1920 (C'th) to prevent it enforcing an award which it had purported to make without power. Relying on *R* v *Commonwealth Court of Conciliation and Arbitration and the Australian Builders' Labourers' Federation; ex parte Jones* (1914) 18 CLR 224, Knox CJ and Gavan Duffy J (at 463) held that prohibition could be granted even after an award had been made. *Cf* Isaacs and Rich JJ at 475, "it is difficult to see any escape from the conclusion that the Tribunal . . . was *functus officio* here".

increased the reach of the writ of prohibition, over areas which might have been considered beyond its "classical" scope. This widening had occasioned controversy on the Court. In the result, however, prohibition is granted in situations in which an English court would consider the tribunal against which the writ was sought to be *functus officio*. In *Gilchrist* that argument was canvassed but Knox CJ and Gavan Duffy J avoided the potential difficulty simply by referring to authority.[24] Isaacs J and Rich J elaborately discussed the history of both the writ of prohibition and the writ of certiorari.[25] They came to no conclusion on the availability of certiorari as a remedy specifically conferred by s 75(v). The only reference to it was in their discussion of the effects of a privative clause when they said:

> Nor does the fact that s 75(v) of the Constitution confers inalienable jurisdiction by way of "prohibition" on this Court – not certiorari be it observed – carry the matter any further.[26]

Thus, this early decision of the High Court allowed the issue to go by default. The broadening of prohibition obviated the need to consider whether certiorari, strictly speaking, would lie in the Court's original jurisdiction.[27] The silence has continued, with muted exceptions.[28] The problem is, however, a real one. The Court has never expressly held that the scope of prohibition and certiorari is the same, whatever it may have done as a matter of practice.

It is necessary to distinguish and consider a number of possible heads of jurisdiction to grant certiorari. These are:

(a) s 71 of the Constitution, on the basis that the power to grant all writs is an integral part of "the judicial power of the Commonwealth";
(b) Section 75(iii) of the Constitution, on the basis that in an application for the writ "the Commonwealth, or a person . . . being sued on behalf of the Commonwealth, is a party";
(c) Section 75(v) of the Constitution, on the basis that certiorari is by implication included in the category of "Mandamus or prohibition or an injunction"; and
(d) Section 76 of the Constitution, on the basis that Parliament has made a law which confers "original jurisdiction on the High Court in . . . [a] matter [a]rising under [the] Constitution". This law, s 30(a) of the Judiciary Act,

---

[24] In *Gilchrist* the Court was pressed with the decision of the House of Lords in *Clifford and O'Sullivan* [1921] 2 AC 570. Knox CJ and Gavan Duffy J relied on the *Broken Hill* case (1909) 8 CLR 419, the *Builders' Labourers'* case *supra* n 23, the *Tramways* case, *(No 1)* (1914) 18 CLR 54 and *Hibble supra* n 23 to reject the proposed limitation.

[25] *Supra* n 17, 501-526.

[26] *Ibid* 526.

[27] R D Lumb & K W Ryan, *The Constitution of the Commonwealth of Australia Annotated* (3rd ed 1981) 290: ". . . any inconvenience which the absence of certiorari in s 75(v) may have caused has been avoided by peculiarly *[sic]* Australian extension of prohibition exemplified in *R* v *Hickman*." It is not clear from the early judgments of the Court how much influence the lack of explicit reference to certiorari in s 75(v) had upon the development of the width of prohibition. There is almost a deliberate lack of reference to the topic and it is not unreasonable to suppose that such an absence had some effect, albeit at an unconscious level.

[28] *R* v *Drake-Brockman; ex parte National Oil Pty Ltd* (1943) 68 CLR 51.

specifically confers jurisdiction on the Court in matters arising under the Constitution or involving its interpretation and brings with it all the supplemental relief provided by s 33 of the Judiciary Act.

In *R* v *Marshall; ex parte Federated Clerks Union of Australia*[29] Mason J suggested that a want of jurisdiction on the part of the Industrial Registrar, ". . . possibly taken in conjunction with a bona fide claim for prohibition, gave the Court jurisdiction, despite the absence of any reference to certiorari in s 75(v) of the Constitution" to grant the writ. This suggestion echoed an earlier view of Sir Victor Windeyer[30] that certiorari could be granted if the claim was made in conjunction with another claim for relief that clearly did fall within the original jurisdiction of the High Court; *eg* a claim for the writ of prohibition pursuant to s 75(v). This "ancillary" jurisdiction, invoking perhaps the accrued jurisdiction[31] of the Court, has certain difficulties.

It is only coincidental that the claim for certiorari is usually made in conjunction with a claim for prohibition. Of course, the two writs were traditional partners at common law.[32] If the "ancillary" explanation is correct in theory, certiorari presumably could be sought in an action for mandamus or an injunction. Such a course would have a far less familiar look to it. The argument that the Court may be seized of a matter by a bona fide claim[33] for prohibition which "turns into" a claim for certiorari is, in a sense, self-defeating, for the remedies are not coterminous. The ambit which has been bestowed on prohibition in Australia[34] must not be allowed to conceal that the writs have different aims.

As Quick and Garran said long ago:

> It does not follow . . . that the plaintiff in any suit against an officer of the Commonwealth in which the substantial relief sought does not come within this subsection [s 75(v)] can bring the proceeding within the jurisdiction of the High Court by adding an untenable claim for a mandamus, prohibition, or injunction. It is submitted that in such a case the same principle would apply as when a plaintiff endeavours to bring a common law dispute into a Court of Equity by alleging an untenable equity.[35]

It is irrelevant in deciding the jurisdiction of the Court that the inappropriate nature of prohibition as a remedy only appears *ex post facto*.

---

[29] (1975) 132 CLR 595, 609 explaining the decision in *Pitfield* v *Franki*.

[30] In *R* v *District Court of the Metropolitan District; ex parte White* (1966) 116 CLR 644, 655 his Honour said: ". . . on top of the limitations of the scope of the prerogative remedy, which are inherent in its nature and arise from its history, there are also in this case some questions, peculiar to this Court, both of jurisdiction and of parties. It is at least questionable whether certiorari to quash proceedings of an inferior tribunal can issue from this Court as a substantive remedy not ancillary to some proceeding otherwise within the original jurisdiction of the Court."

[31] The concept of "pendent jurisdiction" has been introduced into discussions of both the High Court's power to issue writs pursuant to s 33 of the Judiciary Act, and the power of the Federal Court of Australia to examine claims which are related to, but not strictly within, the ambit of those brought under the Federal Court Act. See generally, W M C Gummow, "Pendent Jurisdiction in Australia – Section 32 of the Federal Court of Australia Act 1976" (1979) 10 FL Rev 211 and Sir Harry Gibbs supra n 13, 12-13.

[32] The writs are discussed together. See *Gilchrist* (1924) 34 CLR 482, 501-526 *per* Isaacs and Rich JJ.

[33] *Supra* n 30.

[34] *Supra* n 24.

[35] Quick and Garran *supra* n 14, 783.

In would be odd if a premium were to be placed on obtaining *incorrect* legal advice so that an applicant for a writ could argue that he did not realise his mistake concerning which writ to seek when he instituted proceedings. On the other hand, correct advice on which writ is the proper one, *ie* certiorari, would result in prohibition being sought "colourably" and not bona fide since the applicant would know that in the circumstances prohibition would not provide the relief which he sought. The Court's jurisdiction to grant certiorari, whatever else its basis, cannot be based on a power to grant relief "ancillary" to relief which, *ex hypothesi*, it never had power to grant in the first place.

The decision in *R* v *Cook; ex parte Twigg*[36] exemplifies these difficulties. A solicitor who had been held in contempt of the Family Court and fined, sought both writs of prohibition and certiorari from the High Court. As Sir Keith Aickin pointed out in his judgment, prohibition was a possible remedy in that it could be appropriate to prohibit any further proceedings by way of enforcement of the order on the basis that it was made without jurisdiction.[37] However:

> Such an order would however not be a satisfactory solution to the problem presented by the errors involved in the judgment. It would leave standing a conviction made without justification or jurisdiction, even though enforcement of the order so made would be prohibited. To leave such a conviction standing would be a serious matter, especially so in the case of a legal practitioner in relation to his conduct in court.[38]

Prohibition would be insufficient to expunge the error which had occurred in the Family Court. The formal quashing of the record of the inferior tribunal could only be managed by a grant of certiorari in its traditional form and not by using the High Court's extended view of prohibition. Aickin J supported the grant of certiorari, saying that it may:

> be used as an adjunct to an order for prohibition so as to make such order fully effective. It is merely a procedural question whether the order for prohibition should be made as well as an order for certiorari.[39]

His Honour said the case was "one in which a writ of prohibition could properly issue, and not one where all that can be said is that it was sought 'not merely colourably, but in good faith'".[40]

The High Court cannot arrogate a jurisdiction to itself on the basis of a claim, albeit bona fide, that such a jurisdiction exists.[41] Such an argument

---

[36] (1980) 31 ALR 353.

[37] *Ibid* 365 citing *R* v *Hibble; ex parte Broken Hill Proprietary Co Ltd* (1920) CLR 456.

[38] *Ibid.*

[39] *Ibid* 366.

[40] *Ibid.* His Honour also said: ". . . it seems to me that it would not be proper to make an order for certiorari except upon a basis which involved the court in treating its jurisdiction to make such an order as established, if not by the decision in *Pitfield* v *Franki*, then by the circumstances of the present case".

[41] As Griffith CJ said in a different context in *Ridley* v *Whipp* (1916) 22 CLR 381, 386: ". . . consent cannot give jurisdiction over subject matter which is itself not within the cognizance of the Court". See, too, *Hopper* v *Egg and Egg Pulp Marketing Board (Victoria)* (1939) 61 CLR 665, 677. P H Lane, *The Australian Federal System* (2nd ed 1979) 595 notes: "I know of no case in which the High Court has actually gone to the length of closing its doors to a litigant suspected of fabricating jurisdiction." The fact that no example may be found makes the problem of *bona fides* no less acute. Lane discusses the question of *bona fides* at pp 595-596.

is open to the criticism made above that it assumes that the ambit of the two writs is identical. As Aickin J stated in his judgment:

> It would however be illogical to make both orders for the court would be in one sense prohibiting any further steps based upon the conviction and at the same time quashing the conviction itself, making the prohibition unnecessary.[42]

It would have sufficed for the applicant solicitor to have applied for certiorari on its own to quash the decision. It is irrelevant that prohibition might also have issued. In no sense can certiorari be said to be "ancillary" to prohibition in such a context.

Is it possible to characterise the claim for certiorari as merely procedural, as Aickin J did? Section 31 of the Judiciary Act might then permit additional relief. It provides:

> The High Court in the exercise of its original jurisdiction may make and pronounce all such judgments as are necessary for doing complete justice in any cause or matter pending before it, and may for the execution of any such judgment in any part of the Commonwealth direct the issue of such process, whether in use in the Commonwealth before the commencement of this Act or not, as is permitted or prescribed by this or any Act or by Rules of Court.[43]

The supplementary power conferred by the section is confined to the case where the Court is acting in "the exercise of its original jurisdiction." This is the matter at issue. The section cannot be construed as conferring additional jurisdiction upon the court.[44] It is facultative only:

> It would seem to be an open question whether s 31 of the Judiciary Act 1903 would operate so as to enable the court to make an order for certiorari if that were not implicit in s 75(v) of the Constitution.[45]

It is only by assuming that the section confers power to grant certiorari that it is possible to invoke s 31.

Murphy J in *R* v *Cook* did not recognize the *petitio principii* which exists in the traditional reasoning. His Honour concluded that the conviction for contempt was bad and said "It is more appropriate to quash or set aside the conviction and fine than to restrain further proceedings on it."[46] It was more appropriate to grant certiorari than prohibition. Accordingly "it is not necessary to resort to certiorari with its technicalities".[47] After quoting the words of s 31 he proceeded, "This court may, . . . simply quash or set aside the conviction and fine without deciding whether or not the case comes strictly within the scope of certiorari."[48] Such a view, given the statutory nature of the Court's jurisdiction, is unusual. One may conclude that if the claim for

---

[42] *Supra* n 36, 366.

[43] His Honour also said, "It cannot be regarded as clear that it would be a matter falling with s 76 in respect of which Parliament might make laws conferring original jurisdiction." *Ibid.*

[44] See generally, the arguments in *Philip Morris Inc* v *Adam P Brown Male Fashions* (1981) 33 ALR 465, 486 *per* Gibbs J at 486. That case was concerned with the operation of s 22 of the Federal Court Act but it is submitted that a similar argument is applicable to s 31 of the Judiciary Act.

[45] *Supra* n 36, 366 *per* Aickin J.

[46] *Ibid* 364.

[47] *Ibid.*

[48] *Ibid.*

prohibition had not been made, s 31 would have been unavailable since the Court would not have been exercising any other "original jurisdiction" upon which the additional relief might "hang". It is unfortunate but not surprising that the other members of the Court did not discuss the matter in their judgments.

In *Re Bowen*,[49] the Court considered an application for certiorari and mandamus directed to the Federal Court in relation to its decision on cancellation of a union registration. In discussing jurisdiction, it said.

> Counsel for the Union made the further submission that s 75(v) of the Constitution, though it makes no reference to certiorari, impliedly confers original jurisdiction on this court to grant certiorari in a case in which the court does not otherwise possess original jurisdiction. This submission is untenable.[50]

Despite the tentative line of authority which may be cited to support s 75(v) of the Constitution as a source of power to grant certiorari, an examination of the reasoning involved reveals the weaknesses in doing so. To date no respondent has objected to the granting of certiorari for want of jurisdiction. The absence of such protest is immaterial: "it is trite law that consent or absence of opposition does not give jurisdiction."[51]

Rather than rely on s 75(v), why not utilise s 75(iii) of the Constitution? That section provides that the High Court shall have original jurisdiction in all matters in "which the Commonwealth, . . . is a party". Here the jurisdiction arises because of the party rather than the remedy. Professor Lane has demonstrated the problems in showing that the Commonwealth is a "party" in a technical sense when the writ of certiorari is sought.[52]

There is also a logical difficulty in relying on the paragraph to support the Court's power to grant certiorari to which he does not advert. If certiorari is the only remedy which is appropriate on the facts,[53] can it be said that the Commonwealth or the person being sued on its behalf is properly sued at all? Is the suit properly commenced if it assumes the existence of the ability to grant relief which is sought? The order impugned can only be quashed if certiorari is available. The reason suggested for the remedy's availability is that the tribunal's order is sought to be quashed. Arguably, the jurisdiction conferred by s 75(iii) cannot arise if the Commonwealth is sued tendentiously. The question of relief is integral to the suit. One cannot sue in any accepted sense of the word for a remedy or relief which is unavailable. To assume that certiorari is then available pursuant to s 31 or s 33 of the Judiciary Act[54] involves the "boot-strap"fallacy explored in relation to "ancillary"

[49] *Supra* n 12.

[50] *Ibid* 189, *per* Mason, Murphy, Wilson, Brennon and Dawson JJ.

[51] *R* v *Cook supra* n 36, 366 *per* Aickin J; *Ridley* v *Whipp supra* n 41, 386 *per* Griffith CJ; P H Lane *supra* n 41, 602.

[52] P H Lane, "High Court's Jurisdiction to Issue Writs" (1967) 41 ALJ 130, 131.

[53] As, for instance, in *R* v *Cook supra* n 36, where prohibition, alone was ineffective.

[54] Section 33 of the Judiciary Act provides: "(1) The High Court may make orders or direct the issue of writs – (a) commanding the performance by any court invested with federal jurisdiction, of any duty relating to the exercise of its federal jurisdiction; or (b) requiring any court to abstain from the exercise of any federal jurisdiction which it does not possess; or (c) commanding the performance of any duty by any person holding office under the Commonwealth; or (d) removing from office any person wrongfully claiming to hold an office under the Commonwealth; or (e) of mandamus; or of *habeas corpus*. (2) 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.

jurisdiction. Both arguments depend upon the Commonwealth being properly impleaded; without that, the supplemental relief which the sections of the Judiciary Act provide has nothing upon which to act.[55]

In *R* v *District Court of the Northern District of Queensland; ex parte Thompson*, McTiernan J made this point without exploring its logical consequences.

> The order . . . for writ of certiorari . . . orders several parties . . . to show cause before this Court why a writ of certiorari should not issue. The effect of this order is . . . to indicate that 'the Commonwealth or a person suing or being sued on behalf of the Commonwealth' – the Minister of State for Labour and National Service – is a party to the controversy . . . *Section 75(iii) of the Constitution would . . . give this Court original jurisdiction in the matter if the Court also has power to grant relief in the application.*[56]

One must assume that the relief is available before s 75(iii) can be used to confer jurisdiction. Unless and until the party sued on the Commonwealth's behalf is properly joined, no question of ancillary relief can arise. A desire for that relief is insufficient to invest the Court with jurisdiction. This difficulty permeates the view that the High Court's pendent jurisdiction justifies the grant of certiorari. Both Sir Garfield Barwick and Sir Harry Gibbs[57] have suggested the "pendent" jurisdiction as a basis for the grant of the writ. *Philip Morris* v *Adam P Brown Male Fashions* Barwick CJ said obiter:

> . . . the authority to grant appropriate remedies will be included in the accrued federal jurisdiction. Section 51 (xxxix) of the Constitution is an appropriate source of legislative power to grant such authority. Section 32 of the Judiciary Act is, in my opinion, an exercise of that constitutional power. Section 51 (xxxix) is not, in my opinion, a source of substantive legislative power but only of adjective power. It presupposes jurisdiction and supplements its existence by the grant of power to give remedies appropriate to the exercise of the substantive jurisdiction. That jurisdiction in the case of this court comes directly from the Constitution.
>
> Thus, in my opinion, s 51(xxxix) would warrant the grant to this court of authority to grant certiorari to quash in a case in which the court otherwise had jurisdiction. *Pitfield* v *Franki* . . . is a case in which the court had jurisdiction to grant prohibition for lack of jurisdiction in the lower court. It might well have done so though that writ would not be as useful as certiorari to quash. Thus, s 32 of the Judiciary Act was available to justify certiorari not because, independently,

---

[55] Sections 32 and 33 of the Judiciary Act do not provide an independent source of jurisdiction. They only come into effect if original jurisdiction is otherwise properly invoked. This flows from the High Court's reasoning in *Philip Morris Inc* v *Adam P Brown Male Fashions supra* n 44, 476 *per* Barwick CJ; *cf* 486 *per* Gibbs J; 499 *per* Mason J, dealing with s 22 of the Federal Court Act which is analogous to s 32 of the Judiciary Act. What is its effect? Is it perhaps intended to catch certiorari? An examination of the writs and orders included in s 33(1) reveal nothing left out. Mandamus is covered by s 33(1)(e); prohibition by s 33(1)(b); *quo warranto* by s 33(1)(d) and *habeas corpus* by s 33(1)(f). The writs not covered are certiorari and *de non procedendo rege inconsulto*. In relation to the writs available see *R* v *Bevan; ex parte Elias and Gordon* (1942) 66 CLR 452, 465 *per* Starke J; *Whybrow's* case *supra* n 16, 48, 49; *Jerger* v *Pearce* (1920) 28 CLR 588.

[56] (1968) 118 CLR 488, 494-495 (italics added)

[57] *Philip Morris Inc* v *Adam P Brown Male Fashions* (1981) 33 ALR 465, 476 *per* Barwick CJ; 486 *per* Gibbs J.

> the court had jurisdiction to entertain an application for the prerogative writ but because, having jurisdiction to grant prohibition, the writ of certiorari was a convenient, indeed a more convenient, mode of exercising the jurisdiction which undoubtedly, in my opinion, the court had.[58]

This invites the criticism that may be levelled at a "broad" construction of s 75(v). It presupposes the existence of the initial jurisdiction. The jurisdiction conferred by the Judiciary Act is only supplementary, as Barwick CJ acknowledges. Sections 75, 76 and 77 of the Constitution delimit the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth.[59] Section 32 of the Judiciary Act cannot be used to widen that original jurisdiction.[60] Although it is permissible to rely on the section to grant more complete relief once the original jurisdiction of the Court has been engaged, the section cannot be used to surmount the initial difficulty of lack of jurisdiction.[61]

Could, however, the writ be granted by use of one of the supplementary sections[62] in a case which arises under s 76(i) of the Constitution? Here the Parliament has acted to confer jurisdiction upon the Court.[63] This argument was advanced in *Gilchrist*.[64] Professor Lane uses similar reasoning to support *Pitfield* v *Franki*. He suggests that "because of (the) close relationship between the Act and the Constitution, one can say, not altogether loosely, that in interpreting the Act the High Court was interpreting the Constitution."[65]

Such a solution to the jurisdictional difficulties is a neat one. It does, however, have a number of drawbacks. As Stark J said in *R* v *Bevan; ex parte Elias and Gordon*, the High Court is a statutory court set up under the Constitution; "whatever jurisdiction is not found there either expressly or by necessary implication does not exist".[66] To rely upon s 76(i) as supporting s 30 of the Judiciary Act and thus "catching" the additional remedies provided by s 33 of the Judiciary Act will only work in a limited number of cases. Despite the existence of s 30 (dealing with the Constitution strictly speaking) "no law has been made in general terms conferring original jurisdiction on the High Court in any matter arising under the laws made by Parliament . . .".[67] Thus, the argument will only be possible where a relevant enactment exists. While *Pitfield* and *R* v *Marshall* have the requisite connec-

---

[58] *Ibid* 475-476.
[59] P H Lane *supra* n 41, 58.
[60] *supra* n 48.
[61] *Cf* P H Lane *Supra* n 41, 653, n 37 and text, where the learned author states: "To be exact, the applicant for a writ first establishes a head of jurisdiction, such as s 75(iii) or s 75(iv). Then the applicant relies on the common-law fullness of 'the judicial power' (of the Commonwealth) which is granted to the High Court by Constitution s 71 and which comes into play whenever the Court exercises jurisdiction. By this power the Court can give complete relief, including prerogative writs."
[62] *Ie* ss 31 or 33 of the Judiciary Act.
[63] Section 30(a) of the Judiciary Act.
[64] *Supra* n 17.
[65] Lane, "High Court' Jurisdiction to Interpretation of the Constitution" (1971) 45 ALJ 34, 35.
[66] (1942) 66 CLR 452, 465.
[67] *Ibid.*

tion,[68] *In re Student Assistance Tribunal* will not support such an interpretation; it would only do so if the "general law" mentioned by Starke J, resting on s 76(ii) of the Constitution, had been enacted. It is odd, moreover, that the High Court itself has never suggested such a source of power if s 76(i) and s 30 of the Judiciary Act combine to overcome this long perceived problem. Mason J in *R* v *Marshall* preferred to rely upon the "ancillary" concept rather than take what would have been an easier course. In *R* v *Cook*, Gibbs J (as he then was) noted that *Pitfield* "may also have been regarded as one involving the interpretation of the Constitution".[69] With respect, however, his Honour is surely incorrect in suggesting that this explanation was advanced by Mason J in *Pitfield*.[70] Thus, while it is true that the Constitution and s 30 of the Judiciary Act may assist the reasoning suffers from limitations as a basis of jurisdiction, except in occasional cases. Even in *Pitfield* and *Marshall*, which can be most easily be explained on this basis, the Court itself did not do so.

The argument that s 71 of the Constitution on its own may be a basis for jurisdiction may be shortly discussed and dismissed. Sir Edward McTiernan in *Ex parte Thompson* suggested that "the power to issue a writ of certiorari in cases within its jurisdiction inheres in this Court by virtue of s 71 of the Constitution which vests the 'judicial power of the Commonwealth' in this Court".[71] In the *Tramways Case (No 1)*, Griffith CJ in discussing the power to grant prohibition stated, ". . . I do not think that sec. 71 can be relied upon as of itself conferring jurisdiction"[72] and this view has been generally accepted as correct. Such a denial, of course, applies *a fortiori* to *certiorari*.

A propounder of the arguments advanced above is open, at one level, to a charge of arid semanticism. Looking at the problem pragmatically, there must be some means of quashing the decision of a Federal judge as opposed to merely appealing from it. There is, however, a further and more pressing problem inherent in the very nature of the writ of *certiorari* itself which has only recently been articulated in the High Court's decision in *Re Gray; ex parte Marsh*.[73]

Traditionally, certiorari has issued to quash the decision of an "inferior" tribunal.

> 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.[74]

As Professor Wade has noted:

> The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds.[75]

---

[68] Both *Pitfield* and *Marshall* conceivably involve such an interpretation because they peripherally examine the operation of s 51(xxxv) of the Constitution.
[69] (1981) 31 ALR 353, 361.
[70] *R* v *Marshall* (1975) 132 CLR 595, 609 *per* Mason J.
[71] *Supra* n 56, 495.
[72] (1914) 18 CLR 54, 63; note Professor Lane's contrary view *supra* n 61.
[73] (1985) 59 ALJR 804.
[74] H W R Wade, *Administrative Law* (5th ed 1982) 273.
[75] *Ibid* 547.

That rationale sits uneasily with the statutory averment, contained in s 5 of the Federal Court Act, that the Federal Court is a superior court of record. By definition, then, it ought not be amenable to certiorari. This conceptual difficulty was developed in two dissenting judgments in *Re Gray; ex parte Marsh*.[76]

An unsuccessful candidate in a union election alleged that certain "irregularities" had occurred in its conduct within the meaning of s 4(1) of the *Conciliation and Arbitration Act* 1904 (Cth). In pursuance of Part IX of the Act, the allegations of misconduct were referred to a judge of the Federal Court for an inquiry. The successful candidate then sought prohibition and certiorari against the decision of the judge on the basis that the matters of alleged misconduct were not capable of constituting "irregularities" under the Act.

A statutory majority held[77] that prohibition should issue because the matters alleged were not such impugnable "irregularities". (A further argument, that Part IX was an invalid attempt to confer non-judicial powers on the Federal Court did not need to be determined.) GIbbs CJ, in the majority, noted that the Federal Court had jurisdiction "to determine whether the state of things, upon whose existence its jurisdiction depended, did or did not exist, but the correctness of its decision on that question may be tested by prohibition".[78] Wilson J agreed without discussing the jurisdictional problems arising from the issue of certiorari to the Federal Court.

Deane J examined the question of certiorari in the greatest detail of all the judges. He agreed with the view of Sir Harry Gibbs that the facts alleged did not constitute an "irregularity" for the purposes of the Act. Accordingly, the Federal Court lacked jurisdiction to entertain the application.

His Honour went on to explain in detail why neither prohibition nor certiorari was available to quash the decision of a Federal Court judge.

He began by stating that s 75(v) does not, of itself, justify the granting of a remedy against "an officer of the Commonwealth" if that remedy is, by definition, inappropriate to restrain or correct such an officer. So, if prohibition or certiorari, are, in themselves, inapposite as a means of reviewing a Federal Court decision, such relief may not be granted against the superior court:

> While the parliament cannot, by its laws, over-ride the provision of s 75(v), it can make laws within the context of which the jurisdiction conferred by s 75(v) must be exercised.[79]

On this argument, there is an implied restriction on the width of s 75(v) by the nature of the remedies therein bestowed, even if the officer is relevantly "an officer of the Commonwealth:"

> If . . . the prerogative writs do not go at all to a superior court of record, s 75(v) would not, in my view, confer upon this Court jurisdiction to direct mandamus or prohibition to what was in truth such a court even though the particular judge

---

[76] *Supra* n 73.
[77] Gibbs CJ, Wilson and Brennan JJ; Mason, Deane and Dawson JJ dissenting.
[78] *Supra* n 73, 813.
[79] *Ibid* 818.

> was, for the purposes of that paragraph, properly to be seen as an "officer of the Commonwealth."[80]

As his Honour pointed out, however there is no necessary antimony between the Federal Court being a "superior" court and yet still being liable to prohibition.[81] A "superior" court may have all the muniments of "superiority" and yet still have a "limited" jurisdiction. In such a case, prohibition will issue to the Federal Court if it strays outside the limits of that jurisdiction.

The writ of certiorari, however, stands on a somewhat different footing. It involves the notional removal[82] of the record of the lower court into the court ordering the writ. Because of the direct nature of this intermeddling, it has been generally agreed that it is not consonant with the dignity of a "superior" court to allow certiorari to be directed to it. Deane J qualified this blanket exception:

> . . . the fact that a court is properly regarded as having the status of a superior court of record will [not] preclude that status being modified either by the Constitution or by statutory provision for the issue of certiorari by, or the removal of its proceedings into, another court in a particular category of case.[83]

His Honour cited the possible example of remitter jurisdiction as one in which the issuing of certiorari would be appropriate.[84] In general, however, Deane J concluded that the provisions of s 75(v) confer no jurisdiction on the High Court to grant certiorari to quash the decision of another federal superior court of record:[85]

> The parliament has not conferred upon the [High] Court any power to intermeddle by certiorari in the actual exercise by the Federal Court or the Family Court of its jurisdiction. To the contrary, it has impliedly negated the existence of any such power by expressly creating both those courts as superior courts of record.[86]

His Honour recognized that certain authorities were against his conclusion. In particular, he thought that both *R* v *Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust) Ltd*[87] and *Pitfield* v *Franki*[88] were not in point because the question of issuing certiorari against *a superior court* was not raised. In both cases, the question was rather whether the Arbitration Commission was exercising certain functions.

R v *Cook*, however, is an authority four square against the views of Mr Justice Deane, a fact which his Honour acknowledged.

---

[80] *Ibid.*

[81] That is because a superior court may yet have a "limited" jurisdiction for the purposes of prohibition: see *James* v *South Western Railway Co* discussed in *A-G of Queensland* v *Wilkinson* (1958) 100 CLR 422, 425 *per* Dixon CJ.

[82] At one stage, as Deane J notes, it involved the actual removal of the record.

[83] *Supra* n 73, 819.

[84] *Ibid.*

[85] He reached this conclusion, principally, on the implied exclusion of certiorari by the express choice of remedies contained in s 75(v).

[86] *Supra* n 73, 819.

[87] (1949) 78 CLR 389.

[88] (1970) 123 CLR 448.

So, too, *Re Ross-Jones; ex parte Green*[89] is authority for the granting of certiorari to a superior Federal Court. Deane J held that the grant of the writ in those cases was "erroneous".[90] Furthermore, it is no argument that certiorari is merely doing the same work as prohibition. As noted above, although the nature of prohibition has been extended to do much of the work done by certiorari in a constitutional contest, the issue of the latter may not be properly justified on the ground that they are identical in operation.

Deane J declined to decide whether the decisions in *R* v *Cooke* and *Re Ross-Jones* compelled him, as a matter of precedent, to hold that the High Court possessed the certiorari jurisdiction asserted. He stated, in dicta, that:

> if so constrained, I would be of the view that those cases should be understood as going no further than asserting the availability of the writ of certiorari to control excess of jurisdiction . . .[91]

As his Honour pointed out, it is important not to conclude from the constitutional limitations on jurisdiction that:

> the parliament lacks legislative competence, as an incident of a substantive legislative power, to make the jurisdiction of Ch. III court in relation to a particular matter dependent upon that court's own finding of the existence of the circumstances which underlie the constitutional validity of the grant of jurisdiction.[92]

The ultimate criterion is, then, a matter of interpretation to decide whether:

> the basis upon which the relevant relief could be granted was the objective existence of an irregularity of irregularities as distinct from the trial judge's judicial determination that such irregularity or irregularities had occurred.[93]

Dawson J agreed with Gibbs CJ that the application to the Court was incompetent. He, too, was troubled by the question of granting certiorari to what was, statutorily, a superior court. But, as he pointed out:

> A federal court is necessarily a court of limited jurisdiction. Its powers can be no wider than is permitted by ss 75 and 76 of the Constitution and when jurisdiction is sought to be conferred under s 76(ii) in any matter arising under any laws made by parliament, the confines of the legislative powers of the parliament provide a further limitation.[94]

It follows that the Federal Court enjoys only some of the muniments of a superior court *eg* the power to punish for contempt; the protection of officers from void orders. A superior court presumptively acts within jurisdiction but this does not prevent prohibition issuing to the Federal Court if its lack of jurisdiction becomes clear.

Dawson J pointed out that, since the Federal Court cannot finally determine its jurisdictional facts, a collateral attack is always open in the High Court. Accordingly, it follows that prohibition is available under s 75(v).

---

[89] (1984) 59 ALJR 132.
[90] *Supra* n 73, 820.
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid* 821.
[94] *Ibid.*

On the question whether the case was one in which the alleged error was jurisdictional, his Honour agreed with Mason J.[95]

A different question arose with respect to certiorari: "whether Parliament has, by declaring the Federal court to be a superior court, excluded certiorari as a means of challenging its decisions".[96] Dawson J clearly considered the absence of any reference to certiorari in s 75(v) as decisive; in the absence of certiorari, prohibition is the remedy for excess of jurisdiction.[97]

His Honour acknowledged that *Pitfield* v *Franki, R* v *Cook* and *Ex parte Green* seemed to require a contrary conclusion. No question, however, of constitutional interpretation was involved in *R* v *Cook*. The difficulties with the bona fide argument, although not expressed in detail, form the basis of his Honour's comments.[98]

In the result Dawson J expressed no concluded view on whether s 5(2) of the Federal Court Act excluded the availability of certiorari. Since no question of constitutional competence was involved, Dawson J was content to grant only prohibition.

Unfortunately, none of the judges who adverted to the problem fully explored all its ramifications. Mason J indicated that he had difficulty with the grant of certiorari, at least in relation to error of law on the face of the record. Deane J eloquently expounded all the theoretical problems, but without analysing the inherent weaknesses in those authorities which support certiorari; Dawson J touched upon the problems without expressing a concluded view. Gibbs CJ, Brennan and Wilson JJ did not advert to the issue.

The decision in *Re Gray* provokes more questions than it resolves. Why, for example, did the Chief Justice not articulate the concerns which he had voiced extra-curially?[99] Why did Wilson J, normally zealous to construe rigorously any suggested amorphous accretion to the Court's jurisdiction, not discuss the issue at all? The judgment of Mr Justice Deane was the most trenchant analysis yet of the alleged jurisdiction of the Court to grant certiorari, but it is respectfully submitted that his judgment fell short of a complete exploration of the difficulties inherent in the traditional view.

One concludes that, despite the granting of certiorari over a long period of time, an examination of the various heads of power upon which jurisdiction could conceivably be based reveals no constitutional justification for doing so in most situations. Such a problem is now, perhaps, of little practical importance, given the extended operation of prohibition. Certain cases, however, do arise in which certiorari, and it alone, is the appropriate remedy. With the increase in the jurisdiction of the Federal Court, it is not fanciful to speculate that applicants will seek the writ of certiorari more frequently.

---

[95] *Ibid.* Mason J (*Ibid* 814-815) held that the Federal Court, in deciding whether or not an "irregularity" had occurred, was acting within its jurisdiction. So, even if Gray J made a mistake on the definition of the term, "it [was] not an error susceptible of remedy by way of prohibition."

[96] *Ibid* 822.

[97] *Ibid* 823: "Section 75(v) of the Constitution does not stand in the way *because it does not extend to certiorari* and clearly recognises prohibition as the remedy for a court acting in excess of jurisdiction."

[98] *Ibid.*

[99] *Supra* n 13.

The authorities reveal the willingness of the High Court to disregard a lack of jurisdiction on *ab inconvenienti* grounds. It is clear that prohibition will issue from the High Court to the Federal Court in appropriate circumstances. It will be ironic if the authoritative decision on s 75(v) involves an application to the High Court for certiorari to quash the Federal Court's granting of certiorari pursuant to s 39B.[100]

[100] Note, in that Case, that Professor Lane's quodlibetical argument involving s 76(i) of the Constitution and s 30(a) of the Judiciary Act will be unavailable, since s 30(a) only confers jurisdiction on the High Court, not the Federal Court.