

## Re McBain; Ex parte Australian Catholic Bishops Conference (2002) 209 CLR 372

<https://lawcasesummaries.com/knowledge-base/re-mcbain-ex-parte-australian-catholic-bishops-conference-2002-209-clr-372/>

### Facts

- Dr McBain found that a particular treatment he wished to administer was prohibited by section 8 of the *Infertility Treatment Act 1995* (Vic) (**Vic Act**).
- Section 8 restricted in vitro treatment to women who were married or with a *de facto* partner.
- Dr McBain claimed that this was inconsistent with the *Sex Discrimination Act 1984* (Cth) and therefore invalid by section 109 of the Constitution. Commenced proceedings in Federal Court.
- The Australian Catholic Bishops Conference and Australian Episcopal Conference of the Roman Catholic Church (**Bishops**) supported the Vic Act, and sought to join themselves to proceedings.
- The Bishops lacked standing to be joined and were involved in the proceedings as *amicus curiae* ("friends of the court").
- The Federal Court ruled in favour of Dr McBain.
- Bishops commenced proceedings in the High Court to have an order made under section 76 of the Constitution that the Federal Court decision was incorrect in law.

### Issue

- Did the Bishops have standing to have the decision quashed by a writ of certiorari?

### Held

- The majority followed *In re Judiciary and Navigation Act* (1921) 29 CLR 257 - in order for the High Court to consider section 76, there needed be some "immediate right, duty or liability" to be determined by the Court.
- The Bishops had no right, duty or liability nor was there a controversy that could be solved; the Federal Court proceedings were finalised and there had been no appeal.
- In the obiter of Gaudron, Gummow and Hayne JJ, certiorari was held to be unavailable.
- Certiorari should only be available for jurisdictional error or for a superior court to supervise inferior courts.

## Quote

"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."

(Gaudron and Gummow JJ at page 410 citing the *Union Label Case*)

## Full Text

The full text is available here: <http://eresources.hcourt.gov.au/showCase/2002/HCA/16>

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