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Access to Constitutional Justice: Opening Address

Abstract
The theme of this symposium is accessing constitutional justice which is also the subject of Patrick Keyzer's challenging book, *Open Constitutional Courts* . There are many strands to this theme. Of these strands, the papers in this symposium concentrate on existing limitations to access to constitutional justice and generally favour a relaxation of them, a sentiment with which I agree.

Access to the courts for the enforcement of provisions of the Constitution has, however, been impeded in various ways. Rules relating to standing, the position of amici curiae, the requirements of justiciability and limitations on the concept of judicial power, especially those arising from the concept of 'matter' in Ch III of the Constitution, as well as the cost of litigation, have restricted access to the courts for constitutional relief.

These rules have been strongly influenced by several factors. They include (i) the traditional view that the judicial process involves the adjudication of a controversy which results in the determination of the existence of a right or duty asserted by one or more parties against another or others; (ii) the perceived need to protect the courts from an invasion of meddlesome busybodies and; (iii) a misplaced belief in the willingness of the Attorney-General to represent the community's interest in upholding the law. The traditional view failed to accommodate the special considerations which apply to access to constitutional justice.

Keywords
o Access To Constitutional Justice, Attorney-General, Standing, Advisory Opinions, Amici Curiae, Costs

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ACCESS TO CONSTITUTIONAL JUSTICE: OPENING ADDRESS

SIR ANTHONY MASON AC KBE*

Introduction

The theme of this symposium is accessing constitutional justice which is also the subject of Patrick Keyzer's challenging book, *Open Constitutional Courts*. There are many strands to this theme. Of these strands, the papers in this symposium concentrate on existing limitations to access to constitutional justice and generally favour a relaxation of them, a sentiment with which I agree.

The broad thrust of the papers is to be applauded. In a society that is governed by a constitution it is imperative that its provisions be observed. Compliance with the provisions of the Australian Constitution is central to the rule of law.[1] And, in our system of jurisprudence, the rule of law assumes a separation of powers of which one element is an independent judiciary to ensure that the law – and most notably the Constitution – is fairly applied and impartially enforced. There is the obvious risk that if constitutional provisions are not enforceable, they may not be observed.

Access to the courts for the enforcement of provisions of the Constitution has, however, been impeded in various ways. Rules relating to standing, the position of amici curiae, the requirements of justiciability and limitations on the concept of judicial power, especially those arising from the concept of 'matter' in Ch III of the Constitution, as well as the cost of litigation, have restricted access to the courts for constitutional relief.

These rules have been strongly influenced by several factors. They include (i) the traditional view that the judicial process involves the adjudication of a controversy which results in the determination of the existence of a right or duty asserted by one or more parties against another or others; (ii) the perceived need to protect the courts from an invasion of meddlesome busybodies and; (iii) a misplaced belief in the willingness of the Attorney-General to represent the community's interest in

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* Ninth Chief Justice of Australia; Justice of the Hong Kong Court of Final Appeal. I acknowledge the valuable assistance which I have derived from Professor Geoffrey Lindell in discussing ideas presented in this paper.

1 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (per Dixon J) ('the rule of law forms an assumption" on which the Constitution was framed).

upholding the law. The traditional view of the judicial process, essentially based on a notion stemming from litigation between private parties (what Patrick Keyzer calls 'the private law paradigm'), failed to take account of the secondary role of the courts, especially the High Court, in developing and making the law, as an incident of their adjudicative function. More importantly for present purposes, the traditional view failed to accommodate the special considerations which apply to access to constitutional justice.

In the light of the two imperatives to which I have referred, we need to scrutinise limitations on access to the courts very closely so as to ensure that they are soundly based. Limitations will not be soundly based unless they are necessary to the attainment of a legitimate aim which is consistent with the Constitution and they do not inhibit its ready enforcement.

The Attorney-General as guardian of public law

The Attorney-General, as representative of the government and of the public of his polity, is entitled to bring proceedings for declarations and injunctions to ensure compliance with public law requirements, including a declaration of invalidity of a statute. In addition, the Attorney-General can give permission to a person to bring proceedings by way of relator action. By this procedure an individual who lacks standing to bring an action in his own name and right can bring an action in the name of the Attorney-General. The availability of relief in public law matters at the suit of the Attorney-General was one reason why the courts were slow to expand the concept of standing to enable individuals to sue in their own right in such matters.

But it has become evident that enforceability by the Attorney-General in his own right or by way of relator action is no longer an adequate protection in Australia for an individual who seeks to enforce the requirements of public law. The deficiencies, in Australia, in relief at the suit of the Attorney-General have been recognised by the High Court in *Bateman's Bay*[2] and *Re McBain; Ex parte Australian Catholic Bishops' Conference*.[3] The Attorney-General is not independent of government and cannot be expected to act impartially in deciding whether proceedings should be brought against the government.

It has been said that delay by Senator Murphy in granting a *fiat* in the Black Mountain Tower case and his insistence on the making of an application for an interlocutory injunction exposed the relators to a potential heavy liability on their

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2 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 262-3.

3 (2002) 209 CLR 372, 473-5.

undertaking as to damages.[4] This example and others shows how the Attorney's role in relator actions had become politicised, a matter noted in *Re McBain.* The refusal of Attorney-General Williams to defend the High Court from political criticism was another disturbing example of the degradation of the apolitical role of the Attorney-General.[5] Indeed, in *Attorney-General (Vic) v Commonwealth,*[6] Murphy J (dissenting) said:

> To require a person who is not and will not be affected by the coercive operation of an Act to obtain the *fiat* of the Attorney-General . . . . would put enforcement of constitutional guarantees at the mercy of political pressures exercisable through parliaments, although the purpose of the constitutional guarantees was to provide certain protections even as against parliaments.[7]

Indeed, his Honour went on to say:

> A citizen's right to invoke the judicial power to vindicate constitutional guarantees should not, and in my opinion, does not, depend upon obtaining an Attorney-General's consent.[8]

It would be a mistake to think that each of the topics which constitute obstacles to access to constitutional justice are distinct and unrelated; federal judicial power (which turns on the meaning of the word 'matters' in Ch III), standing, the nature of the interest which the plaintiff is required to have in order to support declaratory relief and the elements of the discretion to grant or refuse declaratory relief are all inter-related.

Standing and matter

The rules relating to standing have evolved in response to the need to formulate rules which would enable the courts to identify the class of persons who are entitled to initiate legal proceedings for relief against unlawful administrative action, the relief sought being different from that sought in an action between private parties. Deficiencies in relief at the suit of the Attorney-General have resulted in a

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4 See *Kent v Cavanagh* (1973) 1 ACTR 43; *Johnson v Kent* (1975) 132 CLR 164. See also the discussion in The Australian Law Reform Commission's Report No 27, 'Standing in Public Interest Litigation' (1985) [162]; pursuant to legislative authority, Senator Murphy removed his name from the relator proceedings in the case.

5 See Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252; Ruth McColl SC, 'Reflections on the Role of the Attorney-General' (2003) 14 *Public Law Review* 20.

6 (1981) 146 CLR 559.

7 Ibid 634.

8 Ibid.

progressive relaxation of the rules relating to standing. Initially the plaintiff in a public law case was required to have a material interest. The *Boyce v Paddington Borough Council*[9] formulation that a person who suffered 'special damage peculiar to himself' was no more than a variation on the material interest requirement. Much later, in *Australian Conservation Foundation v Commonwealth*,[10] Gibbs J criticised this formulation and said that it should be understood as meaning 'having a special interest in the subject matter of the action', a view with which I agreed.[11] In that case, the High Court rejected the proposition that an emotional interest or a belief, however strongly held, that the law should be observed or that conduct should be prevented, gives the possessor standing. This test was applied in *Onus v Alcoa of Australia Ltd*[12] where the indigenous people were held to have a special interest because they had a spiritual interest in the preservation of relics of their ancestors. In the context of standing, the distinction between a spiritual interest and an emotional interest now seems to be less than convincing.

In *Bateman's Bay*,[13] the majority (Gaudron, Gummow and Kirby JJ) went a step further by identifying shortcomings in the reliance on relief at the suit of the Attorney-General in public law cases and by noting an element of incongruity in the *Boyce* principle. The majority favoured greater flexibility in the application of the special interest test. More importantly, the majority said:

> Reasons of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive, procedural application.[14]

The majority also said:

> in federal jurisdiction, questions of standing . . . . are subsumed within the constitutional requirement of a 'matter'. This emphasises the general consideration that the general principles by which standing is assessed are concerned to 'mark out the boundaries of judicial power' whether in federal jurisdiction or otherwise.[15]

The proposition that, in federal jurisdiction, questions of standing are subsumed within the constitutional requirement a 'matter' has been repeated, notably in *Truth*

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9 (1903) 1 Ch 109, 114.
10 (1980) 146 CLR 493, 527, 530.
11 Ibid 547-8.
12 (1981) 149 CLR 27.
13 (1998) 194 CLR 247.
14 Ibid 267.
15 Ibid 262, repeating what had been said in *Croome v Tasmania* (1997) 191 CLR 119, 132-3.

about Motorways v Macquarie[16] and *Pape v Commissioner of Taxation*.[17] To say that, in the context of Ch III of the Constitution, 'standing' is subsumed in the concept of 'matter' is to say no more than that the former is an element in the latter.[18] But this does not mean that the element has a fixed content across Ch III.[19] As Gaudron J pointed out in *Truth about Motorways*, neither the concept of 'judicial power' nor the meaning of 'matter' dictates that a person who institutes proceedings must have a direct or special interest in the subject matter of the proceedings, although 'there may be cases where, absent standing, there is no justiciable controversy'.[20]

The joint judgment in *In re Judiciary & Navigation Acts*[21] was regarded as enunciating a restrictive view of the concept of 'matters' in Ch III and therefore of *federal* judicial power. The effect of the decision was that a plaintiff could not sue for a declaration of constitutional invalidity unless the declaration resolves 'some immediate right, duty or liability to be established by the Court'.[22]

The essence of the reasoning in *In re Judiciary and Navigation Acts* was that the word 'matters' in Ch III does not allow Parliament to confer power or jurisdiction on the High Court to determine abstract questions of law without the right or duty of anyone being involved.[23] In this context, questions of law are 'abstract' if they are unrelated to the determination of the rights and duties of parties to the litigation or, to put the same idea in another way, divorced from any attempt to administer or enforce the law whose validity is the subject of challenge, either by the executive government or someone else in a position to do so. In the same vein, the majority said that a matter must involve:

> some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law.[24]

Another related idea, which was not explicitly dealt with in the majority judgment and is often associated with objections to the determination of 'abstract' questions of law (what I call 'the practical objection'), is that they exist in the air, so to speak, so that the court is asked to determine them without having the advantage of

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16 (2000) 200 CLR 591, 611, 637.

17 (2009) 238 CLR 1 (where standing was not in dispute on the basis of the existing authorities) 28 [25], 68-9 [150-158], 99 [273].

18 *Truth About Motorways v Macquarie* (2000) 200 CLR 591, 637.

19 Ibid.

20 Ibid 611.

21 (1921) 29 CLR 257.

22 Ibid 265.

23 Ibid 266-7.

24 Ibid 266.

considering their validity in a setting in which the critical provisions are sought to be applied to specific and concrete facts. As I point out later,[25] the practical objection is, in the context of proceedings for declaratory relief, to a large extent, a discretionary consideration on which a court will rely as a basis to refuse declaratory relief.

The first point to be made about the reasoning in *In Judiciary and Navigation Acts* is that when it is understood, as just explained, the decision does not entail the consequence that, in matters of federal jurisdiction, the plaintiff must show a special interest over and above the requirement that there be a 'right, duty or liability' or, as it was put in *James v South Australia*,[26] a 'right, title, privilege or immunity', to be established by the determination of the court.

The second point to be made, and it is made by Professor Leslie Zines in his paper on advisory opinions, is that the High Court has in a number of cases granted declaratory relief where there was no determination of the right, duty or liability of a party. In these cases, the High Court exercised its discretionary power to grant declaratory relief under s 31 of the *Judiciary Act 1903* (Cth), s 32 of the *High Court Procedure Act 1903* (Cth) and Order 1V of the High Court Rules, without granting consequential relief.[27]

In proceedings for declaratory relief the plaintiff has been required to have a sufficient interest in the subject matter of the proceedings to warrant the grant of the relief sought.[28] In *Croome v Tasmania* the fact that the plaintiffs *had* engaged in the conduct prohibited by the statute was regarded by Brennan CJ, Dawson and Toohey JJ as giving them a sufficient interest. The fact that the legislation could 'possibly' be enforced against the plaintiffs went to the discretion to grant or refuse declaratory relief.[29] The plaintiffs had a sufficient interest, even though the judgment did not determine a right or immunity which they asserted in proceedings taken by the executive to enforce the law against them.

In that case, the claim of a right, title, privilege or immunity under the Constitution, such as the claim there for the declaration of invalidity of a statute, was held to be the criterion of a matter arising under the Constitution or involving its interpretation. However, Brennan CJ, Dawson and Toohey JJ held that no 'justiciable controversy' (and presumably no 'matter') arises unless the plaintiff has a sufficient interest. On the other hand, Gaudron, McHugh and Gummow JJ dealt with 'matter' and

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25 See discussion below.
26 (1927) 40 CLR 1, 40.
27 See now *High Court Rules 2004* (Cth) O 16 r 19.
28 See *Crouch v Commonwealth* (1948) 77 CLR 339.
29 *Croome v Tasmania* (1997) 191 CLR 119, 127.

'standing' as the first issue (and dealt with it as one issue) and declaratory relief as the second issue. Having resolved the first issue, as a matter of jurisdiction, they turned to the discretionary considerations which govern the grant or refusal of declaratory relief. Under the second issue they found that the fact that the State Act exposed the plaintiff to liability to criminal prosecution justified the exercise of the discretion to grant declaratory relief.[30] On their Honours' approach, this fact went not to 'matter' or 'standing' but to the discretionary element of declaratory relief. With respect, this was a correct approach, subject only perhaps to the question whether it was necessary to invoke this fact in order to justify the grant of declaratory relief.

Their Honours had earlier said:

> There is nothing in the references in *In re Judiciary and Navigation Acts* to the administration of the law which provides any foundation for the submission of the State in this case. The administration referred to is that of the courts in dispensing justice.

The last sentence in this passage placed an interpretation on a sentence in *In re Judiciary v Navigation Acts* where the joint judgment, speaking of the Parliament's power to prescribe procedure, said:

> But it cannot authorise the Court to make a declaration of the law divorced from any attempt to administer that law.[31]

Their Honours' gloss in *Croome v Tasmania* cannot disguise the fact that the reference in the passage just quoted was to the law whose validity was the subject of challenge.

One question here is whether the High Court is well-advised to persevere with the formulation in *In re Judiciary and Navigation Acts* when this course involves subjecting it to interpretations which it does not readily bear. My own preference would be to return to the original understanding of the word 'matters' which was no more than 'cases which arose in the exercise of judicial power', that is, 'matters capable of judicial determination' to repeat the words of O'Connor J in *South Australia v Victoria*[32] or matters which are 'justiciable'.

A reading of the Convention Debates and of the early history of the judicial interpretation of the word 'matters', both strikingly related by James Stellios,[33] leaves one with the firm conviction that, 'matters' was a broad and neutral not a restrictive

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30 Ibid 136-8.

31 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 266.

32 (1911) 12 CLR 667, 708.

33 James Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (LexisNexis Butterworths, 2010) paras 3.50–3.56, 4.21–4.25.

or technical expression and that it was inter-linked with the concept of judicial power. The joint judgment in *In re Judiciary v Navigation Acts* introduced an unintended disjunction between judicial power and 'matters'. This had the effect of avoiding the necessity of deciding whether non-judicial power could be invested in federal courts and postponing the decision on that question to the *Boilermakers Case*.[34] The dissenting judgment of Higgins J is more faithful to the inter-relationship between judicial power and 'matters', though he thought that it extended to non-judicial power. In this respect, his view (with which I agree) was inconsistent with the *Boilermakers Case*[35] and in all probability is beyond recall.

The majority High Court judgment in the *Boilermakers Case* was critical of the joint judgment in *In re Judiciary and Navigation Acts*. In *Boilermakers*, it was said that 'unfortunately' the joint judgment distinguished between judicial power and Commonwealth judicial power. In the *Boilermakers Case*, both the High Court and the Privy Council expressed doubts about the conclusion that the advisory opinion jurisdiction sought to be invested in the High Court involved the exercise of judicial power but the later judgments referred to by Professor Zines affirm the correctness of this conclusion.

In more recent times two judges have suggested that *In re Judiciary and Navigation Acts* might be reconsidered, Kirby J in *North Ganalanya Aboriginal Corporation v Commonwealth*[36] and Callinan J in *Re McBain*.[37] As Professor Zines suggests, however, the decision appears to have acquired iconic status, perhaps because it has brought about a result which appeals to judges. Judges do not like advisory opinions.

If 'matters' are seen, as they should be, as a reflection of judicial power, other beneficial consequences would follow. 'Judicial power' is an indeterminate expression without a content that is fixed by reference to understandings in 1901, even if those understandings equated judicial power with the determination of the rights, duties and liabilities of parties. There would be less difficulty in accommodating the expression to instances of the exercise of judicial power with which we have become familiar in more recent times.

My comments about the meaning of 'matters' relate to the expression in the context of Parliament's power to invest jurisdiction under s 76 of the Constitution. It is perhaps conceivable that the word could bear a different meaning in s 75 of the

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34 (1956) 94 CLR 254, 272.

35 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

36 (1996) 185 CLR 595, 666.

37 *Re McBain* (2002) 209 CLR 372, 476. (His Honour suggested, correctly in my view, that the word 'immediate' should be discarded from the formulation in the joint judgment).

Constitution, though such a development would not have my support. What consequences the meaning I prefer would have for s 75 may need to be explored but I do not think they would be untoward. What is significant is that s 76(i) contemplates that Parliament *will legislate* to confer jurisdiction on the High Court in matters arising under the Constitution or involving its interpretation.

If the requirement is simply that a 'matter' be justiciable, there is the argument that some requirement that the plaintiff has an interest in the outcome of the proceedings ensure that the case for unconstitutionality will be properly argued. The point was well made in the opinion of the Supreme Court of the United States delivered by Warren CJ in *Flast v Cohen,*[38] a case which raised the question of standing of a taxpayer to challenge the validity of Federal legislation providing financial assistance to independent schools, including church schools. Warren CJ quoted with approval the following test of standing in constitutional litigation:

> The "gist of the question of standing" is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assume that concrete adverseness which sharpens the presentation of issues upon which the Court largely depends for illumination of difficult constitutional questions.[39]

Granted that this argument has some force, I doubt that there is a compelling reason to retain in proceedings for declaratory relief, any interest requirement beyond that of enforcing the Constitution. On the contrary, if there is any arguable case against validity, the public interest in the rule of law lies in the prompt determination of that case and the striking down of that law, if it be held invalid. It is enough that the plaintiff seeks to enforce the Constitution, subject to what I have called 'the practical objection' (which takes up 'the concrete adverseness' point) and other discretionary considerations which would include factors relating to the plaintiff and other potential complainants.[40] In her paper, Kristen Walker draws attention to the various matters which bear on the Court's efficient management of constitutional litigation.

There is the question whether the content of 'matters' is to include elements such as 'the practical objection' and other discretionary considerations (apart from the 'significant interest' requirement) which are relevant to the grant of declaratory relief. In my view, the question arises only as a substantial question if 'matter' has a content that goes beyond the content of judicial power. A discussion of *Commonwealth v Queensland*[41] will explain what otherwise I have in mind.

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38 392 US 83, 99 (1960).

39 *Baker v Carr,* 369 US 186, 204 (1962).

40 See Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue For Public Remedies* (Report No 78, 1996) paras 5.24–5.25.

41 (1988) 62 ALJR 1.

In this case, there was a demurrer to a statement of claim which sought declarations that certain sections of the *Industrial (Commercial Practices) Act (Qld)* were invalid by reason of s 109 of the Constitution because they covered conduct which was covered by certain provisions of the *Conciliation and Arbitration Act 1904* (Cth), the *Trade Practices Act 1974* (Cth) and the *Crimes Act 1914* (Cth). The statement of claim did not particularise or allege an actual case or specific facts and amounted to an invitation to decide the questions raised by reference to hypothetical facts. The invitation, if accepted, would have required the Court to chart in the abstract the outer limits of a legislative power of the Commonwealth in order to ascertain what the valid operation of a State law might be. In the course of argument, the plaintiffs sought to amend the claim for relief by deleting any reference to the *Conciliation and Arbitration Act* and by identifying particular sections of the other two Commonwealth Acts.

With respect to the original unamended claim for declaratory relief the Court said of the abstract nature of the questions and the claim to have them determined by reference to hypothetical facts:

> These considerations would have warranted a refusal to exercise the Court's discretion to grant declaratory relief in the terms originally sought in the statement of claim. To have determined the question thus raised would have resulted in the giving of what would have amounted virtually to an advisory opinion.[42]

Of the reformed claim for relief the Court said:

> Unless the Court were confident that the elements and characteristics of the conduct prescribed by both laws were identical, it would be inappropriate to make a declaration in the abstract which would be invoked in future concrete cases.
>
> Differences between the texts of the two sets of laws and differences in the general law of criminal responsibility affecting the operation of the respective statutes make it undesirable to endeavour to identify, in advance of a concrete set of facts, the content of the statutes which are said to attract the operation of s.109. The undesirability is more manifest when a reading down provision converts the question from one of inconsistency as such to one of the scope and operation of the State law.[43]

What is significant here is that the Court, neither in relation to original nor the reformed claim for relief, held that there was no matter or no exercise of judicial power. Instead the Court assumed that it had jurisdiction and decided the case by

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[42] Ibid 2.

[43] Ibid.

reference to discretionary considerations relevant to the refusal of declaratory relief. If the Court was to give full effect to all that was said in *In re Judiciary and Navigation Acts*, the Court might have held that there was no 'matter' because the question was abstract in the sense that no question of any immediate right or duty arose under a statute which was being enforced and the question to be determined was to be resolved on hypothetical rather than concrete facts. But the Court did not do so.

The Court's approach in *Commonwealth v Queensland* has much to commend it. In essence the question whether a statute is constitutionally valid is a question capable of answer by judicial determination; in other words, it is inherently justiciable. It is, however, possible that a party may propose that it should be answered by reference to considerations which are non-justiciable. If so, a court may be entitled to say that neither judicial power nor a 'matter' is involved. But from a practical perspective, it may make more to sense to say that because the question is inherently capable of resolution by way of judicial determination, judicial power is engaged and a 'matter' arises, leaving the practical objection and other considerations raised in argument to be dealt with as discretionary considerations. This, to me, is the way in which the question should be dealt with, as it was in *Commonwealth v Queensland.* And this approach is consistent with the view taken by Gibbs J in *Robinson v Western Australian Museum*[44] where he acknowledged that standing involved an element of judicial discretion.[45]

In this respect, we need to bear in mind that some abstract questions of a constitutional validity can be determined by the High Court. Professor Zines has noted examples in his paper. See also *Australian Boot Trade Employees' Federation v Commonwealth,*[46] in particular the dissenting judgments of Dixon CJ[47] and Fullagar JJ.[48] In that case the plaintiffs claimed that s 78 of the *Conciliation and Arbitration Act 1904* (Cth) was beyond power though no facts were established. Dixon CJ was prepared to make a declaration that 'in no substantial respect entitling the plaintiffs to relief' was s 78 invalid.

There is the objection that any relaxation of standing would expose the courts to proceedings brought by busybodies who have no individual interest in the subject matter of the litigation. The simple answer to this question is that the courts have available procedures which enable them to dispose summarily of unmeritorious cases. And, as I have already said, if a constitutional question is arguable, a court

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44 (1977) 138 CLR 283.
45 Ibid 302-3.
46 (1954) 90 CLR 24.
47 Ibid 45.
48 Ibid 47.

should deal with it, even if the plaintiff has no individual interest in the outcome, subject to discretionary considerations which will govern such matters as joinder of parties, interventions and participation by *amici*.

One particular aspect of standing is the decision in *Logan Downs Pty Ltd v Federal Commissioner of Taxation*[49] where it was said that the plaintiff taxpayer:

> has no interest which it entitles it as a matter of law to challenge the validity of the provisions of the Wool Industry Act or the payments which they authorise.[50]

In other words, according to *Logan Downs*, a taxpayer lacks standing to maintain an action to restrain a public body from improperly spending money. *Logan Downs*, which is inconsistent with *Thorson v Attorney-General (Canada)*,[51] can no longer be supported. Indeed, the Court's recent approach to standing in *Pape* points in this direction. If a taxpayer has standing to argue that he is not entitled to a payment provided for by statute, it can scarcely be supposed that he lacks standing to challenge the validity of the expenditure to be made from tax imposed upon him. Peter Johnston discusses *Pape* in some detail in his paper.

Advisory opinions

It follows from what I have said that I agree with the view expressed by Professor Zines in his paper that *In re Judiciary & Navigation Acts* was wrongly decided, even if his reason for reaching this conclusion is more limited than my approach. The legislation in that case made it clear that an answer to a referred question was a binding and authoritative determination.

The expression 'advisory opinion' is used in various senses often to signify an opinion which is not binding, as the very brief judgment in *Commonwealth v Queensland*[52] indicates. In this respect, I must confess to my astonishment on reading the statement in *North Ganalanja Aboriginal Corporation v Queensland*[53] that, having answered the first of three questions argued, it was not only unnecessary to answer the other two, but also that it would be to deliver an advisory opinion contrary to the Constitution.

The elements which the High Court identified in *In re Judiciary & Navigation Acts* as leading to the conclusion that there was no 'matter' arising under the legislation in

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49 (1965) 112 CLR 177.

50 Ibid 187.

51 Cf *Davis v Commonwealth* (1988) 166 CLR 79, 96.

52 *Commonwealth v Queensland* (1988) 62 ALJR 1. ('To have determined the question thus raised would have resulted in the giving of what was virtually an advisory opinion').

53 (1996) 185 CLR 595.

question, have, in more recent times, been dealt with as discretionary considerations when a court is called upon to exercise its discretion to grant or refuse declaratory relief. Indeed, they are more appropriately dealt with as discretionary considerations than as factors that should operate as an absolute bar to relief, as they do if they are taken to define the word 'matter'. The fact that the case involves an abstract question, though usually a bar to relief, should not be an absolute bar.

If the High Court is to be given an advisory jurisdiction, the High Court should have a discretion to refuse or to accept, subject to conditions, and a discretion to determine how the question shall be dealt with. If the legislation does not confer a discretion, the Court will develop a discretionary approach as it has done in relation to declaratory relief. I agree with the discussion by Professor Zines of the matters that should be taken into account in deciding whether an advisory opinion should be given and how the discretion should be dealt with.

Commonwealth v Queensland is a very good example of why it is necessary to leave the High Court with a discretion as to how it shall deal with a reference, if a reference is legislated. It would be a Herculean, indeed an impossible task, to expect the Court to respond to the questions which were presented in that case. Any discretion given to the Court must extend both to whether the questions referred are appropriate to be answered and the procedures to be adopted if the questions are to be answered.

Amici curiae

Ernst Willheim's provocative paper argues that the High Court 'has not given adequate recognition to the special character of public interest litigation, including constitutional litigation'. I acknowledge that in the context of *amici curiae*, as in other areas of public law, the High Court has been greatly influenced by the private law paradigm of adversary litigation. Beyond that acknowledgment I shall keep out of the sharkpool which this argument is likely to generate and confine myself to making several points. After all, my views on this topic were published in 1998 in a comment on Kenny J's paper 'Interveners and Amici Curiae in the High Court of Australia'.[54]

In that comment and in the remarks which follow, I assume, contrary to the view that I have already expressed, that an individual plaintiff is required to have a sufficient interest to support a constitutional challenge. Even if this assumption is not made, a potential plaintiff or interviewer may well prefer the comfort of being an *amicus* in order to avoid a liability for costs.

[54] Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review*, 159–71 (the article); 173-6 (the comment).

First, I would reject the proposition that *amicus* applications should be granted unless good reason to the contrary is shown. The fact is that litigation, even in the High Court, is between and conducted by the parties. If others wish to participate in the litigation they need to show why they should be permitted to do so.

That said, it is important that there should be no judicial mind-set against *amicus* applications because there are cases, as the papers demonstrate, where *amicus* participation can be valuable. There is a risk that, in some cases at least, that the full range of arguable submissions will not be presented either because it is not to the interest of the actual parties to put them or because they are not put for other reasons. Whether an *amicus* proposes to advance argument and materials which go beyond those presented by the parties is obviously an important consideration in deciding whether an application should be granted. Whether there should be a presumption in favour of granting *amicus* applications, as favoured by Ernst Willheim and Kristen Walker, is a matter on which I have reservations.

The management by the High Court of *amicus* applications involves a number of diverse considerations. Effective and economic use of the time of a hard-pressed Court is one. The tendency of parties and others to submerge the Court in an ocean of mostly irrelevant materials is another, as is the prospect of interest groups using a court appearance to focus public attention on issues which have a political dimension or even to create a tactical advantage in the presentation of an argument. It is essential that the Court should maintain its own efficiency and exclude participations which are pointless or simply time-consuming. The Court should have a discretion as to the mode of participation by an *amicus.* Ordinarily it should be by way of written submission but there will be cases where an oral submission may be appropriate.

There is a strong case for procedural reform and the proposals put forward in papers to be presented are well worth consideration.

Costs

As we all know, the cost of litigation is expensive, if not exorbitant. So costs, particularly the prospect of an adverse costs order are a deterrent to litigation, including constitutional litigation. The ordinary rule that the unsuccessful party pays the successful party's costs applies to constitutional litigation. But is by no means an absolute rule.[55] There is certainly a case for relaxing the ordinary rule in appropriate cases either by relieving the unsuccessful party from the burden of costs or ordering a government or public body which is a party to the litigation to pay the costs in appropriate cases. The important question is how you define the class of 'appropriate

[55] *Oshlack v Richmond River Council* (1998) 193 CLR 72.

cases' so the definition becomes a matter of general understanding. I am, of course, averse to any notion that the Court should radically change course and order government and public body parties to pay the costs of other parties as a matter of course. Ordinarily an *amicus* participates without being at risk of an adverse costs order and there should be no change to this position. An *amicus* is at risk of an adverse costs order if he abuses his position or unnecessarily takes up too much of the Court's time.

Justiciability

Justiciability raises other important issues in relation to access to constitutional justice but they are questions for another day.