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Abstract
At the Constitutional Convention of 1897-1898 there was discussion about whether the High Court should be able to give advisory judgments as to the validity of legislation. Many delegates declared that it was not part of the judicial power to determine abstract questions of law. Dr Quick specifically referred to the possibility that the term 'matters' was wide enough to permit the Commonwealth to obtain an ex parte interpretation of the Constitution (to which he was opposed). Other delegates were of the opposite view. An attempt by Patrick Glynn at the Adelaide Convention to insert a specific provision that would have allowed for advisory opinions was rejected. The concerns expressed included an absence of interested parties, the difficulty of the Court in contemplating the complex circumstances that might arise and the possible impairment of public confidence in the Court.

Keywords
Access To Constitutional Justice, Advisory Opinions, Governmental Suits for a Declaration, Adverseness, Separation of Judicial Power, Abstractness, Demands of Constitutional Text

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ADVISORY OPINIONS AND DECLARATORY JUDGMENTS AT THE SUIT OF GOVERNMENTS

LESLIE ZINES*

Advisory Opinions

At the Constitutional Convention of 1897-1898 there was discussion about whether the High Court should be able to give advisory judgments as to the validity of legislation. Many delegates declared that it was not part of the judicial power to determine abstract questions of law. Dr Quick specifically referred to the possibility that the term 'matters' was wide enough to permit the Commonwealth to obtain an ex parte interpretation of the Constitution (to which he was opposed). Other delegates were of the opposite view.[1] An attempt by Patrick Glynn at the Adelaide Convention to insert a specific provision that would have allowed for advisory opinions was rejected.[2] The concerns expressed included an absence of interested parties, the difficulty of the Court in contemplating the complex circumstances that might arise and the possible impairment of public confidence in the Court.[3]

Glynn referred to the practice of the House of Lords in seeking the opinions of the judges,[4] to s 4 of the *Judicial Committee Act of 1833* authorising the Queen to refer matters to the Privy Council for consideration and advice, and to the provisions in Canada for advisory opinions (at 962-963). For many however the position in the United States was seen as more attractive. It had there been held in many cases going back to *Hayburn's Case* in 1792[5] that it was no part of the judicial power to give advice to the executive government. But that conclusion was based on the fact that the judicial power in Article III of the Constitution was confined to 'all cases' of a prescribed kind and specified 'controversies'. These terms had been used in the Commonwealth draft of 1891 but they were changed to 'matters' in the 1897 draft,

* I wish to acknowledge the great assistance I have received from Professor Geoffrey Lindell, Sir Anthony Mason and Associate Professor James Stellios in the preparation of this paper.

1 Convention Debates, Melbourne, 1898, 318-20.

2 Convention Debates, Adelaide, 1897, 962-7.

3 James Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (LexisNexis Butterworths, 2010) 73-9, 121.

4 For example, *M'Naghton's Case* (1843) 8 ER 718, which laid down the classic rules on insanity in English law.

5 (1792) 2 Dall 408.

apparently without debate.[6] It was recognised that the concept of 'matter' was wider, but most delegates who spoke seemed to agree with the policy behind the American principle. The Privy Council's advisory jurisdiction and that of the Canadian courts appeared to have had no effect on them.

Quick and Garran concluded that the Court had no power to give an advisory opinion because it was not an exercise of judicial power.[7] They referred to the position of judicial advice to the House of Lords as 'very exceptional and only exercised by ancient custom' (at 767). While they set out the power of the Crown to seek advice from the Privy Council, they did not comment on it.

In *In Re Judiciary and Navigation Acts*[8] the High Court (Higgins J dissenting) held invalid a provision which purported to confer jurisdiction on the High Court to hear and determine any question referred to it by the Governor-General as to the validity of a Commonwealth enactment. The main argument against validity was that the power granted was not 'judicial'. If the Court had accepted that argument it would have needed to decide the issue whether non-judicial power could be conferred on a federal court — a question which was not answered for another 35 years.[9] In my view, in the then state of constitutional law, it is likely that if the Court had concluded, as many believed, that non-judicial power was involved the provision would have been upheld. In order, presumably, to avoid that result the joint judgment pointed to the provisions conferring jurisdiction 'to hear and determine' (which they put in italics) a referred question of law and that the determination 'shall be final and conclusive and not subject to appeal'. The Court therefore concluded that Parliament desired to obtain 'not merely an opinion but an authoritative declaration of the law' (at 264), which the judges considered to be clearly a judicial function.

The determination of invalidity rested instead on the view that an advisory opinion was not a 'matter'. As all the heads of federal jurisdiction in ss 75 and 76 of the Constitution are restricted to 'matters' it followed that an advisory opinion, although judicial, was not within the 'judicial power of the Commonwealth'.

The Court insisted that there could be no 'matter' unless there was 'some immediate right, duty or liability to be established by the determination of the Court.' They went on to say that the Court could not make a declaration of the law 'divorced from any

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6 Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 764-5.

7 Ibid 767.

8 (1921) 29 CLR 257.

9 *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*') (1956) 94 CLR 254 (High Court); (1957) 95 CLR 529 (Privy Council).

attempt to administer that law.' Another explanation given of 'matter' was that it 'must involve some right, privilege or protection given by law or the prevention, redress or punishment of some act inhibited by law.'

There have since been a number of cases where the Court has declared that it cannot, as a result of the above case, grant declaratory relief in respect of 'abstract or hypothetical questions', or 'if it is claimed in relation to circumstances that have not occurred and might never happen', or 'if the declaration would produce no foreseeable consequences for the parties.'[10]

This has not stopped the Court from time to time giving advice to governments, where it thinks it is warranted, by means of obiter dicta. This was the situation in *Hughes and Vale Pty Ltd v New South Wales (No 2)*[11] where several attempts by the State to impose a levy on interstate truck operators failed as a result of s 92. The Court gave detailed advice on how legislation should be drafted in order to impose a valid levy (at 175-176). In *Strickland v Rocla Concrete Pipes Ltd*[12] the Court held the *Trade Practices Act 1965* (Cth) invalid on a technical interpretation. Most of the judgments were, however, devoted to showing how the Commonwealth could use the corporations power to achieve valid trade practices legislation. This device of making legal pronouncements where there is no direct consequence for the parties, including no remedy, goes back to *Marbury v Madison.*[13] The Court held that mandamus was not an available remedy because the Act purporting to confer power on the Supreme Court to issue it was inconsistent with the Constitution. The Court nevertheless decided all the issues that would have resulted in the issue of the writ if the Court had had the jurisdiction.[14]

On the other hand the Court will sometimes use *In Re Judiciary and Navigation Acts* in circumstances where normal judicial procedure and practice produces the same result. This occurred, in my view, in *North Ganalanja Aboriginal Corporation v Queensland*.[15] There were three questions before the Court involving native title. The answer given to the first made it unnecessary to deal with the other two, and the Court refused to do so. A Court not restrained by the weight of Ch III could easily have come to the same decision. Yet the judges found it desirable to say that to answer the other questions would be to deliver an advisory opinion, contrary to the Constitution.

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10 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582.

11 (1955) 93 CLR 127.

12 (1971) 124 CLR 468.

13 5 US (1 Cranch) 137 (1803).

14 Cf the Privy Council in the *Bank Nationalisation Case* (1949) 79 CLR 497.

15 (1996) 185 CLR 595.

Governmental Suits for a Declaration

The majority judgments in *In Re Judiciary and Navigation Acts* did not go into the reasons of policy or principle that are usually given against advisory opinions. In so far as they include the difficulty of deciding questions in the abstract, without factual findings or practical context, that reason is substantially undermined by the Court's acceptance of the principle first established in the *Union Label Case*[16] giving a broad scope to the declaratory judgment in public law. The principle that the Attorney-General had standing to seek a declaration to protect the public from excess of jurisdiction or power exercised by a statutory body was adapted to the federal system. A State Attorney-General, it was held, could seek a declaration that the Commonwealth was acting in excess of its power. In *Attorney-General (Vic) v Commonwealth*[17] such a declaration was granted in respect of the *Pharmaceutical Benefits Act 1944* (Cth), even though it had not been proclaimed to commence. The Court did not regard it as a mere abstract question of law, because steps were being taken so it could be brought into effective operation. It followed that the public (in this case of Victoria) would be subject to the Act. The Attorney-General therefore had standing to sue on their behalf.

A similar situation occurred in the *Marriage Act Case*[18] relating, inter alia, to the power of the Commonwealth to provide under s 51(xxi) of the Constitution for legitimation by subsequent marriage. The commencement of the Act was delayed to allow the provisions to be tested. It appears that the provisions were proclaimed to commence more than a year after delivery of judgment by the Court.[19] There have been other cases of this nature.[20]

It now seems accepted that the State itself, or its Attorney-General on the State's behalf, may seek a declaration to protect the interests of the State, such as its legislative powers, from invalid Commonwealth laws.[21]

Some judges have gone further and said that the Commonwealth or a State has standing to institute legal proceedings when the other has exceeded its constitutional authority, without regard to whether the applicant polity or its public have been or could be injuriously affected.

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16 *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469.

17 (1945) 71 CLR 237.

18 *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529.

19 *Croome v Tasmania* (1997) 191 CLR 119, 135.

20 See, eg, *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482, 483, 495.

21 See Peter Johnston, 'Governmental Standing under the Constitution' in Leslie Stein (ed), *Locus Standi* (Lawbook, 1979) 173.

Justice Gibbs in the *AAP Case*[22] in holding that the State had standing to challenge the Australian Assistance Plan said (at 383):

> I would base my conclusion on the fact that the Constitution by defining the limits inter se of the constitutional powers of the Commonwealth and those of any State or States must be taken to have given to the Commonwealth or to each State a right to the observance of the constitutional limits and a standing to obtain such remedies as is necessary to secure their observance.

Justice Mason expressed a similar view. Justice Gibbs repeated his view in *Attorney-General (Vic) ex rel Black v Commonwealth*.[23] I am not aware that this view has been approved specifically by any later judge.

In *Re McBain; ex rel Australian Catholic Bishops Conference*[24] Gaudron and Gummow JJ (at 409) said that 'the 'particular right' of each Attorney-General lies in enlisting the judicial power of the Commonwealth to ensure observance by the other parties to the requirements of the federal compact expressed in the Constitution.' This language seems to reflect the approach of Gibbs J, but there is no reference to it and the context is different.

Interestingly the Supreme Court of Canada has doubted whether a provincial Attorney-General has standing to seek a declaration of invalidity of federal legislation.[25] This is based on the view that the Attorney-General is concerned only with provincial laws. No doubt the Canadians have felt less need for such a cause of action in the light of the fairly widespread use of advisory opinions. In Australia the declaratory suit by governments serves much the same purpose as an advisory opinion as is illustrated by the *Marriage Act Case*.[26] The State Attorney-General on seeking a declaration of invalidity expressly stated that his purpose was 'to set at rest as soon as may be doubts which may now or years hence affect or attend the title to proprietary rights'(at 539). This is the sort of motive or purpose that attends the seeking of an advisory opinion.

Issues relating to Advisory Opinions

These include:

1. Adverseness
2. Separation of judicial power

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22 *Victoria v Commonwealth* (1975) 134 CLR 338.

23 (1981) 146 CLR 559, 589.

24 (2002) 209 CLR 372.

25 *Thorson v Attorney-General* [1975] 43 DLR (3d) 1, 11-2.

26 *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529.

3. Abstractness
4. The demands of the Constitutional text

Adverseness

In one case at least the Commonwealth Attorney-General granted a fiat to permit a challenge to Commonwealth legislation. That was *Attorney-General (Cth); ex rel McKinley v Commonwealth*,[27] where it was argued that various provisions of the *Commonwealth Electoral Act 1918* (Cth) were inconsistent with provisions of the Constitution relating to representation in the House of Representatives. Other actions in this case were brought by South Australia and individual voters in States. Counsel for the defendant Commonwealth and the Chief Electoral Officer informed the Court that he had been instructed not to submit that any of the plaintiffs lacked sufficient interest to maintain their respective actions. It was nevertheless remarkable that the Attorney-General of the Commonwealth and the Commonwealth were on opposite sides of the action, even though the Attorney-General had a relator.[28]

If the legislation considered in *In Re Judiciary and Navigation Acts* had been upheld the Commonwealth would of course have argued in favour of the legislation. The Act ensured so far as possible that there would be adverse interests arguing for invalidity. Justice Jacobs has said that the Commonwealth Attorney-General could in any case seek a declaration that a Commonwealth provision is valid. He said that he could not conceive it to be correct that while the States may claim that a Commonwealth Act is invalid, the Commonwealth cannot claim a declaration that it is valid.[29] In *Attorney General (NSW); ex rel McKeller v Commonwealth*[30] Jacobs J said that he would regard the conclusion in *In Re Judiciary and Navigation Acts* as regrettable 'unless it does no more than affect the manner of bringing such questions before the Court.' Justice Jacobs therefore would deny that that case had any substantive effect.

In *Attorney-General (Cth) v T and G Mutual Life Society Ltd*[31] the Commonwealth sought a declaration that the provisions of the *Privy Council (Appeals from the High Court) Act 1975* (Cth) did not permit T and G to seek special leave to appeal from a High Court judgment to the Privy Council. This amounted to a claim that the Commonwealth Act was valid. The Court accepted the Commonwealth's standing

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27 (1975) 135 CLR 1.

28 Western Australia, Victoria, New South Wales and Queensland were interveners supporting the validity of the legislation.

29 *The Commonwealth v Queensland* (1975) 134 CLR 298, 326.

30 (1977) 139 CLR 527, 56.

31 (1978) 144 CLR 161.

and dismissed the argument that the Act did not relate to public rights. This was a case, however, where there was a specific opposing party who was seeking special leave where a Commonwealth Act purported to prohibit it. It might be argued therefore that the case does not establish the broader proposition put by Jacobs J.

However, if the only objection is that persons with opposing interests must be available to present arguments against validity, the provisions considered in *In Re Judiciary and Navigation Acts* ensured that result. To a degree ss 78A and 78B of the *Judiciary Act 1903* (Cth) assists in achieving the same object. It must be remembered that there is no guarantee in all circumstances that there will be argument by an opposing party even when there is no question that the plaintiff has standing and that there is, on any view, a 'matter'. This occurred, for example, in the suit brought by Dr McBain against Victoria in the Federal Court for a declaration that the Victorian *Infertility Treatment Act 1995* (Vic) was inconsistent with the *Sex Discrimination Act 1984* (Cth) and therefore inoperative under s 109 of the Constitution. Neither the State nor its statutory authority presented any argument. The Attorney-General of the Commonwealth did not intervene. The Catholic Bishops originally sought to intervene and then chose not to (perhaps to avoid being liable for costs). Justice Sundberg, however, allowed them to appear as amici curiae so as to provide countervailing argument.[32]

Similarly, in *Attorney-General (Cth) v Alinta*[33] the Attorney-General intervened in an appeal to the Full Court of the Federal Court in which it was held that the powers of the Takeovers Panel were invalid because inconsistent with Ch III of the Constitution. The unsuccessful party and the Attorney-General were granted leave to appeal to the High Court. The underlying commercial controversy, however, was settled. The original parties therefore were not going to present any arguments. Nevertheless the Attorney was allowed to proceed with the appeal, confined to the validity issue. He caused counsel not previously engaged in the proceedings to apply for leave to appear as amici curiae to submit argument in support of the declaration of invalidity. The Court said that the lack of a contradiction to the arguments of the Attorney-General was a sufficient and compelling reason to grant the amici leave to appear and argue.[34]

As mentioned earlier, the provisions in *In Re Judiciary and Navigation Acts* went to considerable lengths to ensure opposing argument. In addition to the rights of State

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

33 (2008) 233 CLR 542.

34 James Stellios has pointed out to me that in *Marbury v Madison* there was no contradictor because Madison refused to participate in the proceedings, regarding it as a judicial interference with the executive branch.

Attorney-General to be represented, the Court was empowered to direct that notice be given to other persons who were entitled to appear or be represented. The Court was also authorised to require counsel to argue the matter as to any interest which in the opinion of the Court was affected and for whom counsel did not appear. The argument that all advisory opinions should be prevented because of a possible lack of adverseness or contradictors must, in my opinion, be rejected for the above reasons.

Judicial or Non-Judicial Power?

What of the argument against advisory opinions that they do not constitute an exercise of judicial power? The High Court, of course, decided otherwise in 1921 and so avoided having to decide whether non-judicial power could be conferred on a federal court.

In the *Boilermakers' Case* both the High Court and the Privy Council questioned that view, but did not need to decide it. Later judges, however, reaffirmed the correctness of the classification made in *In Re Judiciary and Navigation Acts*.[35]

When one considers that a large part of the judicial development of Canadian constitutional law has been by means of what they call 'reference jurisdiction', it seems ludicrous to describe these advisory opinions as exercises in non-judicial power. Yet, when the Privy Council upheld the conferring of such jurisdiction on the Supreme Court (and therefore on the Privy Council itself by way of appeal) it described the Court's answer to any question referred to it as 'advisory only' and said that the answers were 'of no more effect than opinions of the law officers'.[36]

It is clear from that judgment that in the Privy Council's view an opinion given on a reference did not have the same value or weight as a judgment in a contested case. But during the 90 years or so since that pronouncement the opposite has proved true. An opinion delivered on a reference has always been treated by the Privy Council and the Supreme Court of Canada in the same way as other judgments. There seems to be no case where such an opinion has not been followed simply because it is merely an advisory opinion.[37]

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35 *The Commonwealth v Queensland* (1975) 134 CLR 298, 327 (Jacobs J); *Re Wakim* (1999) 198 CLR 511, 541-2 (Gleeson CJ); *Gould v Brown* (1998) 193 CLR 346, 421 (McHugh J), 440 (Gummow J).

36 *Attorney-General (Ont)* v *Attorney-General (Can) Reference Appeal* [1912] AC 571.

37 Peter Hogg, *Constitutional Law of Canada* (Thomson Carswell, 5th ed, 2008) 254.

In *Commonwealth v Queensland (Queen of Queensland Case)*[38] the High Court expressed a view different from that of the Privy Council. The case involved Queensland legislation one of the objects of which was the referral of a question by the Queen to the Judicial Committee under s 4 of the *Judicial Committee Act of 1833*. The particular question in the case raised an 'inter se' constitutional issue. It was argued that the Queensland Act simply provided a means by which the Government could obtain advice. The above Privy Council case was relied on as showing that the advice would have no greater authority or effect than the opinions of the law officers.

Justice Gibbs (with whose judgment Barwick CJ, Stephen and Mason JJ agreed) rejected the argument. He said (at 310):

> When the Committee sits to hear or consider a matter referred to it under s 4 of the Act of 1833 its proceedings remain strictly judicial.

He went on to suggest that if it were valid for the question to be referred under s 4, the Judicial Committee's advice would bind Australian courts.

In the *Boilermakers' Case*[39] the Privy Council suggested that the giving of advisory opinions could be incompatible with the judicial functions of the Court. They said that advisory opinions given by judges are 'regarded as tending to sap their independence and impartiality.' Justice Gummow in *Grollo v Palmer*[40] expressed a similar view when he said that advisory opinions 'have the potential to deplete the capital of the judicial branch of government'.

Again, the Canadian experience tells against this view. It seems that the so-called 'sapping' of independence has gone on for well over a century and a quarter in the case of the Supreme Court of Canada and did so for nearly three quarters of a century in respect of the Privy Council in hearing Canadian appeals. No objective observer, however, could deny that the Canadian Court is seen as being as independent and impartial as the High Court of Australia, with 'the capital of the judicial branch' unaffected.

Abstractness and Concreteness

The strongest argument against advisory opinions and, therefore, declaratory judgments at the suit of an Attorney-General is that the courts are deprived of developed facts and experience of how the legislation has operated for the purpose of determining validity. When I was a postgraduate scholar at Harvard Law School I

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38 *The Commonwealth v Queensland* (1975) 134 CLR 298.

39 *Boilermakers' Case* (1957) 95 CLR 529, 541.

40 (1995) 184 CLR 348, 391.

noticed that those academics who had knowledge of comparative constitutional law would contrast United States constitutional decisions with those of the Canadian Supreme Court and the Australian High Court. The judgments of the latter courts were said to be characterised by abstractness and conceptualism as compared with the more concrete examination by the US Court based on the actual operation of the legislation in the context of social facts. Some writers such as Paul Freund put this difference down to the use of advisory opinions in Canada and declaratory judgments in Australia.[41]

While 'abstract' and 'conceptual' might be reasonable descriptions of Australian and Canadian judgments for a considerable part of the twentieth century, I doubt whether it had much to do with advisory opinions or declaratory judgments at the suit of attorneys-general or governments. Other constitutional judgments in those countries arising from ordinary litigation were written in much the same style and to some extent still are. In Australia the Mason Court was noted for explicit reference to values and social facts without any change in the use of declaratory judgments. It seems to me that a similar change occurred in Canada from the late 1970s.

Some Canadian writers have pointed to cases where the reference jurisdiction was not a suitable vehicle for deciding the issue. Hogg has said:

> [It] is my opinion that the Court has not made sufficient use of its discretion not to answer a question imposed on a reference. The reference procedure has often presented the Court with a relatively abstract question divorced from the factual setting which would present in a concrete case. It has been a common and justified complaint that some of the opinions rendered in references have propounded doctrine that was too general and abstract to provide a satisfactory rule.[42]

Strayer has expressed a similar opinion.[43]

Neither Hogg, nor others who have taken a similar view, argue for the abolition of advisory opinions. Rather the complaint is that the Court has at times given an advisory opinion where it should not have done. The issue, however, is in the hands of the Court itself. If facts are needed before the Court can give a proper answer it can say so. In Canada s 53 of the *Supreme Court Act*, conferring reference jurisdiction, provides that 'it is the duty of the Court to hear and consider it [a referred question] and answer each question so referred'. Despite this imperative language the Supreme

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41 Paul A Freund, 'The Federal Judiciary' in Robert R Bowie and Carl J Friedrich (eds), *Studies in Federalism* (Little Brown, 1954), 110-11.

42 Hogg, above n 37, 258.

43 Barry L Strayer, *The Canadian Constitution and the Courts* (Butterworths, 3rd ed, 1988) 323-8.

Court has always regarded itself as exercising a discretion where it is thought that the question is not ripe or too vague to admit of a satisfactory or useful answer.[44] The main complaint seems to be that it does not always exercise this discretion in cases where it should.

Since about the late 1970s the Canadian Supreme Court has often encouraged the lodgment of all information of a social and economic nature relevant to the issue before the Court. Much of the material resembles that in a 'Brandeis Brief'. There is therefore no necessary reason why an advisory opinion must be 'abstract' or 'conceptual' when contrasted with United States jurisprudence, provided the Court has a discretion whether to give the advice and exercises that discretion sensibly.[45]

A good example, where the High Court held it could not on a demurrer make a useful determination of validity without specific facts is *Commonwealth v Queensland*.[46] The Court said it could not on a demurrer determine whether a State law was inconsistent with several Commonwealth laws which relied on many heads of Commonwealth power, such as the *Trade Practices Act*, with the additional operation given by s 6. The judgment went on to say that to determine the issue of inconsistency 'it is necessary to identify with precision the elements and character of the conduct which is said to fall under both laws'.

It is the case that not all possible grounds of challenge will be clear when an Act is passed. Advisory opinion jurisdiction will not ensure that all appropriate issues are presented to the Court at the time. Therefore future constitutional challenges can occur. But that is the position anyway. In the *First Fringe Benefits Case*[47] the Act was challenged on the basis of s 114 of the Constitution. A few months later, in the *Second Fringe Benefits Case*[48] another suit was brought challenging the Act, on grounds of s 55 of the Constitution and the implied immunity of the States. Whenever a suit is brought for a declaration that an Act is valid or invalid the Court may, in certain circumstances, be forced to consider whether any declaration should be limited to particular issues or facts. That remains the situation whether a case is decided on demurrer or as an advisory opinion.

The Demands of the Text

In refusing to uphold advisory opinions the Court in *In Re Judiciary and Navigation Acts* did not canvass any wider issues of policy or values. The judges did not, for

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44 Hogg, above n 37, 256-9.

45 Strayer, above n 43, 294-7.

46 (1988) 62 ALJR 1.

47 *Queensland v Commonwealth* (1987) 162 CLR 74.

48 *State Chamber of Commerce and Industry* (1987) 163 CLR 329.

example, weigh the disadvantages of the Court determining abstract or hypothetical questions against what the Constitutional Commission referred to as 'the inconvenience and confusion that can arise from a cloud of doubt hanging over the validity of the legislation'.[49]

The decision rested entirely on the text, that is the meaning of the term 'matter'. So far as I am aware there has been no attempt to argue before the Court that the decision should be overruled. On the contrary, later cases have referred to it as an undoubted authority, even if only to distinguish the situation before the Court.[50] Passages from the judgment are often quoted as if they were contained in the Constitution.

The authorities discussed in the case were far from conclusive. Indeed it is possible to use the language of the joint judgment to come to the opposite conclusion. For example, it is said that Parliament 'cannot authorise this Court to make a declaration of the law divorced from any attempt to administer that law.' Yet in *Croome v Tasmania*[51] Brennan CJ, Dawson and Toohey JJ said (at 126) that 'the law being administered in such proceedings [that is, for a declaration of invalidity] is not the impugned law, but the constitutional or administrative law which determines the validity or invalidity of the impugned law.' This, it was said, justified the Attorney-General of a State seeking a declaration of invalidity of Commonwealth law. It is difficult to see why it does not permit the Commonwealth Attorney-General to bring a suit for a declaration of validity.

They went on to say that if a person with a 'sufficient interest' has a right to a declaration that right satisfies the requirement, as stated in *In Re Judiciary and Navigation Acts,* of some 'right, duty or liability to be established by the determination of the Court'. It begs the question to say that the Commonwealth does not have a 'sufficient interest' to seek a declaration of validity and does not have a 'right' to a declaration if its argument succeeds.

Of course if the Commonwealth has such a right, as Jacobs J said, *In Re Judiciary and Navigation Acts* is a decision concerned with correct procedure rather than substance. That is an unlikely or somewhat absurd interpretation to give to a constitutional provision or expression.

Similarly in *In Re Judiciary and Navigation Acts* the Court referred to 'the prevention, redress or punishment of some act inhibited by law'. It is difficult to see that the issue

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49 *Final Report of the Constitutional Commission*, Vol 1, 414.

50 For example, *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289*; Croome v Tasmania* (1997) 191 CLR 119.

51 *Croome v Tasmania* (1997) 191 CLR 119.

of whether an Act is valid does not involve the prevention of some act inhibited by law even if, formally, the Commonwealth is asking whether the Act is valid.

However, whatever might be said about the reasoning in that case, the text, itself, provides no conclusive reason for the result in that case. It is clear that 'matters' was chosen in preference to 'cases' and 'controversies' because it was a broad expression. As Symon put it 'We want the very widest word we can procure in order to embrace everything that can possibly arise within the ambit of what are comprised' under the provision.[52] Much of the debate was related to concern that it should not cover 'political matters'. Barton replied to these concerns by saying that matters means 'such matters as can arise for judicial determination'.[53]

Once it is accepted that advisory opinion jurisdiction related to the issue of the constitutional validity of a law or executive action is an exercise of judicial power, it is difficult to see, from a textual point of view, why the expression 'matters' should be given an interpretation that would exclude it.

Conclusion

There seem to me to be no good reasons based on principle, policy or textual provisions for the decision in *In Re Judiciary and Navigation Acts*.

[52] Constitutional Convention, Melbourne, 1898, 319.

[53] Ibid 320.