University of Western Australia – Faculty of Law
Perspectives on Declaratory Relief

Declarations – Homer Simpson's Remedy – Is there anything they cannot do?

Justice RS French
Federal Court of Australia
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Introduction

1 The familiar words "Well I declare" appear in a poem called "Kavanagh" written by Longfellow in 1839. The word "declare" so used is content free. Nothing is declared about nothing. A step ahead of this exclamatory usage is Pt IIIA of the *Trade Practices Act 1974* (Cth) which provides for declarations of nothing about something. Under s 44H the relevant Minister may "declare a service" for the purposes of the access regime for which that part of the Act provides. The Minister does not declare anything about the service. He or she simply declares it. In that case the declaration of nothing has significant statutory consequences. A service, once declared, is potentially amenable to access by third parties on payment to its provider of a tariff in an amount and under terms and conditions which may be negotiated or ultimately arbitrated by the Australian Competition and Consumer Commission.

2 Further along the line of official declarations, although not without semantic difficulty, is the power conferred on the Takeovers Panel under s 657AW of the *Corporations Act 2001* (Cth) to declare "circumstances" in relation to the affairs of a company to be unacceptable. Such a declaration is a declaration of something about something although it is a little odd to be heaping moral obloquy upon "circumstances" as distinct from conduct.

3 A perusal of the statute law of the Commonwealth and the State would no doubt

disclose many cases which provide for official declarations of an administrative character to which statutory consequences attach. Declarations by administrative tribunals may also have consequences. But a tribunal which is truly administrative and, by definition not invested with judicial power, does not make a final and binding determination of right whether by declaration or otherwise. A State tribunal which does so might well be treated as a court in relation to that function. This paper concerns the declaration in its character as an order made by a court.

The nature of the judicial declaration

4 Different legal usages of the word "declare" and "declaration" throw up the need to consider what it is that a court does when it makes a declaration. It is also necessary to consider what it does not do. That raises the question whether a declaration is, strictly speaking, an exercise of power at all. A judicial declaration says something about something. It is a formal statement which may be of fact or law or mixed fact and law.[1] In State jurisdictions it generally must concern a justiciable controversy. In federal jurisdiction it must relate to a "matter" in the sense in which that term is used in Ch 3 of the Constitution. It does not require the prior existence of a cause of action, a wrong or an injury. Importantly, it does not create rights capable of enforcement without a further order of the Court. As PW Young observed in the 2nd edition of his text, "Declaratory Orders":

> The enforceability of a declaratory order is the weak spot in its armour, as there is no sanction built into declaratory relief.[2]

Zamir and Woolf put it thus in the 3rd edition of "The Declaratory Judgment":

> A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words coercive, judgment which can be enforced by the courts.[3]

5 Nevertheless, declarations by courts have legal consequences. A declaration is not "a

[1] See Young PW, *Declaratory Orders* (2nd ed, Butterworths, 1984) [602] – [603].
[2] Young PW, *Declaratory Orders* (2nd ed, Butterworths, 1984) p 214.
[3] Zamir and Woolf, *The Declaratory Judgment* (3rd ed, Sweet & Maxwell, 2000) 1.02.

mere opinion devoid of legal effect".[4] It "operates in law either as a res judicata or an issue estoppel and such an order is a final order for the purposes of appeal".[5] In the public law context Aronson, Dyer & Groves have written:

> To the extent to which the theory of unenforceability depends upon the notion of a declaration as a judicial snapshot, a remedy which records the true facts and law but changes nothing, it should be rejected for failure to accord with recent judicial recognition of the declaration as an active or constitutive remedy. Furthermore a declaration (as opposed to a refusal to write a declaration) as res judicata and issue estoppel effects as between the parties.[6]

6 The absence of any coercive element in declaratory judgments is reflected in the difficulty of securing stay orders in relation to them. Again, citing PW Young:

> The effect of the court's order is not to create rights but merely to indicate what they have always been … Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings.

7 That difficulty appeared from the recent decision of the Full Court of the Federal Court in *Arnhem Land Aboriginal Land Trust v Northern Territory of Australia* [2007] FCAFC 31, given on 16 March 2007. The Court had made a declaration that the *Fisheries Act 1988* (NT) had no application to waters in the intertidal zone covered by fee simple grants under the *Aboriginal Land Rights (Northern Territory) Act 1976.* It further declared that the Director of Fisheries of the Northern Territory had no power to grant a licence which would authorise or permit the holder to enter and take fish or aquatic life from areas subject to the grants and that the Act was invalid and of no effect so far as it purported to operate with respect to those areas. The intertidal zone extends for a considerable distance in Arnhem Land and the declaration had an immediate effect upon many holders of recreational and other fishing licences. The relevant Land Council was prepared to grant permits to licence holders pending an application for special leave to appeal to the High Court. Nevertheless a stay of the declaratory order was sought by consent of the parties. Underpinning the Full Court's reasons for refusing to make the order was the basic logic that there is nothing about

[4] Zamir and Woolf, op cit at 1.07.
[5] Young PW, op cit at [213].
[6] Aronson Dwyer and Grove, *Judicial Review of Administrative Action* (3rd ed, Law Book Co, 2004) p 802.

a declaratory order that can be stayed.[7] A curial declaration says something about something. It has a legal effect but otherwise does nothing. This paper considers the sources of the power to award this curious but useful remedy.

8 The utility of the declaration that makes it worth talking about derives from its flexibility and procedural simplicity. Sarah Worthington made the point explicitly in her monograph "Equity":

> Declarations can be made that a person is a member of a club; that her purported expulsion is invalid; that she is the owner of land; that the terms in a will or a trust have a particular meaning; that a contract exists or has been breached or terminated; that an agreement is binding or illegal; or that a form of notice is reasonable. The list is endless. Indeed a declaration may prove appropriate in virtually any situation imaginable.[8]

Well may we ask rhetorically of declarations as Homer Simpson asked of donuts – "is there anything they can't do?"

The varieties of declaratory order

9 At the outset a distinction should be drawn between declaratory orders properly so called and orders, declaratory in form, which create new legal relationships such as adoption orders, decrees of divorce or nullity and orders that partnerships are dissolved. Not in the latter category are declarations which declare remedies. A court may declare that a party is entitled to an amount of damages without coupling that declaration with an enforceable order for payment. They are declarations properly so called. One rationale for such declarations is reflected in what Lord Denning said of them in the context of Crown proceedings:

> It is always presumed that once a declaration of entitlement is made the Crown will honour it.[9]

[7] See generally *Bunnings Forest Products Pty Ltd v Bullen* (1994) 126 ALR 660; 54 FCR 342; *Re Sol Theo; Ex parte Sol Theo v The Official Trustee in Bankruptcy* [1996] FCA 787; *Stellar Call Centres Pty Ltd v CPSU, Community and Public Sector Union* [1999] FCA 1236; *Long v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 774; *Roosters Club Inc v Northern Tavern Pty Ltd (No 2)* [2003] SASC 143; *Jeans v Bruce* [2004] NSWSC 758; *Smolarek v Brian Keith McMaster as Administrator of Eznut Pty Ltd* [2006] WASCA 216.

[8] Worthington S, *Equity* (2003, Clarendon Press) pp 42-43.

[9] *Franklin v The Queen (No 2)* [1974] 1 QB 205 at 218.

10 On a similar rationale an official decision may be declared invalid on administrative law grounds without the need to resort to certiorari which for technical reasons may be unavailable. Apart from being polite to the Crown, the public law declaration may have procedural advantages. Technicalities associated with prerogative writs do not apply to it. It may be easier to get discovery in declaratory proceedings. A challenge to the validity of an official decision can be brought in the Federal Court under the specific jurisdiction conferred by s 39B(1) of the *Judiciary Act 1903* (Cth) which replicates, in statutory form, the jurisdiction of the High Court to issue so called constitutional writs under s 75(v) of the Constitution. But an official decision made under a law of the Commonwealth may also involve a matter arising under that law and therefore amenable to the jurisdiction conferred in such matters by s 39B(1A) of the *Judiciary Act.* Section 21 of the *Federal Court of Australia Act* would expressly authorise the court to make a declaration of invalidity in such a case. The State courts pick up a similar jurisdiction under s 39 of the *Judiciary Act* in federal matters and under their own constituting statutes in State matters.

11 The declaratory order in lieu of a coercive remedy may also minimise the intrusion of the court into parliamentary processes where a question arises whether legislation proposed for assent has complied with constitutional procedures. In *Marquet v Attorney-General (WA)* (2002) 26 WAR 1, the Court of Appeal granted a declaration that it was not lawful to present two bills to the Governor of the State of Western Australia for assent. This was related to the question whether the passage of the Bills had complied with the manner and form requirements under the State Constitution.

12 A further important and distinctive feature of the declaratory order is that it is not limited to cases which might have justified an action for an executory or coercive order or decree. It extends to cases in which other relief would not be available. As Professor Borchard said in his classic 1941 book on Declaratory Orders:

> The distinctive feature of this second group is that no “injury” or “wrong” need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by

denial,…[10]

Declarations and advisory opinions

13 The absence of any requirement or an injury or wrong or a "cause of action" to justify declaratory relief does not mean that a declaration can be used to get legal advice from a court. Mere advisory opinions cannot validly be given by courts in the exercise of federal jurisdiction as they do not decide any "matter" or controversy.[11] In *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 the joint majority judgment stated:

> The adjudication of the court may be sought in proceedings inter partes or ex parte, or, if the courts had the requisite jurisdiction, even in those administrative proceedings with reference to the custody, residence and management of the affairs of infants or lunatics. But we can find nothing in Chapter III of the Constitution to lend colour to the view that parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.[12]

14 The term "abstract declaration" was used in the High Court in *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 to describe advisory opinions. That judgment referred to two critical concepts emerging from *Re Judiciary and Navigation Acts*:

> One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or dissociated from any attempt to administer it.[13]

15 Absent specific legislative authority, State courts are not empowered by their general constitutive statutes to make abstract declarations. However there is no formal separation of powers between the judiciary on the one hand and the legislature and executive on the other under State Constitutions. So, subject to retaining their fitness to exercise federal jurisdiction, State courts can be empowered to discharge non-judicial functions. They are not limited, in the exercise of State jurisdiction, to the determination of "matters". As Ann Twomey has said, State courts in principle, can give advisory opinions. She makes, however,

[10] Borchard E, *Declaratory Judgments* (2nd ed, 1941, Repr 2000, William S Hein & Co Inc) p 27.
[11] *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.
[12] *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266-267.
[13] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 303

the following points:

1. The court must have power conferred upon it to give an advisory opinion;
2. No appeal will lie from an advisory opinion to the High Court; and
3. Commonwealth constitutional principles may cut down the State court's power to give an advisory opinion.[14]

16 Like most boundary lines in the law those which fence advisory opinions from the scope of judicial power for the purposes of federal jurisdiction and put them beyond the range of the general jurisdiction of State courts are fuzzy. For example, there has been a long standing power in courts to give directions to trustees, administrators and executors.[15] Courts may give directions to court-appointed liquidators in a court ordered winding up. They may also determine questions which arise in the course of a voluntary winding up upon application of the liquidator or a contributory or creditor.[16] The form of orders made in response to such applications under the *Corporations Act 2001* (Cth) may be declaratory or advisory in nature. The power to make such orders arises in the exercise of jurisdiction conferred, in the case of the Federal Court, by s 1337B(1) of the Act. The power has a long ancestry dating back to the *Joint Stock Companies Winding Up Act 1848* (UK) under which an official manager could apply for directions from the Master from time to time. Orders made under s 479(3) relating to court-appointed liquidators protect the liquidator acting in accordance with such direction from personal liability. But neither a direction under s 479(3) nor a determination under s 511 gives rise to a res judicata as between parties who may have competing interests affected by it.[17]

17 A very recent example of declaratory relief granted pursuant to s 479(3) of the *Corporations Act,* illustrating its advisory application, appeared in a judgment of Rares J delivered on 26 October 2007 in *Food Improvers Pty Ltd v BGR Corporation Pty Ltd (In Liq) (No 7)* [2007] FCA 1836. His Honour ordered:

[14] Twomey A, *The Constitution of New South Wales* (Federation Press, 2004) p 754 et nff.
[15] Eg *Trustees Act 1962* (WA) s 92.
[16] *Corporations Act 2001* (Cth) s 479(3) and s 511 respectively.
[17] *Equity Funds of Australia (In liq)* (1977) CLC 40-303 at 29,253-29,254; *Re GB Nathan & Co Pty Ltd (In liq)* (1991) 24 NSWLR 674 at 677. And see the recent discussion of these provisions in *Meadow Springs Fairway Resort Ltd (In Liq) (ACN 084 358 592) v Balanced Securities Ltd (ACN 083 514 685)* [2007] FCA 1443.

> 1. The advice and direction of the Court is that David John Kerr, as liquidator of BGR Corporation Pty Limited (In Liquidation), would be justified on the material contained in the affidavits and exhibits in the evidence in the interlocutory process filed on 28 September 2007 and heard on 26 October 2007 in making a demand or demands pursuant to s 459E of the *Corporation Act 2001* (Cth) as he may be advised on the second defendant, the Triad Health Products Group of Companies Pty Limited for payment of:
>
> (a) the sum of $311,558.86; and
> (b) the sum of $340,000.
>
> the subject of orders 2 and 4(a) made on 19 February 2007, together with such interest as the first defendant may be entitled to claim in accordance with the rules of Court.

18 The forms of proceeding in applications such as those brought under the provisions of the *Corporations Act* are sometimes difficult to fit within the concept of a case or controversy for the purposes of federal jurisdiction. They nevertheless lie within the scope of judicial power for the judicial power of the Commonwealth extends to functions which, at least at the time of Federation, were traditionally exercised by courts. This was recently discussed in the context of the investigative function of courts in *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 at [45].

19 The creation of an express power in a State court to make purely advisory declarations may become a live issue in Western Australia in the near future. The State Government is contemplating the enactment of statutory protection for human rights. A statutory Bill of Rights could not be used to strike down subsequent legislation inconsistent with it except, perhaps, by means of manner and form entrenchment. A lesser mechanism, modelled on that adopted in the United Kingdom, would allow a court in proceedings brought under a Human Rights Act to declare any State statute incompatible with a human right or freedom guaranteed by the Act. This is the procedure used in the Australian Capital Territory and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Section 36 of the latter Act relevantly provides:

> (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration

to that effect in accordance with this section.

Such a declaration does not affect the validity, operation or enforcement of the statutory provision in respect of which it is made.[18] Its consequences are essentially political. Subject to any appeal against a declaration the minister administering the statutory provision must prepare a written response to be laid before each House of Parliament and published in the Government Gazette.[19]

20 It seems questionable whether an appeal would lie from such a declaration to the High Court under s 73 of the Constitution, it being merely an advisory opinion. That concern, if well founded, could have unfortunate implications. There are presently two human rights statutes in force in Australia using the UK inspired model. A Western Australian statute, if enacted, is likely to do the same. While the Supreme Courts of the States and Territories are likely to respect each others decisions on similar points of interpretation and application, an authoritative national jurisprudence will only be developed if the High Court has a role as the ultimate appellate court in this important area.

21 Declarations of incompatibility would raise particular problems if introduced in the federal sphere. A Commonwealth statute adopting provisions modelled on those of the States is likely to run up against the problem that, while the decision in *Re Judiciary and Navigation Acts* stands, such declarations could not be made at all in the exercise of federal jurisdiction. A recent paper in the November 2007 edition of the Constitutional Law and Policy Review makes the point well:

> … a declaration of incompatibility would not determine any immediate right, duty or liability involved in the relevant controversy. Nor would it determine what the rights of the parties would be if the law had been properly applied.[20]

Declarations about future conduct

22 Declarations have been made to the effect that a proposed course of conduct will not be unlawful. In *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297

[18] Section 36(5).
[19] Section 37.
[20] South J, "The campaign for a national Bill of Rights: would 'declarations of incompatibility' be compatible with the Constitution? (2007) Vol 10 No 1 CLPR 2 and 3.

at 305, Barwick CJ said that the capacity of the courts to declare that conduct which has not yet taken place will not be in breach of a contract or a law "contributes enormously to the utility of the jurisdiction". In *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, the High Court said of declaratory relief:

> The jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law and such a declaration will not be hypothetical in the relevant sense.[21]

23 There have been some prominent examples in the United Kingdom of such uses of the declaration. A declaration was granted that Departmental advice relating to the termination of pregnancy by medical staff in a hospital did not involve the commission of any offence against the *Abortion Act 1967* (UK) by hospital staff implementing that advice.[22] In another case a declaration was made to the effect that life sustaining treatment and medical support for a young patient in a permanent vegetative state could be discontinued. Lord Goff accepted that although strong warnings had been given against civil courts usurping the function of the criminal courts, jurisdiction existed to grant such a declaration and it would be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in such a case.[23]

24 The making of a declaration on the lawfulness of future conduct can be an exercise of power in federal jurisdiction provided that it arises out of a contemporary controversy in which a party's freedom of action is challenged in some way or a right threatened. That controversy must constitute a matter for the purposes of the exercise of federal jurisdiction. Similar considerations, albeit not generally of a constitutional character, will affect the exercise of such power by State courts. In each case the existence of a "real controversy" is a question of judgment.

25 The want of a legal right or cause of action in the applicant is not a bar to the claim for declaratory relief. However, absent express legislative provision, there are requirements for standing to seek declaratory relief which are effectively constraints upon the power to

[21] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356.
[22] *Royal College of Nursing (UK) v The Department of Health and Social Security* [1981] AC 800.

grant it. They were enunciated by Lockhart J on behalf of the Full Court of the Federal Court in 1996:

- The proceeding must involve the determination of a question that is not abstract or hypothetical. There must be a real question involved, and the declaratory relief must be directed to the determination of legal controversy. The answer to the question must produce some real consequence to the parties.
- The applicant for declaratory relief will not have sufficient status if relief is claimed in relation to circumstances that (have) not occurred and might never happen; or if the court's declaration will produce no foreseeable consequence for the parties.
- The party seeking declaratory relief must have a real interest to raise it.
- Generally there must be a proper contradictor.[24]

26 A claim for declaratory relief may be faced with a preliminary objection to jurisdiction on the basis that what is sought is merely an opinion and that there is no justiciable controversy. In a relatively recent example in federal jurisdiction a declaration was sought that the proposed acquisition by a corporation of interests in another corporation would not contravene s 50 of the *Trade Practices Act*. The declaration was sought against a background of threatened divestiture action by the Australian Competition and Consumer Commission (ACCC) if the acquisition proceeded. On an objection to jurisdiction heard and determined as a preliminary question, it was held that the court was apprised of a real controversy with real consequences depending upon its resolution.[25] On the other hand an inquirer who wished to proceed with an acquisition and, without communication with or threat from the ACCC or any third party came to court to seek a declaration would face with considerable difficulty. On the face of it there would be no "matter" to determine. Moreover it would be difficult to see how the regulator or any other party could be conscripted as a contradictor absent any prior position adopted or threat made by that party.

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[23] *Airedale National Health Service Trust v Bland* [1993] AC 789.

[24] *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663. A similar list relevant to the Supreme Court of South Australia was enunciated by King CJ in *JN Taylor Holdings Ltd (In liq) v Alan Bond* (1993) 59 SASR 342.

[25] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 2)* [2003] FCA 1229.

27 It is not always straightforward to determine whether a proposed declaration resolves a justiciable controversy or is merely seeks an abstract opinion. In *IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrator Appointed)* (2004) 211 ALR 231, a commercial litigation funder based in Western Australia sought to communicate with the shareholders of a company under administration with a view to enlisting them in a class action against the company for failure to disclose matters affected the value of its shares. The funder sought a declaration in the Federal Court that the use of the company share register with a view to communicating with the shareholders in that way did not contravene s 177 of the *Corporations Act*. A declaration was made that the proposed use of the share register was prohibited by s 177(1) and not exempted by s 177(1A). The Full Court dismissed an appeal against the construction of s 177 which underpinned the first instance judgment. However Moore and Emmett JJ questioned whether the proceedings actually involved a "matter". Moore J put it thus:

> What the appellant seeks is a declaration that conduct it may engage in would be lawful. There can be no certainty that the appellant would conduct itself as proposed even if a declaration were made. It is under no legal obligation to do so.[26]

28 His Honour referred to the observation of Barwick CJ in *Sterling Nicholas Duty Free Pty Ltd* but noted that the observations were not endorsed by other members of the High Court. In the light of *Bass* it is too late in the day to suggest that such declarations cannot be made. In matters involving federal law however there will always be a question for the court, antecedent to the power to grant a declaration, namely whether the court has jurisdiction, that is whether there is a "matter" upon which the court has authority to adjudicate.

29 In a somewhat different context, still relevant to justiciability, there have been a number of cases in which an applicant has sued an insolvent respondent who carried insurance which arguably covered the liability which the applicant asserted. Where the insolvent respondent has been unwilling to joint the insurer a question has arisen whether the applicant can join the insurer for the purpose of obtaining a declaration that the insurer is obliged to indemnify the respondent. There have been varying approaches, and in some cases

[26] *IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrator Appointed)* (2005) 222 ALR 109; 143 FCR 274

conflicting approaches, between Full Court and Court of Appeal decisions around Australia on this question.[27] Recently in *Ashmere Cove Pty Ltd v Beekink (No 2*) [2007] FCA 1421 an order was made joining insurers of a company in liquidation so that an applicant could seek a declaration that the insurers were bound to indemnify the company under a policy taken out by it. In relation to the proceeds of an insurance policy payable to meet the liability of a company which is being wound up, s 562 of the *Corporations Act* creates a priority in favour of the party to whom the company is liable. It does not, however, confer any direct right of action upon the third party against the insurer. The decision in *Ashmere* is the subject of an appeal to be heard by the Full Court in February next year where questions relevant to the basis upon which declaratory relief can be claimed may well be agitated.

Jurisdiction and power distinguished

30 There is a distinction which is functional and important, if not semantically strict, between jurisdiction and power. It is a distinction with respectable antecedents and relevance to a discussion of declaratory relief. For the declaration could arguably be said to have one foot in jurisdiction and one foot in power.

31 The word "jurisdiction" was described by Isaacs J in 1907 as "generic" signifying "authority to adjudicate":

> State jurisdiction is the authority which State courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws.[28]

That definition does not incorporate power to make orders or grant remedies. The point has been made on more than one occasion in the High Court. In *Harris v Caladine* (1991) 172 CLR 84 Toohey J said (at [26]):

> Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court

[27] *JN Taylor Holdings Ltd (In liq) v Alan Bond* (1993) 59 SASR 342; *CE Heath Casualty and General Insurance Co Ltd v Pyramid Building Society (In liq)* (1997) 2 VR 256; *Beneficial Finance Corporation Ltd v Price Waterhouse* (1996) 68 SASR 19; *International Computers (In liq) v FAI General Insurance Co Ltd* [1998] 2 Qd R 301.

[28] *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

> and "such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred".[29]

In 2002 the Family Court, in the exercise of what was called its "welfare jurisdiction" under s 67ZC of the *Family Law Act,* directed the Minister for Immigration and Multicultural and Indigenous Affairs to release certain children from immigration detention. In reversing the decision the High Court again drew the distinction between jurisdiction and power. Gleeson and McHugh JJ said:

> In a legal context the primary meaning of jurisdiction is "authority to decide". It is to be distinguished from the powers that a court may use in the exercise of its jurisdiction.[30]

Gummow, Hayne and Heydon JJ, citing Toohey J, made statements similar in effect to those made by Gleeson and McHugh JJ.[31] The identification of jurisdiction therefore logically precedes the discussion of the power of courts to make orders and award remedies.

The High Court and Federal Court – sources of jurisdiction and power

32 In the case of federal courts, both jurisdiction and power derive from the Constitution and statute. Starke J said of the High Court in a well known passage:

> To the Constitution and the laws made under the Constitution it owes its existence and all its powers, and whatever jurisdiction is not found there either expressly or by necessary implication does not exist.[32]

What is true of the High Court is true of all federal courts.[33]

33 The High Court is given original jurisdiction directly by s 75 of the Constitution and, under s 76, it may receive additional original jurisdiction by statute. Its appellate jurisdiction is conferred by s 73 of the Constitution.

34 The former O 26, r 19 of the High Court Rules provided:

[29] *Harris v Caladine* (1991) 172 CLR 84 at 136 citing *Parsons v Martin* (1984) 5 FCR 235 at 241 and *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 630-631.
[30] *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at [6].
[31] *Minister for Immigration and Multicultural and Indigenous Affairs v B* 219 CLR 365 at [69].
[32] *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 464-465.
[33] *DJL v Central Authority* (2000) 201 CLR 226 at 240-241.

> A proceeding is not open to objection on the ground that a merely declaratory judgment or order is sought by the proceeding, and the court may make binding declarations of right in an action or other proceeding whether any consequential relief is or could be claimed in that action or proceeding or not.

This rule was modelled upon O 25, r 5 of the *Supreme Court Rules of 1883* which were based on, albeit more widely expressed than, s 50 of the *Chancery Procedure Act 1852* (UK). There appears to be no equivalent provision under the new High Court Rules 2004. However s 32 of the *Judiciary Act* provides:

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

35 Section 33 expressly authorises the High Court to make orders or direct the issue of writs of mandamus, prohibition, habeas corpus or for the removal from office of any person wrongfully claiming to hold an office under the Commonwealth. Section 33(2) provides:

> This section shall not be taken to limit by implication the power of the High Court to make any order or direct the issue of any writ.

36 Even without express reference to a power to grant declaratory relief the High Court itself has made it plain that all superior courts have inherent power to grant such relief. The Court said in 1992:

> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise". However, it is confined by considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have "a real interest" and relief will not be granted if the question is "purely hypothetical", if relief

> is "claimed in relation to circumstances that [have] not occurred and might never happen" or if "the court's declaration will produce no foreseeable consequences for the parties".[34]

37 As Aronson Dyer & Groves note, the proposition that all superior courts have inherent power to grant declaratory relied "used not to be the general view". They add that "… perhaps the superior courts of general jurisdiction have been exercising their declaratory jurisdiction for so long that it may now be properly regarded as part of the inherent judicial review jurisdiction."[35] As they point out Callinan J said in the *Lenah Game Meats* case that, since *Ainsworth*, the declaration cannot be regarded as a statutory remedy, rather superior courts have an inherent power to grant it. [36] But at least in the federal courts which derive all their powers from statute, the power to grant the remedy must be statutory. And absent express power to grant declaratory relief in the High Court, it may be that the power can be inferred from the general power to make orders under s 32 of the *Judiciary* Act or be regarded as an "implied incidental power". The latter term, in the case of the Federal Court, corresponds to the concept of "inherent jurisdiction" used in State Supreme Courts. Given their statutory origins it may be that the term implied incidental power would also be more appropriate to them. "Inherent power" has a rather mystical air about it.

38 The jurisdiction of the Federal Court of Australia is defined by a large range of statutes as was anticipated at the outset by s 19 of the *Federal Court of Australia Act 1976* (Cth) which provides:

> The Court has such original jurisdiction as is vested in it by laws made by the Parliament.

39 Section 23 of the *Federal Court Act* provides:

> The Court has *power*, in relation to matters in which it has *jurisdiction*, to make orders of such kinds, including interlocutory orders, and to issue, or

[34] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 citing in respect of each of the propositions advanced *Forster v Jodedex Aust Pty Ltd* (1972) 127 CLR 421 at 437; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade, Ltd* [1921] 2 AC 438 at 448; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10; *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188 and 189.

[35] Aronson, Dyer & Groves, op cit p 783-784.

[36] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 288-289.

> direct the issue of, writs of such kinds, as the Court thinks appropriate. [emphasis added]

Section 22 of the Act is in substance similarly to s 32 of the *Judiciary Act*. There is little room for debate that the Court would be empowered under those provisions to grant declaratory orders. However, to put the matter beyond doubt, s 21 provides:

> (1) The Court may, in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.
>
> (2) A suit is not open to objection on the ground that a declaratory order only is sought.

40 The jurisdiction of the Federal Magistrates Court is defined by various statutes as is the jurisdiction of the Federal Court. Section 16 of the *Federal Magistrates Court Act 1999* (Cth) replicates s 21 of the *Federal Court Act.*

41 In addition to its general powers to make declarations, the Federal Court has a specific power to make declarations under s 163A of the *Trade Practices Act.* That section states, inter alia:

> (1) Subject to this section, a person may, in relation to a matter arising under this Act, institute a proceeding in a court having jurisdiction to hear and determine proceedings under this section seeking the making of:
>
> (a) a declaration in relation to the operation or effect of any provisions of this Act other than the following provisions:
>
> (i) Division 2, 2A or 3 of Part V;
> (ia) Part VB;
> (ii) Part XIB;
> (iii) Part XIC ; or
>
> (aa) a declaration in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act; or
>
> (b) an order by way of, or in the nature of, prohibition, certiorari or mandamus;
>
> or both such a declaration and such an order.
>
> …

> (3A) In so far as this section has effect as a law of the Commonwealth, the Federal Court has jurisdiction to hear and determine proceedings under this section.

The remaining subsections are not material for this discussion.

42 It is a particular feature of s 163A that any person may seek a declaration or order under it. Its constitutional validity was challenged but upheld in the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1999) 200 CLR 591. The Court held that the law making power of the Commonwealth Parliament extended to allow a person not injured or affected by a breach of its laws to institute proceedings in respect of the breach. There was no requirement that a person must owe a duty to the person who institutes such proceedings for there to be a "matter" within Ch 3. Both s 80, which provides for injunctive relief, and s 163A which provides for declaratory relief were valid in so far as they purported to confer standing on the applicant.

Jurisdiction and power of State courts

43 The proposition that judicial power derives from written Constitution and statutes made under it is also true, within their own constitutional settings, for State courts. In one sense they claim their pedigree from the common law courts at Westminster which were able to draw upon what the High Court called a "well of undefined powers".[37] Each of the State courts nevertheless is created by or under a State Constitution and enjoys jurisdiction and powers conferred by statute. The statutes of some incorporate by reference the jurisdiction and powers of the English Courts. The *Supreme Court Act 1935* (WA) is an example. Section 16 provides, inter alia:

> (1) Subject as otherwise provided in this Act, and to any other enactment in force in this State, the Supreme Court –
>
> (a) is invested with and shall exercise such and the like jurisdiction, powers and, authority within Western Australia and its dependencies as the Courts of Queens Bench, Common Pleas, and Exchequer, or either of them, and the judges thereof, had and exercised in England at the commencement of the *Supreme Court Ordinance 1861.*

[37] *Grassby v R* (1989) 168 CLR 1 at 16; *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at 451-452, cited in *DJL v Central Authority* 201 CLR 226 at [25].

The Court is also a Court of Equity with power and authority within Western Australia and its dependencies:

> (d)(i) to administer justice, and to do, exercise, and perform all acts, matters, and things necessary for the due execution of such equitable jurisdiction as, at the commencement of the *Supreme Court Ordinance 1861*, the Lord Chancellor of England could or lawfully might have done within the realm of England in the exercise of the jurisdiction to him belonging;…

A simpler provision, but to like effect, is found in s 17 of the *Supreme Court Act 1935* (SA).

44 By way of contrast, s 23 of the *Supreme Court Act 1970* (NSW) provides:

> The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

A similar formula is found in s 58(1) of the Constitution of Queensland 2001 with the added provision that the Court is the superior court of record in Queensland and has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise. The general jurisdiction of the Supreme Court of Victoria is defined in s 85 of the *Constitution Act 1975* which provides, inter alia:

> (3) The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the Supreme Court Act 1986.
>
> (4) This Act does not limit or affect the power of the Parliament to confer additional jurisdiction or powers on the Court.

45 The expression of the powers of State courts with respect to declaratory judgments takes similar forms modelled upon s 50 of the *Chancery Procedure Act 1852* (UK) and its more widely expressed successor, O 25, r 5 of the *Supreme Court Rules of 1883*:

> No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.

46 In the case of Western Australia, s 25(6) of the *Supreme Court Act 1935* provides:

> No action shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and it shall be lawful for the Court to make

> binding declarations of right without granting consequential relief. [38]

This might be thought to be a rather curious way of expressing a power. Nevertheless it is reflected in each of the statutes or Rules of Court of the State and Territory Supreme Courts. The *Chancery Procedure Act 1852* and O 25 of the *Supreme Court Rules* were introduced to overcome the perceived inability of English courts, unlike their Scottish equivalents, to grant declaratory relief. The position prior to this change may be said to have been reflected in the observation of Knight-Bruce VJ in 1847:

> Nakedly to declare a right, without doing or directing anything else relating to the right does not, I conceive, belong to the functions of this court.[39]

A less than bright line – the exercise of jurisdiction and the grant of declaratory relief

47 It is necessary always to make the distinction between the exercise of a court's authority to decide factual and legal questions and its power to make orders and grant remedies in aid of that jurisdiction. It is helpful however to consider to what extent the grant of a declaration approaches the antecedent function of adjudication. The point is made by reflection upon the evolution of the judgment function in Roman law. Professor Edwin Borchard described the judicial function in pre-classical Roman law. There were two methods of trying civil issues described by the Latin words "*legis actio sacramento*" and the "*sponsio praejudicialis*". In each case parties would submit an issue to an arbitrator or judge. There was no remedy granted. The successful party would enforce the judgment as best he could. Borchard said:

> Both methods had the peculiarity of looking to a declaratory, not an executory, judgment, …[40]

He added the observation that the procedure sustained the hypothesis that a weak state dare not go beyond the judicial declaration of rights whereas the modern strong state has no need to go beyond it. The latter point was based upon the proposition that the more highly organised a society becomes the less occasion there is to display force in order to secure

[38] See also *Supreme Court Act 1970* (NSW) s 75; *Supreme Court Act 1986* (Vic) s 36; *Supreme Court Act 1995* (Qld) s 128; *Supreme Court Act 1935* (SA) s 31; *Supreme Court Rules 2000* (Tas) r 103; *Courts Procedure Rules 2006* (ACT) r 2009; *Supreme Court Act 1979* (NT) s 18.
[39] *Clough v Ratcliffe* (1847) 1 De G and Sm 164 at 178.
[40] Borchard E, *Declaratory Judgments* (2nd ed, 1941, Repr 2000, William S Hein & Co Inc) p 87.

obedience to its decrees and adjudications. He quoted Salmond, who described the coercive element in the administration of justice as "merely latent" and said:

> … it is now for the most part sufficient for the state to declare the rights and duties of its subjects, without going beyond declaration to enforcement.[41]

This optimistic view was reflected in the first American article on the declaratory judgment published by Professor Sunderland in the Michigan Law Review in 1917:

> In early times the basis of jurisdiction is the existence and the constant assertion of physical power over the parties to the action, but as civilisation advances the mere existence of such power tends to make its exercise less and less essential.
> …
> If the parties to the action desire to obey the law, a mere determination by the court of their reciprocal rights and duties is enough. No sheriff with his writ of injunction or execution need shake the mailed fist of the State in the faces of the litigants. The judgment of the court merely directs the will of the parties and the performance of duty becomes the automatic consequence of the declaration of right.[42]

48 Before the emergence of the formal declaration of right as a remedy procedures relating to disputed points in wills and trusts required the initiation of a process of administration for their determination. To avoid the full burden of that process lawyers were accustomed to pursue the case until the disputed points had been decided and then to stay further proceedings. The findings in a judgment in the decision of the case were sufficient without further proceeding to a substantive remedy.

49 Is a declaration then juristically indistinguishable from a formally expressed passage in reasons for judgment making findings of fact or law or holding that a right or liability does or does not exist or that particular conduct will or will not be lawful? There is little doubt that a declaration is regarded at law as more than that even though its terms may replicate something stated in the court's reasons for judgment. In *Warramunda Village Inc v Pryde* (2001) 105 FCR 437 the Full Federal Court said (at [8]):

[41] Salmond, *Jurisprudence* (6th ed, 1920) p 66.
[42] Sunderland, "A Modern Evolution in Remedial Rights – The Declaratory Judgment" (1917) 16 Michigan Law Review 69 at 70.

> The remedy of a declaration of rights is ordinarily granted as final relief in a proceeding. It is intended to state the rights of the parties with respect to a particular matter with precision, and in a binding way. The remedy of a declaration is not an appropriate way of recording in a summary form, conclusions reached by the Court in reasons for judgment. This is even more strongly the case when the conclusion is not one from which any right or liability necessarily flows.[43]

That is not to say that a formal declaration in relation to the conduct of a party in contravention of a law cannot be a means of marking the disapproval by the court of that conduct.[44] So a declaration may be made that there has been misleading or deceptive conduct on the part of a party in contravention of s 52 of the *Trade Practices Act* or that a party has otherwise engaged in contravening conduct. Such a declaration may be distinct and not required for the purposes of associated injunctive relief and the imposition of pecuniary penalties or an award of damages. That having been said, it is reasonable to conclude that the making of a declaration is properly the exercise of a power and not merely an extract from the process of adjudication. Regardless of any question about the logic that underpins that view, it is firmly entrenched in history.

Finality

50 Finally a declaratory order is final. In *Graham Barclay Oyster Pty Ltd v Ryan* (2002) 211 CLR 402, Gummow and Hayne JJ said categorically (at [128]):

> "Interlocutory declaration" is a form of order not known to the law…

In *Magman International Pty Ltd v Westpac Banking Corporation* (1991) 32 FCR 1, which was cited by Gummow and Hayne JJ, a five member bench of the Full Court of the Federal Court allowed an appeal against declarations made by a judge at first instance on a preliminary question. The declarations were to the effect that the applicant's claims were statute barred. Stressing the necessary finality of a declaration, Beaumont J, with whom other members of the Court agreed, cited as the applicable principle the statement of Upjohn LJ in *International General Electric Co of New York Ltd v Customs and Excise Commissioners* [1962] Ch 784 at 789:

[43] See also *Mees v Roads Corporation* [2003] FCA 410.
[44] *Australian Competition and Consumer Commission v Chen* [2003] FCA 897; *Tobacco Institute of Australia Ltd v Australian Federation of Insurance Organisations Inc (No 2)* (1993) 41 FCR 89

> [A]n order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties forever, subject only, of course, to a right of appeal.[45]

The position in England, however, has changed under the new Civil Procedure Rules. Civil Procedure Rule Pt 25.1(b) expressly gives the courts the power to grant interim declarations.

Conclusion

51 The powers of the courts, both Federal and State, to make declaratory orders are wide. They are constrained by the requirement that they can only be used in the exercise of the jurisdiction of the courts making them. In federal courts this requires identification of a "matter" in which the court has jurisdiction. In the State courts, generally there is a requirement for a justiciable controversy. Relevant to power in both courts are requirements of standing although in some cases these are modified by statutory provisions such as s 163A of the *Trade Practices Act* which make the remedy available to any person in relation to matters arising under that Act.

52 The declaratory remedy has become well entrenched in both State and Federal judicial systems. It is now an indispensable tool in the administration of justice in both public and private law.

[45] *Magman* at 15, also citing *Bond v Sulan* (1990) 26 FCR 580 at 590-591 (Gummow J).