APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 42795

NONHUMAN RIGHTS PROJECT, INC.,
ON BEHALF OF BEULAH, MINNIE AND KAREN

v.

R.W. COMMERFORD & SONS, INC. A/K/A COMMERFORD ZOO, AND
WILLIAM R. COMMERFORD, AS PRESIDENT OF R.W. COMMERFORD & SONS, INC.

APPENDIX TO SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT
(PART TWO)

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the same time assessed for the plaintiff upon a new assignment to which there was judgment by default:] and *Postan* v. *Stanway* (*d*).

[194] Abbott, contrà, was asked by the Court (*e*) how the plaintiff could have avoided going down to trial, when the plea claiming a right of way for the defendant at all times, that is by night as well as by day, was put upon the record. To which he answered, that the plaintiff should have let judgment go by default on the plea claiming a right of way only in the day-time; and then if the cause had gone to trial only on the issue as to the general right of way claimed by the defendant at all times, the plaintiff succeeding on that issue would have been entitled to the general costs of the trial.

The Court were satisfied with that answer, and made the rule absolute for the Master to review his taxation (*f*).

[195] THE CASE OF THE HOTTENTOT VENUS. Saturday, Nov. 24th, 1810. The Court upon affidavit laid before them, suggesting probable cause to believe that a helpless and ignorant foreigner was brought into this country, and exhibited for money, against her consent, by those in whose keeping she was, granted a rule upon her keepers to shew cause why a writ of habeas corpus should not issue to bring her before the Court, and directed an examination to be taken of her in the mean time before the coroner and attorney of the Court, in the presence of proper persons deputed by the persons applying for the writ, and by those against whom it was prayed.

A female native of South Africa, remarkable for the formation of her person, was exhibited in London in the course of the autumn of this year under the name of the Hottentot Venus (her real name being Saartje Baartman) by certain persons who had the apparent custody of her, and who received money for such exhibition. The decency of the exhibition was not called in question; it appearing that the woman had proper cloathing adapted to the occasion; but from some expressions which had been uttered by those who had brought her over to this country, and with whom she continued, and some apparent indications of reluctance on her part during her exhibition, there was reason to believe, and affidavits were accordingly laid before the Court to that effect, by the secretary of a society, denominated the African Institution, that she had been clandestinely inveigled from the Cape of Good Hope, without the knowledge of the British Governor, (who extends his peculiar protection in nature of a guardian over the Hottentot nation under his government, by reason of their general imbecile state;) and that she was brought to this country and since kept in custody and exhibited here against her consent. Whereupon the Court, on the motion of Mr. Attorney General, granted the following rule:

England.—Upon reading the several affidavits of Zachary Macauley and others, and William Bullock, it is ordered, that Tuesday next be given to Alexander Dunlop and Henrick Cæsar, to **[196]** shew cause why a writ of habeas corpus should not issue directed to them, commanding them to have the body of a certain native of South Africa, denominated the Hottentot Venus, before this Court immediately, to undergo, &c. Upon notice of this rule to be given to them in the mean time. And it is further ordered, that one or two such person or persons as shall be approved for that purpose by the coroner and attorney of this Court shall, at such times as shall be appointed by the said coroner and attorney, have free access to the said native of South Africa at the house of the said Alexander Dunlop and Henrick Cæsar, in York Street, Piccadilly, in the absence of the said Alexander Dunlop and Henrick Cæsar, but in the presence of one or two such person or persons as shall be nominated by them,

(*d*) 5 East, 261.

(*e*) Lord Ellenborough, C.J. had left the Court at this time.

(*f*) This case differs from *Martin* v. *Vallance*, 1 East, 350, where to trespass quare clausum fregit, the defendant pleaded not guilty, and also a justification of a right of way; and the plaintiff traversed the right of way, and new assigned extra viam; and issue was taken, as well on the new assignment, as on the right of way; there, after verdict for the plaintiff, with 1s. damages on the new assignment, and for the defendant on the justification, the plaintiff was held entitled to full costs; deducting only the defendant's costs on the issue found for him.

and to be approved of by the said coroner and attorney for the purpose of conversing with her.

Such examination took place accordingly before the coroner and attorney of this Court, who made his report thereof; from whence it satisfactorily appeared to the Court that the woman came over here, and was exhibited, by her own consent, upon a contract to receive a certain proportion of the profits arising from the exhibition of herself: and this being confirmed by affidavits made by those who had the care of her; the Court, whose authority as guardian of the personal liberty of the subject was alone called into action on this occasion, finally discharged the rule.

Gaselee appeared on behalf of the persons against whom the writ was prayed.

End of Michaelmas term.

[197] CASES ARGUED AND DETERMINED IN THE COURT OF KING'S BENCH, IN HILARY TERM, IN THE FIFTY-FIRST YEAR OF THE REIGN OF GEORGE III.

MAY AND ANOTHER, Assignees of Taylor, a Bankrupt, *against* HARVEY. Thursday, Jan. 24th, 1811. If a thing be deposited by one, with the authority of another, and received by the bailee, to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it. But where it only appeared that if it had been agreed between the assignor and the assignee of a lease, that, to save the expence of a counterpart, it should be deposited in the hands of a third person, and the assignee afterwards delivered it to the bailee to keep, but without mentioning that it was on the joint account, and no communication was made of the deposit to the assignor, who never interfered further in the matter; but the defendant afterwards (with the privity of the bailee who acted as his agent) procured an illegal and void conveyance of the property in it from the assignee: Held that the assignee or his legal representatives might alone maintain trover for it, after demand and refusal.

In trover for a lease and assignment, which was tried before the Lord Chief Baron in Essex, the case appeared to be this. The defendant was a creditor of Taylor before and at the time of his bankruptcy. On the 4th of November 1809 Taylor committed an act of bankruptcy by assigning all his goods and effects to one Carter, another creditor, by whom he was pressed for his debt: and this was known to the defendant in the De-[198]-cember following, who also pressed Taylor for a security, and proposed that he should assign the lease in question to him (being a lease of a messuage, &c. occupied by Taylor,) which had been before deposited by Taylor in the hands of the defendant's son, who it appeared acted throughout this transaction under this defendant's direction and as his agent. Taylor did accordingly some little time before Christmas execute an assignment of the lease, which had been prepared by order of the defendant, ante-dated the 2d of November preceding: and soon afterwards the commission of bankrupt issued against Taylor. It further appeared that the lease had been originally assigned to Taylor by one Bridge; and to save the expence of a counterpart, Taylor, who was examined as a witness at the trial, said that it had been agreed by him and Bridge that the lease should remain for both of them in the hands of the defendant's son: but it did not appear that this agreement was communicated by Taylor to the son at the time when the lease was deposited with him; and when, after the commission issued, the lease was demanded of the defendant by order of the assignees, he made no objection that it had been deposited by the joint authority of Bridge and Taylor, but said that it was in the possession of his son, whom he had directed to keep it as a security for his, the defendant's, debt, in virtue of the assignment executed and bearing date on the 2d of November preceding: and for this reason alone also the son refused to part with it when applied to for that purpose. It was objected at the trial that the consent of Bridge to the delivery up of the lease was not proved, without which the plaintiffs were not entitled to recover, as it had been originally deposited by the authority of both: but his Lordship overruled the objection; considering that this had not been relied upon by the defendant; but on the contrary [199] that he had claimed the beneficial interest in the lease by the assignment from Taylor, which the jury believed to be ante-dated; and that it was inconsistent that the defendant should insist on the

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and
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Habeas Corpus—56 Geo. III, c. 100, s. 3—*False return.*

The truth of the return to a writ of *habeas corpus* may be impeached and inquired into under the 56 Geo. III, c. 100 (s. 3), which is in force in New South Wales.

It is the right and duty of the Court to issue a rule *ex mero motu*, calling upon a respondent to show cause why an attachment should not issue against him, if it has reason to believe that his return to a writ of *habeas corpus* is untrue.

THIS was an application for a writ of *habeas corpus*, calling upon Mr. *Collins*, a squatter, to produce in Court an aboriginal boy named "*Tommy*," alleged to be in his custody, and to show cause why he detained the boy. The application was based upon an affidavit of Mr. *David Russell*, to the effect that he had heard *Collins* say that he had "rushed" the boy from among his tribe, and that the boy would never see his tribe again.

Dec. 16,

Milford, for the applicant, the Rev. *John West*. A stranger can apply for a writ in such a case. *Case of the Hottentot Venus* (2).

The COURT granted the writ, returnable on Wednesday, Dec. 18, notice of the proceedings, with a copy of the affidavit, to be given to the *Attorney-General*.

Dec. 18,

The return of *Alexander Keith Collins*, stated that the boy *Tommy* was in his custody with the consent of his father, and of his own free will, and the boy was produced in Court.

Faucett, *Milford* with him, for the Rev. *John West*, wished to controvert the truth of the return.

[The COURT. The return must be first filed.]

Faucett moved that the return be filed.

The COURT ordered the return to be filed.

Faucett, and *Milford*, impeached the truth of the return.

The affidavit of *David Russell* was read, the objection of the other side, that no copy had been served on them, being overruled.

(1) *The Sydney Morning Herald*, Dec. 17, 19, and 28, 1861. (2) 13 East 197.

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Isaacs, for the respondent, *Collins*. There is no necessity for an inquiry. The respondent is willing to abide the decision of the Court.

The *Attorney-General* stated (on the inquiry of the Court) that the Crown was willing to take charge of the boy.

The CHIEF JUSTICE said that except as to how the lad was to be disposed of there was no difficulty whatever in the case. The respondent had produced the boy in Court in obedience to the writ, and had made a return which was, *prima facie*, quite good, as tending to show that respondent had received the legal custody of the boy from his father. The writ was issued under the common law power of the Court, under which the return would formerly have been conclusive. But it had been already decided that the 56th George III, was in force in this colony, and by that statute the truth of the return could be impeached, and when so impeached must be inquired into by the Court. It was impeached in the present case by the affidavit on which the writ had been granted. It might be that *Collins* withheld all explanation under legal advice, and therefore his conduct would not be open to the comments which it would otherwise have been fairly liable to; but the plain fact was this:—that there was only evidence on one side, and that the effect of this evidence was to show that the return to the writ was a false one, and that the child had been stolen from his parents. It might be admitted that the boy had been most kindly treated, but no end would justify an act such as was alleged to have been committed. It was a moral wrong—an outrage—an act of gross cruelty which no man of common feeling could hear described without an expression of strong indignation. It was not a light matter, but the infliction of an insufferable wrong—a misdemeanor for which any person who committed it was liable to heavy punishment by fine and imprisonment. Looking at the natural results of such acts, it might be that the best interests of the country would suffer. Suppose it was true that these boys were run down like wild animals, and stolen from their parents and relatives, it was a natural result that the latter should pursue with vengeance the people of the same race as the offender. Such would be probably the case with the whites in the event of any corresponding outrage by the blacks. These people were British subjects, and if held responsible for crime on the one hand, should be protected from outrage on the other. The respondent having made what, as the case now stood, must be held to be a false return, and having failed to show that he had the slightest right to the charge of the boy, must pay the costs of this proceeding. It was simply absurd to assume that there was anything tyrannical in directing an inquiry

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of the nature alluded to, although if any further inquiry had taken place, care would have been taken that the evidence thus obtained should not be used for any other purpose than the legitimate one of seeing what was to be done with the boy. The boy must now be delivered over to the Colonial Secretary on the part of the Government.

MILFORD, J., considered the question one of dry law. The return showed *prima facie* a right to the custody of the boy. The Court, proceeding to investigate the truth of this return under its statutory power, had evidence on oath that *Collins*, according to his own admission, had stolen the boy, thereby committing a high misdemeanour. There was no evidence on oath to controvert this, and they were thus bound to assume that the return was false.

WISE, J., concurred with his learned colleagues. It was a first principle of justice that the liberty of the subject should be protected, and the aborigines who were held to be British subjects, even without their own concurrence, and as such to be amenable to punishment, were equally entitled with the whites to this protection. His Honor equally concurred with the other members of the Court as to this child-stealing, if committed, being a gross outrage, and stated his belief, as at present advised, that such an act as this, or the abduction of natives from any of the South Sea Islands, would be punishable under the statute against slavery.

Ordered that the boy be handed over to the Colonial Secretary, costs to be paid by respondent.

On Dec. 27,

the respondent, *Collins*, was called on by rule *nisi*, issued on the order of the Court, *ex mero motu*, to show cause why an attachment should not be issued against him for having made a false return.

Darvall, Q.C., *Martin*, Q.C., and *Isaacs*, showed cause. The Court has no jurisdiction to issue this rule *ex mero motu*. Mr. *Collins* obeyed the Court by producing the boy, leaving their Honors to deal with him as they thought fit, and had not claimed to retain the boy in his own custody. The truth of his statement, now that the Court had dealt with the boy, was unimportant.

Their HONORS had no doubt that it was their right and their duty to issue this rule. Mr. *Collins* was called upon to do two things: to bring up the body of the boy, and to make a statement—a true statement—of the reasons for his detention. He (*Collins*) had done but one of these things, for although he produced the body, and made a

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statement, the only evidence on oath before the Court went to impeach the veracity of that statement. It was most probable that it could be sustained, but it was necessary for the character, not only of Mr. *Collins*, but of the country itself, that this should be done. The power now exercised was precisely the same as that under which they committed witnesses for gross prevarication of evidence.

The affidavits of *George Barber*, squatter, and Mr. *Collins* were read.

The COURT held that there was no necessity for further affidavits, or for argument. The statements made to Mr. *Russell* had evidently been so made in joke.

Rule discharged.

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duced to come within this rule. I think, therefore, that the view of the plaintiff here is the correct view, and this case does not fall within the rule.

Solicitors for plaintiff: *Madden & Butler.*

Solicitors for defendant: *Connelly & Crocker.*

J. E. H.

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April 1, 26.
June 19.

THE KING *v.* WATERS.

Habeas corpus—Infant—Custody of—Mother dead, father insane—Blood relations of infant, rights of—Principles on which Court deals with infant's custody.

A., a girl of 10 years of age, was the child of M. and her husband, born in Ireland of their marriage. M.'s husband having become insane, she brought A. from Ireland to Australia. In Victoria M. lived with W. as his wife, though her husband was still living. M. died in September 1911, and during her last illness requested W. to take care of A. This W. did, and placed A. in the care of a woman, whom he paid for A.'s maintenance. Upon application by the maternal aunt of A. for a writ of *habeas corpus* directed to W. to produce the body of A.,

Held, that the aunt's only right was to come to the Court as a Court of Equity and inform the Court that a *de facto* guardian was detaining the child against its interest.

Held further, that the aunt had failed to satisfy the Court that such detention was against the child's interest, and that therefore the writ should be refused.

Nobody can obtain a writ of *habeas corpus* for the custody of an infant child except persons who have an absolute right to the child's custody.

Such persons are, in the case of a legitimate child, its father during his life, and after his death the testamentary guardian appointed by him, and, failing such appointment, its mother during her life, and after her death a testamentary guardian appointed by her; in the case of an illegitimate child, its mother during her life, and after her death a testamentary guardian appointed by her.

The issue of writs of *habeas corpus* is not confined to Courts of Law, but is within the jurisdiction of Courts of Equity also. Blood relations of a child other than the father and mother have no absolute right to its custody, but in looking to the child's interest the Court may prefer a blood relation as its guardian.

Principles upon which the Court deals with the guardianship of infants discussed.

APPLICATION FOR WRIT OF *habeas corpus*.

This was the return of an order *nisi* calling upon George Thomas Waters, at the instance of Mrs. Alice Dawson, to show cause why a writ of *habeas corpus* should not issue for the production of the body of a child, Elizabeth Miskelly, aged 10 years, and alleged to be detained in his custody. Mrs. Dawson was the maternal aunt of the child. From the affidavits filed on the

application it appeared that the child's mother and Waters had lived together as man and wife for some time prior to the mother's death in September 1911, and that since then the child had been maintained by Waters. Further facts appear in the judgment, *infra*.

Jacobs to move the order absolute.

Nolan to show cause—The aunt here has no right to the writ sought. No one except a person with an absolute legal right to the custody of the infant can obtain a writ of *habeas*. All the aunt can do is to come to the Court in its equitable jurisdiction and seek to have herself appointed as the child's guardian. The aunt's blood relationship to the child confers no right upon her. Here, as there is no legal right in the aunt, she must establish that it is for the infant's benefit that it should be removed from its present custody, and on the facts this is not established.

He cited *In re Spence* (*a*); *In re McGrath* (*b*); *In re Harper* (*c*); *Eversley on Domestic Relations* (3rd ed.), 514; *Annual Practice* (1912), vol. ii., 473.

Jacobs in reply—*Primâ facie*, it is to the child's interest that its guardian should be a blood relation and not a stranger. Blood reationship itself gives a right: *In re Kerr* (*d*); *In re Beatrice Taylor* (*e*). Any person may apply for the issue of a writ of *habeas* to produce the body of a person illegally detained. Moreover, the Court in its equitable jurisdiction has a discretion, and can give the child into the custody of the aunt. The legal right to custody is not confined to parents and guardians; it extends to blood relations. In any case, on the facts, it would appear that the aunt's guardianship must be more to the advantage of the child than that of Waters.

He also cited *In re Agar-Ellis* (*f*); *Reg.* v. *Nash* (*g*); *Barnardo* v. *McHugh* (*h*); *In re Daly* (*i*); *Goldsmith* v. *Sands* (*k*); *In re Buchanan* (*l*); *Daniell's Chancery Practice* (7th ed.), 910.

Cur. adv. vult.

(*a*) [1847] 2 Ph. 247, 252.
(*b*) [1893] 1 Ch. 143, 147.
(*c*) [1895] 2 Ir. 571.
(*d*) [1889] 24 L.R. Ir. 59.
(*e*) [1887] 3 T.L.R. 718.
(*f*) [1883] 24 C.D. 317, 326.
(*g*) [1883] 10 Q.B.D. 454.
(*h*) [1891] A.C. 388, 394.
(*i*) [1860] 2 F. & F. 258.
(*k*) [1907] 4 C.L.R. 1648.
(*l*) [1896] 21 V.L.R. 702.

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MADDEN, C.J. This was an application by way of writ of *habeas corpus* to have the custody of a child, a little girl of 10 years of age, transferred from George Thomas Waters, in whose custody the child now is, to that of her maternal aunt, Mrs. Dawson. The facts from which the difficulty arose are these. The child is the daughter of a man named Miskelly. The father and mother were living in Ireland. The father became insane and dangerous to his wife, and she ran away, taking the child with her. It is said that the child's father is still living, and still insane. Mrs. Dawson and her husband and her sister, Mrs. Miskelly, came in the same ship to Australia together. On board was George Thomas Waters, who is defendant. On the voyage he and Mrs. Miskelly formed a connection which they maintained till the mother died; they lived together as husband and wife, and an illegitimate child was born to them. After they arrived here they remained for a time together in a house in Richmond, and then they went to live together as man and wife in the employment of a gentleman at Mornington. From there they went to Mansfield, and Waters became assistant to a chemist there. He lived there with Mrs. Miskelly till she died in September 1911. He swears that in her last illness she besought him to take care of her little child, the subject of this application, and he consented to do so. He had always maintained her up till then. He returned to North Melbourne, where he opened a grocer's shop, and has continued to keep that shop till the present time. He has maintained both the legitimate child of Mrs. Miskelly and their illegitimate child, and they are both at North Melbourne now. His illegitimate child is 3 years old, and the little girl 10. He placed them in the charge of a Mrs. Woodhead, who keeps a boarding-house in North Melbourne, and paid her twelve shillings a week for their maintenance, and he has continued to pay till the present. In March of this year Mrs. Dawson came to Melbourne, seized the child in question at the State school, and attempted to take her away to her home at Mansfield. Waters and Mrs. Woodhead pursued and intercepted them before the child was got into the train, recaptured her, and brought her back to her original home at North Melbourne. Then Mrs. Dawson later took out this writ of *habeas corpus* to have it adjudged that she is entitled as against George Thomas Waters to the custody of this infant girl.

At the hearing it was contended in the first place by Mr. Nolan that nobody can take out a writ of *habeas corpus* for the custody of an infant child except a person who has an absolute legal right to that custody, and if it be sought by a person who has only a discretionary right so far as the Court is concerned to the custody of the child, the proper course is to proceed in a Court of Equity to have himself or herself appointed guardian, but that it is only a person who is by law as guardian entitled to the custody of the child who is entitled to sue for the recovery of the custody of the child by *habeas corpus*. I think that view is right. The meaning of *habeas corpus* is that it is a writ that is issued when somebody informs the Court that somebody else is wrongfully detained against his or her will, and ought, therefore, to be relieved from that imprisonment. The writ goes at the suit of anybody in relation to the mere imprisonment of any person. Anybody in the community who knows that a person is wrongfully imprisoned has a right to have the writ to discharge that person out of the imprisonment; but in a case like this, where the child is detained by a person who is acting as her guardian in fact, and as such maintaining that child, and it is suggested that this is a wrongful detention, it is not everybody who has that right. The instances in which the writ can be used in reference to such cases are where the father of a legitimate child, or, after his death, by Statute, the mother of that child, or the mother of an illegitimate child, desires to obtain custody of it. It may also be taken out by the testamentary guardian appointed by the father of a legitimate child, or by the testamentary guardian of an illegitimate child appointed by the mother, by Statute. The position was originally this, that the father was by nature the guardian. He was the person whose child it was, although in that point of view it would not be altogether inexcusable to suppose that the mother had some part. At any rate, in the times when the feudal system prevailed, the father had on that ground the charge of his child; though in reality a very strong reason why he should have it was that, if it were a male he should maintain it and train it up in arms to do its duty to the overlord, or if a girl that he might bestow her in marriage in a way to conserve the rights of the overlord. If the father died, the overlord had the wardship in the case of a male for the same reason, that he might be trained up to arms and carry

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out his duties, and in the case of a female because the overlord had a strong interest in that he would receive a sum of money on her marriage. In that case the wardship of the children went from the father to the overlord, and the mother had no right of guardianship, because she might not do her duty, but deprive the overlord of his dues. The father's position has always remained the same. In more recent and more reasonable times, by sec. 40 of the *Marriage Act* 1890, following the English Act 49 & 50 Vict., c. 27, it is provided that "Where a father has died without having legally appointed or made legal provision for the appointment of a guardian of any infant child the mother shall be deemed to be the lawful guardian and shall have power to appoint a guardian or guardians of such child with the same rights and powers and as fully as by law the father now has." That therefore shows that the father—and no doubt the law was so before this Act—had also the right by his will to appoint a legal guardian to take possession of and provide for the child and educate her as he could have done had he lived, to the exclusion of the mother. That section provides that, where the father has not so appointed a testamentary guardian the mother may appoint under that provision. Sec. 36 likewise provides that "The mother of an illegitimate infant shall have power to appoint a guardian or guardians of such infant in the same manner and with the same rights and powers and as fully as by law the father of a legitimate infant now has."

Starting, then, from that position, one may first of all dispose of the proposition that the operation of the writ of *habeas corpus* is closely confined to Courts of Law, as was argued, unnecessarily as I think, in this case. In the case of *In re Agar-Ellis* (*m*) it is made quite clear that the writ of *habeas corpus* is not the instrument of any branch or jurisdiction of the Courts of Law. It is part of the general law of the realm, and every Court may issue that writ, and every Judge must issue that writ, under a penalty, if it is demanded of him. But the distinction does exist that Courts of Law did and do now issue that writ for restoration to the father or in succession to him to the testamentary guardian appointed by him, or in default of such guardian to the mother, who is appointed guardian, or in the case of an illegitimate child to the mother. In that case a Court of Law, where the application

(*m*) [1883] 24 C.D. 317, at p. 326 *et seq.*

is by any of those persons, if they have an absolute legal right as it is called, will direct that the custody shall be given to the person who has that right, subject to certain other limitations which have crept in, and those are that it will be given in the case of males who are within the age of 14, and of girls within the age of 16. Up to 21 years the father has a right to the custody *primâ facie*. Up to 14 years in the case of males, and up to 16 in the case of girls, he has that right *sub modo*. But if the child is over 14 or 16, as the case may be, and he or she appears capable of making a wise choice, the Court will consult the child to see what its own disposition is, and is often influenced in saying whether or no it will order that child into the custody of the father or mother by the wishes of the child, and may disregard the legal right. There is also the position which first arose in Equity, and which all the Courts now regard equally—namely, that if it is manifestly for the benefit of the child that he or she should not go to the person who has the legal right to the custody, then the Court will not order the child into that legal custody. A child up to the ages of 14 or 16 has nothing to say in the matter, provided the father is not of a grossly immoral character, and has not abdicated his legal right, or where the father is attempting, if the child is a ward of Court, to take it out of the jurisdiction without the leave of the Court. With this restriction the right is absolute, and, as Mr. Nolan argued, *habeas corpus* is the proper means in such instances for the person having the legal right to the custody of the child to assert such right. The Court will nowadays exercise its discretion, even where the person claiming the custody has at Law nominally the absolute right, if that person is subject to any of those deficiencies to which I have alluded.

All that has been made perfectly clear by the case of *In re Agar Ellis* (*supra*), at p. 326 *et seq.*; and it has further become part of the law that though at Common Law an illegitimate child was regarded as nobody's child, the Court now for this purpose of guardianship regards an illegitimate child as if it were a legitimate child in some important respects—for instance, those which concern the benefit and advantage of the child itself—and the mother is entitled to stand in relation to it in the same degree that the father would stand in relation to a legitimate child. A good deal of informaion is to be found with regard to this point in *Eversley on Domestic Relations* (3rd ed.), p. 611. It is difficult

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to say which case first enunciated these principles; at all events, they have been reviewed again and again—as in *Reg.* v. *Nash* (*n*); *Barnardo* v. *McHugh* (*o*). A number of cases dealt with the matter, both as to the appropriateness of *habeas corpus* as the remedy, and as to the right of guardianship of all relations, but more immediately in the last two cases the matter is dealt with in relation to the guardianship of an illegitimate child. In the case of *In re Spence* (*p*), the first clear line of demarcation, judicially, which I find, is this, that there the Lord Chancellor pointed out that a Court of Law always approaches this question from the point of view of guardianship—that is to say, it looked to the rights of those who were guardians of the children—while a Court of Equity always founded its particular jurisdiction on the function of the Crown as *parens patriæ* to look to the welfare of infants in whosesoever's hands they might be, which it does apart from particular claims.

It is necessary to go into this in detail, because the proposition I am stating differs from those Mr. Jacobs advanced on behalf of the aunt of this child. He argued that there was no such thing as exclusive rights appertaining to parents only within the limits I have mentioned, but that there was perpetual succession in the case of blood relatives; so that if the father were dead or out of the way, the grandfather, or if the grandfather were out of the way, the aunt or uncle might come in on an equal footing. It is important to see whether that proposition is true or not. I have no difficulty in deciding that, the father and mother and testamentary guardian being disposed of, there is no right in any other blood relation to the guardianship of any infant child. There is in all procedures the principle that the child's own benefit and interests are what the Court will be guided by, and in looking at that the Court will always have special regard to the blood relations, on the mother's side particularly, on the principle, though it may not be always true, that blood relations do have an affection for the offspring of their kin. That view has been propounded, particularly in the case of *Reg.* v. *Nash* (*supra*).

Then the next question is—What is the right of a blood relation or any person who seeks to interfere on behalf of a child when it is in the possession of another person who is *de facto* guardian?

(*n*) [1883] 10 Q.B.D. 454. (*o*) [1891] A.C. 388.
(*p*) [1847] 2 Ph. 252.

The judgment in *In re McGrath* (*q*) is particularly instructive in dealing with this question, and it deals with it thus, that anybody whosoever, whether a kind and philanthropic person or a blood relation, at his or her own proper cost, may come into a Court of Equity and inform the Court that somebody acting *de facto* as guardian is detaining a child against its interests, and a Court of Equity will inquire into that matter, and will direct what is for the benefit of the child. It will do that whether the child has money or not, though it used to be stated that a Court of Equity will not make a child a ward of Court unless it has an interest in some fund, and cannot do so unless there is some money which the Court can apply towards a scheme for its education and maintenance. The proposition, therefore, is this, that the aunt can approach the Court like anybody else, at her own cost and peril, and inform the Court that somebody has the custody of the child to its disadvantage.

Then it was argued by Mr. Jacobs, in pursuance of his proposition, that he could point out two cases in which the Court did appoint a person in a somewhat similar position to the aunt here. One of those cases was *In re Kerr* (*r*). In that case the mother of an illegitimate child died, and before she died she asked her brother, who was only 18 years of age—that is, the child's uncle in blood—to take charge of the child and educate her and bring her up. He consented. He was a bricklayer by trade, and had to be all day long away at his business, and the child was found wandering about the streets to its danger. The putative father picked it up and placed it with a respectable woman to take care of. The uncle then sought to get back the custody of the child, and the Court decided that the child's interests in a case like that manifestly demanded that it should be in a place where it could be taken care of, and that in such a position as he was, without any woman to look after the child, without any time or opportunity to look after it himself, he could not recover the custody of the child, which was boarded in the hands of a person who could take care of it. That case did not decide, and one of the Judges declared it did not decide, as to what were the relative rights of these blood relations as against others who were not blood relations. *In re Beatrice Taylor* (*s*) was another case

(*q*) [1893] 1 Ch., at p. 147. (*r*) [1889] 24 L.R. Ir. 59.
(*s*) [1887] 3 T.L.R. 718.

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relied on very strongly. In that case the maternal grandfather applied that the child should be delivered over to him, and placed in a particular home which he had selected, and that she should be taken from the home in which she had been placed by her step-mother. In that particular case the father, who was dead, had been one of those sporadic weaklings, who, after producing children, did nothing for them but take them into the workhouse, whence they were put out to board with other people. Finally, the maternal grandfather asked that the custody of the child should be given to him, and the question of right was discussed by the Court a good deal. It did order that the custody of the child should be given to the maternal grandfather, but on this ground, that the grandfather was, by the poor law in England, compelled to maintain the child, and that the person who was compelled to maintain a child was entitled to its custody, in order that he might maintain it and bring it up. It was on that special ground, a statutory ground, that the maternal grandfather was given charge.

There was a later case—*The King* v. *New* (*t*)—in which the mother of an illegitimate child gave it over to a kindly couple, who became practically its foster-parents, brought it up from infancy and for years, but at last the mother desired that the custody of the child should be given to an institution that she chose. The foster-parents desired to retain the child, but the Court held that the mother of an illegitimate child had a perfect right to choose where it should be, and to choose the custody of the child, provided the custody in which it was proposed to place it was not to the disadvantage of the child, and therefore ordered that it should be placed where the mother directed.

It was ably and keenly debated before me as to what was the true legal position. It was contended that there were certain persons, whom I have indicated, who have a *primâ facie* legal right to the custody of a child, but that anybody else than they must apply to a Court of Equity and show that the benefit of the child demands that the Court shall interfere and say where the child should be placed. If any person takes that step he does it at the danger of having to pay costs. It may be only a kindly act, but he may have to pay costs for invoking a power which does not agree with the applicant in the views he or she takes. The

(*t*) [1904] 20 T.L.R. 583.

aunt here has no other right than that, it appears to me. Assuming she has the right to bring *habeas corpus* at all, her right is to apply to this Court as a Court of Equity, but she invokes it as a Court of Law. I do not propose to deal with the ultimate niceties of that position, as I do not think it is necessary. The aunt has, as I understand the law, to show that the present guardian is an improper person to hold this child, or that it is not to the benefit of the child itself to remain with him.

Then I refer to the affidavits, which show that all came out in one ship; that Waters and the child's mother formed an attachment for one another, and that he lived with her for four years; that the mother of the child died, handing over the child and enjoining him to take charge of her. He has done so. He is a tradesman in a small way of business, which he is maintaining in North Melbourne. He has placed the child in the hands of Mrs. Woodhead, who appears to be a thoroughly respectable woman. The affidavits show a certain bitterness and recrimination on either side. Each charges the other with having gone under assumed or false names, but each knew that was done for a particular and plausible purpose, and that was lest the husband should find out that his wife and her sister were going away on the same ship and intercept her. These recriminations come to extremely little, except one. Mrs. Dawson says the applicant "George Thomas Waters is addicted to drink, and I have often seen him in a very drunken state. He is also of bad moral character, and it is in my opinion prejudicial to the child's welfare that she should remain in his custody." Now, that at first sight looks uncommonly like a lawyer's paragraph; yet, if true, it would disclose facts which would turn the scale in her favour. A drunken guardian is not for the benefit of an infant. The husband of Mrs. Dawson says that all she says is true, without going into any details. On the other hand, Waters says the Dawsons are leading " a nomadic life, working on stations and farms, that the said Alice Dawson is addicted to drink, and is an immoderate tobacco smoker, and to the best of my belief still a widow." The lady herself denies all this literally, and says that she does not lead a nomadic life, is not addicted to drink, nor an immoderate smoker of tobacco; but so far as these things are concerned, they show a reservation of mind which is striking. Waters himself, however, says as to her charge against him: " I absolutely deny

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the allegations contained in paragraph 22 "—that is the paragraph which charges him with drunkenness, impropriety, and so on; and Mrs. Woodhead says that she has known him since he arrived in this country, and "I know the said George Thomas Waters to be a man of temperate habits, an affectionate man to those he was associated with, and he is, to the best of my belief, a man of good moral character, and weekly pays me the sum of twelve shillings for the maintenance of the two children of the said Mary Miskelly, deceased," which is a very fair testimonial to one side of his character. The obligation to prove her statements rests on Mrs. Dawson. She was also bound particularly, I think, to state these things in detail, and then Waters could have handled them in detail. Her duty would be to state the facts and let the Court conclude. He denies them unequivocally, which was the only thing he could do. She makes an affidavit in reply, in which she goes into recriminatory and family matters, but does not say one word in conflict with his general denial on this matter. The obligation was on her to prove what she has undertaken to prove, and she has not satisfied me that Waters is a man guilty of misconduct or of drunken habits. Under those circumstances, she has no right to demand the child from him, and she has shown no reason why I should interfere with his custody of the child, which is exercised in pursuance of the mother's injunction, and also according to the dictates of a decent and industrious man. Under these circumstances, I think the child should be returned to the custody of Mrs. Woodhead, and the application for a writ of *habeas corpus* refused, with costs.

Solicitor for the applicant: *P. J. Ridgeway.*

Solicitors for the respondent: *Nolan & Nolan.*

C. J. L.

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

TRUTH ABOUT MOTORWAYS PTY LIMITED — APPLICANT

AND

MACQUARIE INFRASTRUCTURE
INVESTMENT MANAGEMENT LIMITED — RESPONDENT

Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited [2000] HCA 11
9 March 2000
S186/1998

ORDER

The questions in the Case Stated on 17 August 1999 should be answered as follows:

1. *Are sections 80 and 163A of the* Trade Practices Act 1974 (Cth) *invalid insofar as they purport to confer standing on the applicant to bring the present proceedings?*

   Answer: No.

2. *Does the applicant have standing to bring proceedings in the Federal Court in respect of the subject matter of these proceedings:*

   (a) for an injunction in reliance upon section 65 of the Fair Trading Act 1987 (NSW) *and in purported reliance upon the accrued or pendent jurisdiction of the Federal Court;*

   (b) for an injunction in reliance upon section 23 of the Federal Court of Australia Act 1976 (Cth)*;*

   (c) for a declaration that another person has engaged in misleading and deceptive conduct in contravention of section 52 of the Trade Practices Act *or section 42 of the* Fair Trading Act*?*

   Answer: Unnecessary to answer.

3. *Is section 65 of the* Fair Trading Act *a law of a State:*

   (a) for the purposes of section 109 of the Constitution, *inconsistent with the* Trade Practices Act*; or*

   (b) in conflict with Chapter III of the Constitution *in purporting to confer standing on the applicant to bring the proceedings in the Supreme Court of New South Wales against the respondent?*

   Answer: Unnecessary to answer.

4. *If the Federal Court has no jurisdiction in respect of these proceedings, should the proceedings be remitted to a court of a state?*

   Answer: Unnecessary to answer.

5. *By whom should the costs of the proceedings in the Full Court be borne?*

   Answer: The respondent.

Representation:

J D Heydon QC with G J Williams and I R Pike for the applicant (instructed by Maurice May & Co)

D F Jackson QC with T D Castle and J R Clarke for the respondent (instructed by Mallesons Stephen Jaques)

Interveners:

H C Burmester QC, Acting Solicitor-General of the Commonwealth with M K Moshinsky intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with N D Hopkins intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with P D Quinlan intervening on behalf of the Attorneys-General for the States of Western Australia and South Australia (instructed by Crown Solicitors for Western Australia and South Australia)

CATCHWORDS

Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited

Constitutional law – "Matter" – Validity of law conferring standing to seek injunctive and declaratory relief – Where applicant has no direct or special interest in subject matter of proceedings – Whether reciprocity of right and duty is required.

Trade practices – Misleading and deceptive conduct – Application for injunction and declaration – Standing of applicant.

The Constitution, Ch III, ss 71, 75-78.
Trade Practices Act 1974 (Cth), ss 51A, 52, 53(aa), 53(c), 80, 163A.

Words and phrases – "matter" – "a person".

1 GLEESON CJ AND McHUGH J. The primary issue for determination is whether the Parliament, in legislating with respect to a subject matter specified in s 51 of the Constitution, (in this case, corporations of the kind referred to in s 51(xx)), may provide for the judicial enforcement of the law at the suit of any person.

2 There are reasons why, in the case of many laws, Parliament may not wish to enact such a provision. The common law requirement that a plaintiff who brings an action, not to vindicate a private right, but to prevent the violation of a public right or to enforce the performance of a public duty, must have a special interest to protect[1], is based upon considerations of public policy which the legislature would not lightly disregard[2]. Nevertheless, it is not difficult to understand why, in the case of certain laws, it might be considered in the public interest to provide differently. Apart from statute, there are ample precedents for private enforcement of laws. In *Phelps v Western Mining Corporation Ltd*[3], in considering the legislation in question in the present case, Deane J pointed out that such private enforcement has a long history in the administration of the criminal law. He referred to Lord Mansfield's statement[4] that if a certain kind of restrictive trade agreement were made "the court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to shew their sense of the crime". An application for a writ of prohibition, seeking the exercise of the judicial power of the Commonwealth under s 75(v) of the Constitution, may be made by a "stranger"[5]. The same applies to applications for *habeas corpus*[6]. The people who sought, and obtained, the release of the slave in *Somerset v Stewart*[7] were regarded by some as officiously interfering with England's trading interests, but their standing was not in dispute.

3 The concern of this Court is not whether a law of the kind in question is a good idea. The issue is whether it is beyond legislative power.

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1 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 524 per Gibbs J.

2 *Gouriet v Union of Post Office Workers* [1978] AC 435.

3 (1978) 20 ALR 183 at 189.

4 *R v Norris* (1758) 2 Keny 300 [96 ER 1189].

5 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247.

6 cf *Clarkson v The Queen* [1986] VR 464.

7 (1772) Lofft 1 [98 ER 499].

4 At first sight, a provision that a law concerning the conduct of corporations may be enforced by a court at the suit of any person appears to be within the power given by s 51(xx). That power, however, is subject to the Constitution. It is argued that the enactment of such a law is inconsistent with Ch III of the Constitution, and with the arrangements made by Ch III for the exercise of the judicial power of the Commonwealth.

5 The context in which the issue arises may be stated briefly.

6 Section 52 of the *Trade Practices Act* 1974 (Cth) ("the Act") provides that a corporation shall not, in trade or commerce, engage in misleading or deceptive conduct. That section appears in Pt V of the Act. Section 80 of the Act, which is in Pt VI dealing with "Enforcement and Remedies", provides that the Federal Court of Australia may grant injunctive relief where, on the application of the Australian Competition and Consumer Commission ("the Commission") "or any other person", it is satisfied that a person was engaged, or is proposing to engage, in conduct in contravention of a provision of Pt V. Section 163A of the Act also provides that "a person" may institute proceedings, in the Federal Court, seeking, in relation to a matter arising under the Act, a declaration in relation to the operation or effect of (amongst others) a provision of Pt V, and that the Federal Court has jurisdiction to hear and determine the proceedings.

7 The applicant commenced proceedings against the respondent in the Federal Court, claiming that the respondent contravened s 52 and two related provisions of Pt V. The applicant sought a declaration that the respondent had contravened s 52, and an order, in the nature of a mandatory injunction, compelling publication of corrective advertising.

8 The alleged misleading and deceptive conduct related to the publication of a prospectus inviting the public to subscribe for units in an investment trust. The investment concerned the construction of a toll road. The applicant complains that information given concerning the volume of traffic on the road was misleading.

9 The applicant claims no special interest in the subject matter of the dispute. It has not suffered any loss or damage by reason of the respondent's conduct. It invokes the jurisdiction conferred on the Federal Court by ss 80 and 163A simply in its capacity as a (corporate) person.

10 The respondent challenges the applicant's standing to bring the proceedings, and has raised a number of questions which have been made the subject of a Case Stated for this Court.

11 The first question asks whether ss 80 and 163A of the Act are invalid, insofar as they purport to confer standing on the applicant to bring the present proceedings.

12 It is agreed that, if that question is answered in the negative, and the validity of the provisions is upheld, it is unnecessary to answer the other questions.

13 It has been established for more than 20 years that s 80 means what it says. In *Phelps v Western Mining Corporation Ltd*[8] the Full Court of the Federal Court rejected an argument that the words "any other person" in s 80 should be read down as meaning that only persons who are affected by a contravention of Pt V could seek relief under s 80. Deane J said[9]:

> "As a matter of ordinary language, the phrase 'any other person' connotes any other person whatsoever. The context in which the phrase appears in s 80 ... does not, upon analysis, suggest, let alone justify, the conclusion that the Legislature intended that the phrase be modified by the engrafting of speculative qualifications such as 'who is a consumer' or 'who is a competitor' or 'who has an interest of a type which would give him standing to institute common law civil proceedings if the conduct complained of were tortious'."

14 Bowen CJ pointed out[10] that what was at issue was a question of standing, not a question as to the considerations which might, in a particular case, bear upon whether it was appropriate to grant any, and if so what, relief. He adverted to the problems, as to relief, that could arise in the case of a suit commenced by an officious bystander, but declined to accept, in relation to legislation protective of the public interest, that the solution to those problems was to be found in giving a narrow and artificial interpretation to the statutory provisions conferring jurisdiction and standing.

15 The word "any" does not lend itself to a restrictive interpretation.

16 The relevant provisions of Ch III of the Constitution, which are relied upon in aid of the respondent's contention that ss 80 and 163A of the Act do not validly confer upon the applicant standing to bring these proceedings, are as follows. Section 76 (ii) empowers the Parliament to make laws conferring

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8 (1978) 20 ALR 183.

9 (1978) 20 ALR 183 at 189.

10 (1978) 20 ALR 183 at 187-188.

original jurisdiction on the High Court in any matter arising under any laws made by the Parliament. Section 77 enables the same jurisdiction to be conferred on another federal court. The essence of the respondent's argument is that in a case such as the present, there is no "matter", and the purported conferment of jurisdiction is therefore invalid. The reason why there is no matter, it is submitted, is that there is no justiciable controversy. That, in turn, is said to follow from the absence of any direct or special interest of the applicant in the subject matter of the proceedings.

17 As Bowen CJ observed in *Phelps v Western Mining Corporation Ltd*[11], the purpose of s 52 is to protect the public from being misled or deceived. An application for injunctive relief under s 80 is, in its nature, one for the protection of the public interest. The same may be said of s 163A. Any public protection of the applicant's own business or other interests is incidental or collateral. What is sought to be established by the determination of a court is a violation by the respondent of a statutory norm of conduct, and the existence of a duty or liability. The court is not invited "to make a declaration of the law divorced from any attempt to administer that law"[12]. Such a subject matter is justiciable in character. Parliament, by conferring standing upon any person to invoke the jurisdiction of the court has, at the one time, created the potential for a justiciable controversy and conferred jurisdiction to determine the controversy. This is a common feature of legislation.

18 In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[13], Dixon J said:

> "Legislation in the form under discussion must, of course, fall within one of the subjects of the legislative power of the Federal Parliament in s 51 or s 52. But, assuming the law is one with respect to one or other of the enumerated powers and that it also defines the jurisdiction of a Federal court with respect to a justiciable subject matter, why should not an application to obtain the benefit of the provision be a matter arising under that very law? *Ex hypothesi*, the justiciable subject matter is not only specified or indicated by the law defining the jurisdiction, but falls within one of the enumerated legislative powers. That is to say that, apart from the special requirements of Chapter III, it would be an exercise of legislative power upon an assigned subject. Why should not the legislation thus

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11 (1978) 20 ALR 183 at 186-187.

12 cf *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

13 (1945) 70 CLR 141 at 168.

conferring power upon the court perform the two functions of giving rise to the 'matter' and conferring jurisdiction over it?"

19 The same may be asked of ss 80 and 163A.

20 The fact that no private right, or special interest, of the applicant is at stake in the present case does not deny to its disputed assertion that the respondent has violated s 52 of the Act and its claim for remedies of the kind provided by the Act the character of a justiciable controversy. Parliament is no less entitled to confer on a federal court jurisdiction to grant such remedies at the suit of "any other person" than it is entitled to confer jurisdiction to grant them at the suit of the Commission.

21 Reliance was placed upon authorities concerning Art III of the United States Constitution and the power of Congress to confer standing in citizen suits[14]. The constitutional context in which those cases were decided is materially different from the Australian context. In particular, the references in Art III to "cases" and "controversies", as opposed to "matters", and the somewhat different role of the Executive, means that the United States learning is not of assistance in the resolution of the Australian problem.

22 The legislation is valid. The first question in the Case Stated should be answered in the negative. The other questions, except as to costs, need not be answered. The costs of the Case Stated in this Court should be borne by the respondent.

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14 eg *Steel Co v Citizens for a Better Environment* 523 US 83 (1998).

23 GAUDRON J. The respondent, Macquarie Infrastructure Investment Management Limited, is the manager of two unit trusts ("the trusts"). One of the assets of those trusts is a toll road project in Sydney known as the "Eastern Distributor". In November 1996, the respondent issued a prospectus and a supplementary prospectus inviting members of the public to purchase units in the trusts. The prospectus contained the following statement:

> "Traffic volume on the Eastern Distributor is anticipated to build up rapidly, as a consequence of the existing traffic volumes and the current congestion in the corridor, to an average daily volume of nearly 60,000 vehicles by 2006. Thereafter traffic volume on the Eastern Distributor is forecast to increase more slowly."

24 The applicant commenced proceedings against the respondent in the Federal Court of Australia claiming that, in making the statement set out above, it contravened ss 52, 53(aa) and 53(c) of the *Trade Practices Act* 1974 (Cth) ("the Act") and the equivalent provisions of the *Fair Trading Act* 1987 (NSW). The terms of ss 52(1), 53(aa) and 53(c) of the Act will be set out later in these reasons.

25 By its amended application, the applicant seeks an order that the respondent publish "corrective advertising ... so as to provide an accurate estimate of likely future traffic volumes on the Eastern Distributor" and also a declaration that the respondent engaged in misleading and deceptive conduct contrary to s 52 of the Act or in breach of s 42 of the *Fair Trading Act*. The proceedings were removed into this Court by order under s 40(1) of the *Judiciary Act* 1903 (Cth).

26 The applicant does not assert that it suffered any loss or damage in consequence of the conduct of which it complains. Moreover, it admits that it has no special interest in the subject-matter of the proceedings. It claims, however, that, so far as it complains of contraventions of the Act, it has standing to bring the proceedings by reason of ss 80 and 163A of the Act.

27 Subject to certain other provisions which do not bear on these proceedings, s 80(1) relevantly provides that:

> "... where, on the application of the Commission[15] or any other person, the Court is satisfied that a person has engaged ... in conduct that constitutes ...:

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15 "Commission" is defined in s 4(1) to mean:

> "the Australian Competition and Consumer Commission established by section 6A, and includes a member of the Commission or a Division of the Commission performing functions of the Commission".

(a) a contravention of any of the following provisions:
(i) a provision of Part IV, IVA, IVB or V;

...

the Court may grant an injunction in such terms as the Court determines to be appropriate."[16]

Sections 52, 53(aa) and 53(c) of the Act, which, as already noted, the applicant claims were contravened by the respondent, are in Pt V of the Act.

28 Section 163A(1) relevantly provides that:

"... a person may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, the making of:
(a) a declaration in relation to the operation or effect of any provision 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;
... and the Court has jurisdiction to hear and determine the proceeding."

Sections 52, 53(aa) and 53(c) are not in any of the Divisions or Parts referred to in ss 163A(1)(a)(i), (ia), (ii) and (iii)[17].

29 After the proceedings were removed into this Court, a case was stated for the consideration of the Full Court. The first question in the Case Stated asks:

"Are sections 80 and 163A of the *Trade Practices Act 1974 (Cth)* invalid insofar as they purport to confer standing on the applicant to bring the present proceedings."

The parties are agreed that, if that question is answered "No", it is unnecessary to answer other questions in the Case Stated. As I am of the view that the first question should be answered in that way, it is unnecessary to refer, at this stage, to the other questions.

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16 Section 80 of the Act was in a slightly different form at the time the action was commenced but nothing turns on that difference.

17 Again, s 163A(1) was in slightly different form when the action was commenced but nothing turns on that difference.

The argument for invalidity

30 As a matter of ordinary language, the expressions "any other person" in s 80 and "a person" in s 163A of the Act include a person who has neither a direct nor special interest in the subject-matter of the proceedings[18]. And the ordinary rules of statutory interpretation require that they be so construed[19]. However, it was contended for the respondent that those sections are invalid insofar as they purport to authorise the institution of proceedings by persons who have neither a direct nor a special interest in the subject-matter of the proceedings and that they should be read down accordingly. That is so, it was put, because, absent a direct or special interest, there is no justiciable controversy with respect to which jurisdiction may be conferred on or invested in a court pursuant to Ch III of the Constitution.

31 It is well settled that the only power that the Parliament may confer on courts created pursuant to Ch III of the Constitution is judicial power or power ancillary to the exercise of judicial power[20]. Moreover, by ss 75, 76 and 77 of

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18 See *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 186 per Bowen CJ, 198 per Brennan J; *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 234 per Murphy J; *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 120-121 per Stephen J, 128 per Mason J (with whom Jacobs J agreed), 131 per Murphy J; *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183; *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 255 per Lockhart J, 268 per French J.

19 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421. See also *Hyman v Rose* [1912] AC 623 at 631 per Earl Loreburn LC; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284 per Wilson J, 290 per Gaudron J; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 185 per Mason CJ and Deane J, 202-203 per Dawson J, 205 per Gaudron J.

20 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271-272, 289 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97-98 per Dixon J; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 586-587 per Dixon and Evatt JJ; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 606-607 per Deane J, 703 per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 per Mason CJ, Dawson and McHugh JJ, 487 per Deane and Toohey JJ; *Gould v Brown* (1998) 193

(Footnote continues on next page)

the Constitution, it can only confer or invest jurisdiction with respect to "matters"[21]. Central to the notion of "judicial power" and central, also, to the meaning of "matter" is the requirement that there be a justiciable controversy[22]. In essence, it was contended for the respondent that, unless the person who institutes proceedings has some direct or special interest in the subject-matter of the proceedings, there is no justiciable controversy and, hence, no "matter" capable of resolution by the exercise of judicial power.

32 In support of the argument that there is no justiciable controversy unless the person invoking jurisdiction has some direct or special interest in the subject-matter of the proceedings, counsel for the respondent pointed to various judicial statements as to what is involved in the notion of "justiciable controversy" and, also, to a number of decisions of the United States Supreme Court with respect to Art III of the United States Constitution. Recently, in *Steel Co v Citizens for a Better Environment*[23], the United States Supreme Court considered a question similar to that involved in these proceedings. It is convenient to refer at once to that case.

CLR 346 at 385-386 per Brennan CJ and Toohey J, 400-401 per Gaudron J, 419 per McHugh J, 440 per Gummow J, 499-500 per Kirby J.

21 See *Abebe v Commonwealth* (1999) 73 ALJR 584 at 590-591 per Gleeson CJ and McHugh J, 626 per Kirby J; 162 ALR 1 at 8-9, 58. See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 491-492 per Gibbs J, 506 per Mason J (with whom Stephen J agreed), 547 per Wilson J; *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 290 per Mason, Brennan and Deane JJ.

22 See *Abebe v Commonwealth* (1999) 73 ALJR 584 at 596 per Gleeson CJ and McHugh J, 618 per Gummow and Hayne JJ; 162 ALR 1 at 16, 46. See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 508-509 per Mason J (with whom Stephen J agreed); *Fencott v Muller* (1983) 152 CLR 570 at 606-608 per Mason, Murphy, Brennan and Deane JJ; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 278 per Gibbs CJ, 290 per Mason, Brennan and Deane JJ; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 316 per Brennan J.

23 523 US 83 (1998).

33 The question in *Steel Co* was whether an environmental protection organisation had standing under a citizen-suit provision[24] to seek a declaration that Steel Co had violated a legislative reporting requirement and, also, to seek injunctive and other relief. In that case, Scalia J (with whom Rehnquist CJ, O'Connor, Kennedy and Thomas JJ concurred; Breyer J also concurred in relation to this part of the judgment) enunciated three "irreducible" constitutional requirements for standing. The first was that earlier identified in *Lujan v Defenders of Wildlife*[25], namely, that there be "an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) 'actual or imminent, not "conjectural" or "hypothetical"'"[26]. The second was that there be "a fairly traceable connection between the plaintiff's injury and the complained-of conduct" and the third that there be "redressability – a likelihood that the requested relief will redress the ... injury"[27].

Sections 52(1), 53(aa) and 53(c) of the Act

34 Before turning to the notion of "justiciable controversy", it is convenient to note the terms of ss 52(1), 53(aa) and 53(c) of the Act. Section 52(1) is in these terms:

> " A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

Section 53 relevantly provides as follows:

> " A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services:
>
> ...

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24 The *Emergency Planning and Community Right-To-Know Act* 1986 (42 USCS §§11001 et seq) provides in 42 USCS §11046(a)(1) that, subject to a qualification that was not relevant in the *Steel Co* case, "any person may commence a civil action on his own behalf against" an owner or operator of a facility, the Administrator, a State Governor or a State emergency response commission for failure to do any of a number of listed actions.

25 504 US 555 (1992).

26 504 US 555 at 560 (1992).

27 *Steel Co v Citizens for a Better Environment* 523 US 83 at 103 (1998). See also *Simon v Eastern Kentucky Welfare Rights Organization* 426 US 26 at 41-42 (1976); *Lujan v Defenders of Wildlife* 504 US 555 at 560-561 (1992).

(aa) falsely represent that services are of a particular standard, quality, value or grade;

...

(c) represent that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have".

35 The Act provides a number of different remedies and enforcement procedures for contravention of the provisions of Pt V, in which ss 52 and 53 are found. By s 82(1), a person who has suffered loss or damage may bring an action for damages. And as already indicated, ss 80 and 163A, respectively, allow for any person to institute proceedings for an injunction and declaration. By s 79(1), a person who contravenes s 53 is guilty of an offence in respect of which proceedings may be instituted by the Australian Competition and Consumer Commission[28]. However, s 79(1) expressly states that that section does not apply to a person who contravenes s 52 of the Act. In context, ss 52 and 53 impose a public duty on corporations not to engage in conduct of the kind proscribed by those sections. This is achieved by effecting a general prohibition upon that conduct, short, only, of rendering conduct in contravention of s 52 a criminal offence.

36 Had the Act rendered contravention of s 52 a criminal offence, as it has with s 53, and allowed that any person might institute proceedings for those offences, there could be no doubt that, in each case, those proceedings would constitute a justiciable controversy and, thus, a "matter" for the purposes of Ch III of the Constitution. In this regard, it is sufficient to note that private prosecutions have long been known to the law[29]. The question raised by this case is whether different considerations apply with respect to non-criminal proceedings founded on breach of a public duty constituting a contravention of those sections. Before turning to that question, it is convenient to say something

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28 Section 163(4)(a). Section 163(4) also permits prosecutions for offences against the Act to be instituted by a person authorised in writing by the Commission, the Secretary to the Department, the Minister or a person authorised by the Minister in writing to give such consents.

29 See, for example, *Sargood v Veale* (1891) 17 VLR 660 at 662; *Lizars v Sabelberg* [1905] VLR 608 at 609 per Hood J; *Steane v Whitchell* [1906] VLR 704 at 705-707; *Brebner v Bruce* (1950) 82 CLR 161 at 167 per Latham CJ (with whom Webb and Kitto JJ agreed), 169-170 per McTiernan J, 173-175 per Fullagar J; *Gouldham v Sharrett* [1966] WAR 129 at 132-134 per Wolff CJ (with whom Jackson and Nevile JJ concurred).

of the notion of "special interest" and the general rule that only the Attorney-General or a person who has been granted the Attorney-General's fiat can institute proceedings with respect to a public wrong.

Special interest and the role of the Attorney-General in relation to public wrongs

37 In *Gouriet v Union of Post Office Workers*, Lord Wilberforce described the general rule that only the Attorney-General or a person who has been granted the Attorney-General's fiat may bring proceedings with respect to a public wrong as "constitutional" in nature, explaining "[t]hat it is the exclusive right of the Attorney-General to represent the public interest"[30]. In that regard, his Lordship referred to the observation of Lord Westbury LC in *Stockport District Waterworks Company v Mayor of Manchester*[31] that "the constitution of [Great Britain] ha[d] wisely intrusted the privilege [of representing the public interest] with a public officer, and has not allowed it to be usurped by a private individual."

38 It is clear from what was said in *Gouriet* that the general rule that only the Attorney-General may institute proceedings for a public wrong derives not from any constitutional limitation as to the role or jurisdiction of courts, but from the constitutional role of the Attorney-General. So much is confirmed by *Attorney-General v Oxford, Worcester, and Wolverhampton Railway Company*, in which case Lord Romilly MR founded the Attorney-General's right to seek relief for a public wrong on his role as the representative of the parens patriae[32].

39 The general rule that only the Attorney-General may institute proceedings with respect to a public wrong is, however, subject to exceptions. Thus in *Boyce v Paddington Borough Council*[33], Buckley J held that an individual could bring proceedings with respect to an interference with a public right, "first, where the interference ... is such as that some private right of his is at the same time interfered with ... and, secondly, where ... the plaintiff, in respect of his public right, suffers special damage peculiar to himself". In *Australian Conservation Foundation v The Commonwealth*[34], this Court extended the second of those

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30 [1978] AC 435 at 481.

31 (1863) 9 Jur NS 266 at 267.

32 (1854) 2 WR 330 at 331. See also *Attorney-General v Shrewsbury (Kingsland) Bridge Company* (1882) 21 Ch D 752 at 755 per Fry J; *Gouriet v Union of Post Office Workers* [1978] AC 435 at 508 per Lord Edmund-Davies.

33 [1903] 1 Ch 109 at 114.

34 (1980) 146 CLR 493.

exceptions to permit of the institution of proceedings by a person who has a special interest in the subject-matter of those proceedings.

40 Once it is appreciated that the "constitutional" nature of the rule that only the Attorney-General may bring proceedings with respect to a public wrong derives from the status of the Attorney-General in British law, it follows that there is no equivalent constitutional basis for that rule in this country. That is because, although the Attorney-General occupies an office which is well understood in our legal system, it is not an office recognised by the Constitution. Thus in this country, the general rule that only the Attorney-General may bring proceedings with respect to a public wrong is simply a rule of the common law.

41 To say that the general rule that only the Attorney-General may bring proceedings with respect to a public wrong is simply a rule of the common law is not to say that it does not find some resonance within the concept of "judicial power" or in the constitutional meaning of "matter" in Ch III of the Constitution. But save to the extent that it finds that resonance, there is no reason why it cannot be abrogated by the Parliament so as to allow any person to represent the public interest and, thus, institute legal proceedings with respect to a public wrong. And subject to the same qualification, there is no reason why the rule cannot be modified and adapted by the evolutionary processes of the common law. In fact, it was modified by those processes when the second of the *Boyce* exceptions was extended to allow for persons having a special interest to institute proceedings with respect to a public wrong.

Chapter III of the Constitution: "Judicial power" and "matter"

42 It is convenient to note, at once, that although Ch III of the Constitution has significant similarities with Art III of the Constitution of the United States of America, there are, as this Court has often noted, significant differences[35]. In particular, the latter is concerned with "Cases" and "Controversies", whereas Ch III selects "matters" as the subject-matter of federal jurisdiction. And

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35 See *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 544-546 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ; *Felton v Mulligan* (1971) 124 CLR 367 at 387-388 per Windeyer J; *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 530 per Gibbs J, 550-551 per Mason J; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 536 per Aickin J (dissenting in the result), 548 per Wilson J; *Fencott v Muller* (1983) 152 CLR 570 at 630 per Dawson J. But compare *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 508-509 where Mason J stated that the interpretation of the word "matter" in Ch III does not depart from the American concept of "cases" and "controversies" in Art III of the Constitution of the United States.

"matters" is a word of such generality that it necessarily takes its content from the categories of matter which fall within federal jurisdiction and from the concept of "judicial power". There is, thus, no reason why the position in this country should equate precisely with that reached in the United States of America.

43 Although the constitutional meaning of "matter" is to be derived, in significant part, from the concept of "judicial power", it is not necessary in this case to attempt any exhaustive exposition of that concept. It is sufficient to describe judicial power as that power exercised by courts in making final and binding adjudications as to rights, duties or obligations put in issue by the parties[36]. Similarly, it is sufficient to note that the constitutional meaning of "matter" involves the existence of a controversy as to "some immediate right, duty or liability to be established by the determination of the Court."[37]

44 The classes of matter in respect of which the judicial power of the Commonwealth is engaged are specified in ss 75 and 76 of the Constitution and include matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth"[38]. It is well established that prohibition may issue to a person who has neither a direct nor special interest in the subject-matter of the proceedings constituted by an application to obtain that

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36 See *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 211-212 per Starke J; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666; *Harris v Caladine* (1991) 172 CLR 84 at 147 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 497 per Gaudron J; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 256-259 per Mason CJ, Brennan and Toohey JJ, 267-269 per Deane, Dawson, Gaudron and McHugh JJ; *Nicholas v The Queen* (1998) 193 CLR 173 at 207 per Gaudron J; *Abebe v Commonwealth* (1999) 73 ALJR 584 at 609 per Gaudron J; 162 ALR 1 at 34.

37 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Fencott v Muller* (1983) 152 CLR 570 at 603 per Mason, Murphy, Brennan and Deane JJ; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 316-317 per Brennan J; *Abebe v Commonwealth* (1999) 73 ALJR 584 at 609 per Gaudron J, 618 per Gummow and Hayne JJ, 626 per Kirby J; 162 ALR 1 at 34, 46, 58; cf *Abebe v Commonwealth* (1999) 73 ALJR 584 at 591 per Gleeson CJ and McHugh J; 162 ALR 1 at 9.

38 Section 75(v).

relief[39]. That being so, there is no basis for concluding that either the concept of "judicial power" or the constitutional meaning of "matter" dictates that a person who institutes proceedings must have a direct or special interest in the subject-matter of those proceedings. Indeed that proposition is denied by the very rule that the Attorney-General as the representative of the public interest – not as a person having a direct or special interest – may bring proceedings with respect to a public wrong.

45 Once it is accepted that neither the concept of "judicial power" nor the constitutional meaning of "matter" dictates that a person who institutes proceedings must have a direct or special interest in the subject-matter of those proceedings, it follows as was pointed out in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* that, for the purposes of Ch III of the Constitution, "questions of 'standing', when they arise, are subsumed within the constitutional requirement of a 'matter'."[40] This does not mean that, for the purposes of Ch III, questions of standing are wholly irrelevant.

46 There may be cases where, absent standing, there is no justiciable controversy. That may be because the court is not able to make a final and binding adjudication. To take a simple example, a court could not make a final and binding adjudication with respect to private rights other than at the suit of a person who claimed that his or her right was infringed. Or there may be no justiciable controversy because there is no relief that the court can give to enforce the right, duty or obligation in question[41].

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39 See *R v Graziers' Association of NSW; Ex parte Australian Workers' Union* (1956) 96 CLR 317 at 327 per Dixon CJ, McTiernan and Kitto JJ; *R v Watson; Ex parte Australian Workers' Union* (1972) 128 CLR 77 at 81-82 per Menzies J, 97 per Gibbs J; *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 201-202 per Barwick CJ; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 per Gaudron, Gummow and Kirby JJ.

40 (1998) 194 CLR 247 at 262 per Gaudron, Gummow and Kirby JJ. See also *Croome v Tasmania* (1997) 191 CLR 119 at 132-133 per Gaudron, McHugh and Gummow JJ.

41 See *Abebe v Commonwealth* (1999) 73 ALJR 584 at 592-593 per Gleeson CJ and McHugh J; 162 ALR 1 at 11-12.

47 The relationship between "standing" and available relief was adverted to by Aickin J in *Australian Conservation Foundation v The Commonwealth*. In that case his Honour observed[42]:

> "it is an essential requirement for locus standi that it must be related to the relief claimed. The 'interest' of a plaintiff in the subject matter of an action must be such as to warrant the grant of the relief claimed. I do not mean that, where the relief is discretionary, locus standi depends on showing that the discretion must be exercised favourably. What is required is that the plaintiff's interest should be one related to the relief claimed".

That passage not only poses the test to be applied when there is a question of standing but, in my view, discloses the significance of standing to the existence of a matter for the purposes of Ch III of the Constitution.

48 There is no matter within the constitutional meaning of that term unless there is a remedy available at the suit of the person instituting the proceedings in question. That follows from the essential features of "matter" identified in *In re Judiciary and Navigation Acts*. It was said in that case[43]:

> "there can be no matter ... unless there is some immediate right, duty or liability to be established by the determination of the Court. ... [And the legislature] cannot authorize [the] Court to make a declaration of the law divorced from any attempt to administer that law."

49 Absent the availability of relief related to the wrong which the plaintiff alleges, no immediate right, duty or liability is established by the Court's determination. Similarly, if there is no available remedy, there is no administration of the relevant law. Thus, as Gleeson CJ and McHugh J pointed out in *Abebe v Commonwealth*, "[i]f there is no legal remedy for a 'wrong', there can be no 'matter'."[44]

50 Provided there is a remedy which is appropriately related to the wrong in question, whether the remedy derives from the general law or is created by statute, nothing in Ch III of the Constitution prevents Parliament from modifying the general rule that only the Attorney-General may bring proceedings with respect to a public wrong and permitting any person to institute proceedings of

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42 (1980) 146 CLR 493 at 511.

43 (1921) 29 CLR 257 at 265-266 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

44 (1999) 73 ALJR 584 at 592; 162 ALR 1 at 11.

that kind. If it does so, and if there is a remedy appropriate to the asserted wrong, there is, in my view, a matter for the purposes of Ch III of the Constitution.

Appropriate relief

51 The present matter was argued solely on the basis that, for proceedings with respect to a public wrong to constitute a matter for the purposes of Ch III of the Constitution, a private individual must have some special interest in the subject-matter of those proceedings. It is therefore not appropriate to express a concluded view whether, in the circumstances of this case, an appropriate remedy is available. The view has been taken in the Federal Court that, notwithstanding the terms of s 80A(1) of the Act[45], s 80 permits of an order requiring corrective advertising at the request of a person other than the Minister or the Commission[46]. If so, the relief sought pursuant to s 80 of the Act appears appropriate to the wrong complained of. However, different considerations may apply to the claim for declaratory relief by way of a declaration that the respondent has contravened s 52 of the Act and s 42 of the *Fair Trading Act* 1987 (NSW).

52 There may be cases where a bare declaration that some legal requirement has been contravened will serve to redress some or all of the harm brought about by that contravention. *Ainsworth v Criminal Justice Commission*[47] was such a case. But a declaration cannot be made if it "will produce no foreseeable consequences for the parties."[48] That is not simply a matter of discretion. Rather, a declaration that produces no foreseeable consequences is so divorced

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45 Section 80A(1) provides that, "[w]ithout limiting the generality of section 80", the Court may, on the application of the Minister or the Commission only, order a person involved in a contravention of Pts IVB or V of the Act to disclose information to the public or to publish corrective advertising.

46 *Janssen Pharmaceutical Pty Ltd v Pfizer Pty Ltd* (1986) ATPR ¶40-654 at 47,295 per Burchett J; *HCF Australia Ltd v Switzerland Australia Health Fund Pty Ltd* (1987) 78 ALR 483 at 491-492 per Morling J; *Makita (Australia) Pty Ltd v Black & Decker (Australasia) Pty Ltd* (1990) ATPR ¶41-030 at 51,477 per Wilcox J.

47 (1992) 175 CLR 564.

48 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188 per Mason J (with whom Jacobs and Murphy JJ agreed). See also at 189 per Aickin J; 18 ALR 55 at 69, 71. And see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc* unreported, Supreme Court of the United States, 12 January 2000.

from the administration of the law as not to involve a matter for the purposes of Ch III of the Constitution. And as it is not a matter for those purposes, it cannot engage the judicial power of the Commonwealth[49]. In this respect, at least, the practical position may not be very different from that reached in the United States with respect to citizen-suit provisions of the kind considered in *Steel Co.* This issue can, however, be put to one side, for it is not a question raised by the Case Stated.

Answers to questions in the Case Stated

53 The questions in the Case Stated should be answered as follows:

Q12.1 Are sections 80 and 163A of the *Trade Practices Act 1974 (Cth)* invalid insofar as they purport to confer standing on the applicant to bring the present proceedings?

A No.

Q12.2 Does the applicant have standing to bring proceedings in the Federal Court in respect of the subject matter of these proceedings:

(a) for an injunction in reliance upon section 65 of the *Fair Trading Act 1987 (NSW)* and in purported reliance upon the accrued or pendent jurisdiction of the Federal Court;

(b) for an injunction in reliance upon section 23 of the *Federal Court of Australia Act 1976 (Cth)*;

(c) for a declaration that another person has engaged in misleading and deceptive conduct in contravention of section 52 of the *Trade Practices Act* or section 42 of the *Fair Trading Act*?

A Unnecessary to answer.

Q12.3 Is section 65 of the *Fair Trading Act* a law of a State:

(a) for the purposes of section 109 of the *Constitution*, inconsistent with the *Trade Practices Act*; or

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49 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

(b) in conflict with Chapter III of the *Constitution* in purporting to confer standing on the applicant to bring the proceedings in the Supreme Court of New South Wales against the respondent[50]?

A Unnecessary to answer.

Q12.4 If the Federal Court has no jurisdiction in respect of these proceedings, should the proceedings be remitted to a court of a state?

A Unnecessary to answer.

Q12.5 By whom should the costs of the proceedings in the Full Court be borne?

A The respondent, Macquarie Infrastructure Investment Management Limited.

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50 This question originally referred to the Federal Court. The Case Stated was subsequently amended to refer to the Supreme Court of New South Wales.

54 GUMMOW J. One of the questions in the case stated for the Full Court, by a Justice of the Court under s 18 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), asks:

> "Are sections 80 and 163A of the *Trade Practices Act 1974 (Cth)* invalid insofar as they purport to confer standing on the applicant to bring the present proceedings"?

The Federal Court proceeding

55 In a proceeding commenced in the Federal Court of Australia in 1997 (and removed into this Court by order under s 40 of the Judiciary Act), the applicant seeks relief under provisions of the *Trade Practices Act* 1974 (Cth) ("the Act"). It seeks an order pursuant to s 80 of the Act that the respondent publish certain corrective advertising, and a declaration, apparently pursuant to s 163A of the Act, that the respondent engaged in misleading or deceptive conduct contrary to s 52 of the Act by acting in the fashion described in the Amended Application dated 1 July 1998.

56 On the pleadings, the applicant admits that it has no "special interest" in the subject-matter of the claim but it says that it has an interest in common with others in ensuring compliance by the respondent with the laws of the Commonwealth, contravention of which it alleges. The applicant further says that its interest in the subject-matter of the claim, although not an interest which would satisfy "the common law test of standing" is that vested in it by ss 80 and 163A of the Act.

57 The respondent is the manager of two unit trusts identified as Infrastructure Trust of Australia (I) and Infrastructure Trust of Australia (II) ("the ITA Group"). On or about 5 November 1996 the respondent issued a prospectus and a supplementary prospectus for the ITA Group. The prospectus invited the public to purchase units in those trusts. The Eastern Distributor is a project for the construction and operation of a toll road between the city of Sydney and Sydney Airport. The prospectus identified the Eastern Distributor as one of four "seed assets" of the ITA Group. The prospectus contained a statement ("the Statement"):

> "Traffic volume on the Eastern Distributor is anticipated to build up rapidly, as a consequence of the existing traffic volumes and the current congestion in the corridor, to an average daily volume of nearly 60,000 vehicles by 2006. Thereafter traffic volume on the Eastern Distributor is forecast to increase more slowly."

The applicant contends that in making the Statement the respondent represented that traffic on the Eastern Distributor would build up rapidly, that the average daily traffic volume on the Eastern Distributor would be nearly 60,000 vehicles

in 2006, and that traffic volume would build up more slowly after 2006. It alleges that the respondent's conduct in making such representations contravened s 52 of the Act.

58 The order sought pursuant to s 80 of the Act is that the respondent publish corrective advertising in a form and manner approved by the Federal Court "so as to provide an accurate estimate of likely future traffic volumes on the Eastern Distributor, and so as to correct the estimates of such traffic volume made in [the Statement]". The declaration sought is that in making the traffic volume forecasts for the Eastern Distributor in the Statement the respondent engaged in misleading and deceptive conduct.

Section 52

59 Section 52 of the Act states:

> "(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1)."

The United States provenance of s 52 was described by Stephen J in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*[51].

60 Section 52 is contained in Div 1 of Pt V of the Act. Part V (which at the relevant time comprised ss 51A-75A) is headed "Consumer Protection" and Div 1 (which then contained ss 51A-65A) is headed "Unfair Practices". Section 52(1) must be read with s 51A. This provides:

> "(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
>
> (2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.

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51 (1978) 140 CLR 216 at 226-227.

(3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead."

61 Further, with effect from 1 July 1998, s 52 does "not apply to conduct engaged in in relation to financial services". This is the effect of s 51AF(2)(a) which was inserted by s 3 and s 27 of Pt 2 of Sched 2 of the *Financial Sector Reform (Consequential Amendments) Act* 1998 (Cth). Since 1 July 1998, provision with respect to consumer protection in relation to financial services has been made by Div 2 of Pt 2 (ss 12AA-12IA) of the *Australian Securities and Investments Commission Act* 1989 (Cth). Section 12IA(1) provides:

"If:

(a) conduct was, or may have been, engaged in in relation to financial services before the commencement of this Division; and

(b) the conduct contravened, or may have contravened, Part IVA or V of the [Act]; and

(c) if the conduct had been engaged in after the commencement of this Division it would have, or may have, contravened this Division;

the [Australian Securities and Investment] Commission has, by virtue of this section, the same powers under the [Act] in relation to the conduct as the Australian Competition and Consumer Commission."

No point has been taken before this Court as to the significance these changes might have for the present litigation and I say nothing more respecting them.

62 Section 52 has various operations. Upon its face it is addressed to any "corporation". That term is defined in s 4(1) of the Act to mean a body corporate that is a foreign corporation, or a trading corporation formed within the limits of Australia or a financial corporation so formed (s 51(xx) of the Constitution), a body corporate that is incorporated in a Territory (s 122 of the Constitution), and a body corporate that is the holding company of any of these other bodies corporate. Section 6 gives s 52 an expanded operation by implicit reference to various constitutional powers of the Parliament, including those respecting interstate and overseas trade and commerce (s 51(i) of the Constitution), Territories (s 122) and posts and telegraphs (s 51(v)).

Remedies

63 Part VI (ss 75B-87C) of the Act is headed "Enforcement and Remedies". So far as immediately material, s 80(1) of the Act provides[52]:

> "[W]here, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
>
> (a) a contravention of any of the following provisions:
>
> (i) a provision of Part IV, IVA, IVB or V;
>
> (ii) section 75AU;
>
> (b) attempting to contravene such a provision;
>
> (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
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> (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
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> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
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> (f) conspiring with others to contravene such a provision;
>
> the Court may grant an injunction in such terms as the Court determines to be appropriate."

64 Part IV deals with restrictive trade practices and Pt IVA with unconscionable conduct. It will be apparent that s 80 operates in respect of a wide range of contraventions of the Act and it would be myopic to construe it solely by reference to its connection with Pt V, and with s 52 in particular.

65 The reference in s 80(1) to "the Commission" is to the Australian Competition and Consumer Commission established by s 6A of the Act. Section 86(1) is a law made pursuant to s 76(ii) and s 77(i) of the Constitution. It confers jurisdiction upon the Federal Court with respect to matters arising under the Act, such as the present litigation. Concurrent federal jurisdiction with

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52 The reference to s 75AU was included by Item 9 in Sched 1 of *A New Tax System (Trade Practices Amendment) Act* 1999 (Cth), which commenced on 9 July 1999.

respect to certain matters is invested in or conferred upon the courts of the States and Territories by s 86(2), (3). Provision is made by s 86A for the transfer of certain matters by the Federal Court to a court of a State or Territory and s 86B provides for transfer to the Family Court of Australia.

66 The Federal Court may grant an interim injunction pending the determination of an application under s 80(1) where, in the opinion of the Court, it is desirable to do so (s 80(2)). If the Court would require an applicant, not being the Minister or the Commission, to give an undertaking as to damages or costs, the Minister may give that undertaking and it is to be accepted by the Court without requirement of a further undertaking from any other person. That is the effect of s 80(7). Where the applicant in such a proceeding is the Minister or the Commission, there is to be no requirement by the Court for an undertaking as to damages (s 80(6)).

67 The section is wider in scope than s 16 of the Clayton Act 1914 (US) which entitles a private party to seek injunctive relief against "threatened loss or damage by violation of the antitrust laws"[53]. The regime established by s 80 differs in several respects from that applying to injunctions as traditionally understood[54]. In particular, negative and mandatory injunctions may be granted whether or not it appears to the Court that there is a continuing threat or an imminent danger of substantial damage and whether or not there has been a previous contravention. That is the effect of sub-ss (4) and (5) of s 80.

68 The entitlement conferred upon "any other person" by s 80(1) is subject to limitations. In particular, a person, other than the Commission, is not entitled to make such an application by reason of contravention of s 50 (s 80(1A)). Section 50 is in Pt IV (ss 45-51AAA), and deals with the prohibition of acquisitions that would result in a substantial lessening of competition. Section 50A deals with certain acquisitions that occur outside Australia. A person, other than the Minister or the Commission, may not apply for an injunction under s 80(1) on the ground of a person's actual or attempted or proposed contravention of s 50A or actual or proposed involvement in a contravention of that provision (s 80(1AAA)).

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53 See *Eastern Express Pty Limited v General Newspapers Pty Limited* (1992) 35 FCR 43 at 71.

54 *ICI Australia Operations Pty Limited v Trade Practices Commission* (1992) 38 FCR 248 at 254-257, 263-264, 268.

Phelps v Western Mining Corporation Ltd[55]

69 Section 80 has been amended from time to time since it was first enacted. At the time of the decision of the Full Court of the Federal Court in *Phelps*, s 80(1) provided in part:

> "The Court may, on the application of –
>
> (a) the Minister;
>
> (b) the [Trade Practices] Commission; or
>
> (c) subject to sub-section (1A) – any other person,
>
> grant an injunction restraining a person from engaging in conduct that constitutes or would constitute –
>
> (a) a contravention of a provision of Part IV or V".

70 In *Phelps*, the Full Court was construing s 80(1)(c) in its operation with respect to contraventions of certain provisions of Pt V of the Act, including s 52. No question of validity arose.

71 In construing s 80(1)(c), Bowen CJ accepted the submission[56]:

> "that Parliament intended to modify the principles applicable to the standing of private citizens to enforce public rights in their own name and not on the relation of the Attorney-General, by removing the requirement that such a litigant suffer either an infringement of some private right of his own or suffer special damage other than that suffered by the rest of the public (see *Boyce v Paddington Borough Council*[57]; *Helicopter Utilities Pty Ltd v Australian National Airlines Commission*[58])."

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55 (1978) 20 ALR 183.

56 (1978) 20 ALR 183 at 185.

57 [1903] 1 Ch 109.

58 [1962] NSWR 747.

His Honour concluded[59]:

> "The remedy afforded by s 80(1)(c) is a remedy primarily in protection of the class of persons affected by the conduct called in question. In this sense it is in protection of the public against misleading and deceptive practices. Incidentally or collaterally with that protection an applicant under s 80(1)(c) may obtain an advantage to his own trade or business. His standing, however, is derived from the fact that the essential nature of his suit is one for the protection of the public interest. In my view it is irrelevant whether an interest of his own is affected or not (see *World Series Cricket Pty Ltd v Parish*[60]). The standing which the legislature afforded under s 80(1)(c) is expressed in the clearest and simplest terms. In my opinion there is no warrant for qualifying the language which the legislature has used. Certainly the qualifications for which the applicant contends cannot survive the decision of the High Court in *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd*[61] for there it was held that a competitor of a defendant has standing under s 80(1)(c) not by reason of his competitive interest, but rather because he is one of an unqualified class of persons who can proceed under the section."

In his concurring judgment in *Phelps*, Deane J said[62]:

> "The argument that to give the words which the Parliament has used their ordinary meaning would, to use a popular phrase, 'open the flood-gates of litigation' strikes me as irrelevant and somewhat unreal. Irrelevant, in that I can see neither warrant for concluding that the Parliament did not intend that flood-gates be opened on practices which contravene the provisions of the Act nor reason for viewing that prospect, if it were a realistic one, with other than equanimity. Unreal, in that the argument not only assumes the existence of a shoal of officious busybodies agitatedly waiting, behind 'the flood-gates', for the opportunity to institute costly litigation in which they have no legitimate interest but treats as novel and revolutionary an approach to the enforcement of laws which has long been established in the ordinary administration of the criminal law".

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59 (1978) 20 ALR 183 at 187.

60 (1977) 16 ALR 181 at 186-187, 194.

61 (1978) 140 CLR 216.

62 (1978) 20 ALR 183 at 189.

His Honour went on to refer to various authorities respecting informations laid by common informers including *Brebner v Bruce*[63]. In that case this Court construed s 13 of the *Crimes Act* 1914 (Cth) ("the Crimes Act"). Section 13 conferred authority upon "any person" to institute criminal proceedings in respect of an alleged contravention of a law of the Commonwealth.

72 At the time of the adoption of the Constitution, it was well recognised both in England and the United States that statute might grant to the first common informer who brought the action "[t]he right to recover the penalty or forfeiture granted by [the] statute ... although he has no interest in the matter whatever except as such informer"[64]. Further, beginning in 1692 (with 4 Will & Mary, c 8), various English statutes had provided for rewards in substantial sums to persons who apprehended and prosecuted to conviction those guilty of a range of felonies[65]. This "reward system" had been "designed to enhance the incentives to prosecute in a largely privatised criminal justice system, which lacked both police and public prosecutors in the modern sense"[66].

73 In *Phelps* Deane J continued[67]:

> "It is patently desirable that the legislature does not assume that traditional rules of the common law relating to *locus* to institute civil proceedings are universally appropriate to circumstances where laws are increasingly concerned with the attainment and maintenance of what are seen as desirable national economic and commercial objectives and standards and with the protection not only of the life and liberty of the citizen but of the environment in which he lives and of the quality of the life which he may lead. There is little merit in approaching the construction of a statute on the basis that it is to be presumed that the Parliament has in fact ill-advisedly made such an assumption."

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63 (1950) 82 CLR 161.

64 *Marvin v Trout* 199 US 212 at 225 (1905). See also *Marcus v Hess* 317 US 537 at 541-542 (1943); Radzinowicz, *A History of English Criminal Law*, (1956), vol 2 at 138-147.

65 Radzinowicz, *A History of English Criminal Law*, (1956), vol 2 at 57-82.

66 Langbein, "The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors", (1999) 58 *Cambridge Law Journal* 314 at 357.

67 (1978) 20 ALR 183 at 190.

74 The reasoning in *Phelps* also applies to the construction of s 163A of the Act. This is found in Pt XII (ss 155-173) which also deals (s 163) with prosecutions for offences against the Act. Prosecutions by private parties shall not be instituted without Ministerial consent (s 163(4)). Contravention of s 52 does not give rise to an offence (s 79(1)). So far as presently material, s 163A authorises "a person" to institute a proceeding "in relation to a matter arising under this Act", seeking the making of a declaration in relation to the operation or effect of any provision of the Act, other than Divs 2, 2A or 3 of Pt V, Pt VB, Pt XIB and Pt XIC. Division 2 of Pt V deals with conditions and warranties in consumer transactions, Div 2A with actions against manufacturers and importers of goods and Div 3 with the rescission by consumers of certain contracts. Part VB deals with "Price exploitation in relation to A New Tax System"[68]. Part XIB deals with the telecommunications industry and Pt XIC establishes a telecommunications access regime.

75 In the present litigation, the respondent's submissions accept the construction placed upon s 80, in its various forms, in *Phelps* and later authorities over the last 20 years, but challenge its validity and that of s 163A.

Validity

76 The respondent denies the validity of the operation of ss 80 and 163A with respect to the relief sought by the applicant for alleged contravention of s 52 by the respondent. The respondent submits that the vice of these provisions is that, in contravention of Ch III of the Constitution, they purport to confer standing on the applicant, as a person entitled to bring proceedings in the Federal Court and thereby invoke the judicial power of the Commonwealth. This attack is mounted on the ground that there is no "justiciable controversy" and no "matter" to be determined. In particular, it was said to be a fatal defect in the statutory remedial scheme that there was no requirement of mutuality or reciprocity of right and liability between parties.

77 There is no such requirement for enforcement of a law as a matter arising under s 76(ii) of the Constitution. I turn to explain why this is so. It is convenient first to indicate further the place of s 52 in the Act and the nature of the present proceeding.

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68 The reference to Pt VB was inserted by Item 17 in Sched 1 of *A New Tax System (Trade Practices Amendment) Act* 1999 (Cth), which commenced on 9 July 1999.

78 In *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc*[69], the Full Court of the Federal Court analysed the operation of s 52 as follows:

> "Section 52 does not purport to create liability, nor does it vest in any party any cause of action in the ordinary sense of that term; rather, s 52 establishes a norm of conduct, and failure, by the corporations and individuals to whom it is addressed in its various operations, to observe that norm has consequences provided for elsewhere in the Act[70]."

79 Section 52 thus is an exercise by the Parliament of its powers to create new norms of conduct and require their observance by specified sections of the community. The legislature may also, in exercise of its powers, adapt remedies known at general law or modify them or create new remedies. It may do so not only to prevent or to compensate for injury done by violation of the new federal norm of conduct[71], but to enforce or induce compliance with the federal law[72]. An example of the latter was the treble damages provision of s 11 of the *Australian Industries Preservation Act* 1906 (Cth). The validity of s 11 was upheld in *Redfern v Dunlop Rubber Australia Ltd*[73].

80 Part VI (which contains s 80) and Pt XII (which contains s 163A) make provisions which effect the attainment of one or more of those ends. In many cases, the remedy sought under s 80 for a prohibitory injunction would have the character of enforcing present compliance or inducing future compliance with the norm of conduct imposed by s 52, and a declaration would provide consequential relief. In the present case, the mandatory injunction sought would be apt to counterbalance the injury to the public interest allegedly sustained by the publication of the Statement.

81 The applicant contends that its application to the Federal Court invited the exercise by that Court of jurisdiction with respect to a matter arising under a law made by the Parliament, within the meaning of s 76(ii) of the Constitution. The "matter" would "arise under" the Act because the duty in question in the matter,

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69 (1988) 19 FCR 469 at 473.

70 *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 at 348.

71 *Fencott v Muller* (1983) 152 CLR 570 at 599-600.

72 *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194 at 209, 213-214, 223, 229, 232.

73 (1964) 110 CLR 194.

observance of the norm imposed by s 52, would both owe its existence to the Act and depend upon Pt VI of the Act for its enforcement[74].

82 The constitutional point taken by the respondent, which precipitated the order for removal into this Court, gives rise to another "matter" in the same proceeding. This is a matter arising under the Constitution or involving its interpretation within the meaning of s 76(i) of the Constitution and s 30(a) of the Judiciary Act. There is no objection to the constitutional competence of this Court to determine that matter. The objection is that the substantive proceeding does not answer the criteria for a matter arising under a law of the Commonwealth.

83 The Act in its various operations is supported by a number of heads of power in s 51 of the Constitution. I have indicated earlier in these reasons the support derived from such provisions of ss 51(i), (v), (xx) and 122 of the Constitution. However, the legislative powers conferred by s 51 are expressed to be "subject to this Constitution" and therefore to Ch III[75].

84 Section 76(ii), in conjunction with s 77(i), of the Constitution permits the conferral of jurisdiction on federal courts in matters arising under laws made by the Parliament for the Territories under s 122 of the Constitution. It was determined in *Northern Territory v GPAO*[76] that in such cases the constitutional source of the jurisdiction is those provisions of Ch III and that the jurisdiction is federal. Section 122 of the Constitution is not, in terms, expressed to be "subject to this Constitution", as is s 51. Nevertheless, for the purposes of conferral of federal jurisdiction pursuant to Ch III, the same situation must obtain.

Sections 75 and 76 of the Constitution

85 Sections 75 and 76 of the Constitution state:

> "75. In all matters –
>
> (i) Arising under any treaty:
>
> (ii) Affecting consuls or other representatives of other countries:

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74 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

75 See *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205.

76 (1999) 73 ALJR 470; 161 ALR 318.

(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv) Between States, or between residents of different States, or between a State and a resident of another State:

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter –

(i) Arising under this Constitution, or involving its interpretation:

(ii) Arising under any laws made by the Parliament:

(iii) Of Admiralty and maritime jurisdiction:

(iv) Relating to the same subject-matter claimed under the laws of different States."

86 The nine heads of "matter" specified in ss 75 and 76 of the Constitution are identified (a) as to some (for example, s 75(ii), (iii), (iv)) by the identity of the parties not by the source of the rights and liabilities in question or the remedy sought; (b) as to others (for example, ss 75(i), 76(ii), (iii)) by the source of those rights and liabilities; or (c) by the nature of the remedy sought against a party who answers a particular description (as in s 75(v)).

87 To some extent, for example, for matters arising under the Constitution or involving its interpretation (s 76(i)), and actions between States (s 75(iv)), the subject of the litigation has no counterpart to the private law rights and liabilities disputed in common law actions. In other litigation, for example, the subject of the case stated, the liabilities in question are created purely by statute. Further, s 75(v) indicates a head of federal jurisdiction where the activity complained of may be that in purported exercise of the executive power of the Commonwealth, affecting personal rather than proprietary rights. Again, the traditional Admiralty jurisdiction had its own peculiar procedures and remedies, in particular those respecting maritime liens and the action in rem; jurisdictional provision in this respect now is made by Pt II (ss 9-13) of the *Admiralty Act* 1988 (Cth). Further, as this litigation demonstrates, the one proceeding may answer the description of several species of "matter".

The development before 1900 of "standing"

88 The terms "standing" and "*locus standi*" are metaphors, whose origin apparently comes from the posture required of advocates[77]. Metaphors in the law are apt to obscure rather than illuminate.

89 Care is called for in accepting any all-embracing limitation as to what is required for "standing" in matters in federal jurisdiction. It has been well said of the developing use of the term "standing" in the last century[78]:

> "The word appears here and there, spreading very gradually with no discernible pattern. Judges and lawyers found themselves using the term and did not ask why they did so or where it came from."

The term may have its origins in British parliamentary practice. The position reached by 1912 was described as follows in Halsbury, *The Laws of England*[79]:

> "In both Houses there are standing orders which give to certain classes of petitioners a definite *locus standi* or right to appear in opposition against any Bill the provisions of which may affect them injuriously".

90 The use of private bills to authorise the activities of corporations formed to develop railways, waterworks, gasworks, sewers, docks, bridges and other elements of modern infrastructure had directed attention to the practice of the British Parliament with regard to the admission or rejection of the rights of petitioners to be heard in opposition to the promotion of such bills. In their treatise, published in 1870, on the practice with respect to *locus standi* of petitioners, Clifford and Stephens said[80]:

> "There can be few subjects in themselves more worthy of investigation, and few more interesting in their practical bearing upon the springs of national wealth and enterprise, than those which are covered by the Parliamentary phrase of *Locus Standi*."

Until 1864 questions of *locus standi* were determined in the House of Commons by the Committee to which the private bill had been referred; petitioners had no

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77 Winter, "The Metaphor of Standing and the Problem of Self-Governance", (1988) 40 *Stanford Law Review* 1371 at 1386-1393.

78 Vining, *Legal Identity*, (1978) at 55.

79 1st ed, vol 21 at 749.

80 1 Locus Standi Reports 1.

locus standi, as Erskine May, somewhat ambiguously put it, "when their property or interests [were] not directly and specially affected by the bill, or when, for other reasons, they [were] not entitled to oppose it"[81]. In 1864, the Commons established bodies within the House, known as the Courts of Referees, to decide such questions[82]. Standing Orders limited the standing of dissentient shareholders in the company promoting the bill, provided for petitions by municipal authorities and the inhabitants of any town or district alleged to be "injuriously affected" by the bill, and for the admission of petitions against the bill "on the ground of competition"[83].

91 These provisions foreshadowed the development of principles to identify a sufficiency of interest to seek equitable relief to restrain the enterprise, enfranchised by the enactment of the bill, from exceeding its statutory authority[84].

92 When the jurisdiction of the courts of common law in England was defined by the system of writs and the forms of action, there was no need to speak of standing. The question was whether the plaintiff was entitled to a writ and

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81 Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 5th ed (1863) at 731.

82 (1870) 1 Clifford and Stephens Locus Standi Reports 1 at 1; Smethurst, *A Treatise on the Locus Standi of Petitioners Against Private Bills in Parliament*, 2nd ed (1867) at vii; Erskine May, *A Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 10th ed (1893) at 732-733. The Courts of Referees were empowered by statute, *The Parliamentary Costs Act* 1867 (UK), 30 & 31 Vict c 136, to administer oaths and award costs in the same manner as Committees on Private Bills.

83 The text of the relevant Standing Orders Nos 130, 131 and 133 is set out in Smethurst, *A Treatise on the Locus Standi of Petitioners Against Private Bills in Parliament*, 2nd ed (1867) at 130.

84 In some instances, the occasion for the promotion of a particular private bill was provided by proceedings in Chancery which had established that the proposed development, for example a railway line, went beyond that authorised by an existing statute. As such, the proprietor of the railway would not attract a statutory immunity against actions for nuisance by neighbouring landowners: Great Northern Railway (Further Powers) Bill, (1874) 1 Clifford and Rickards Locus Standi Reports 80 at 81; South Eastern Railway Bill, (1876) 1 Clifford and Rickards Locus Standi Reports 258 at 259.

whether the writ lay. Writing in 1870, after the abolition of the forms of action, Dicey said[85]:

> "The maintenance of an action depends upon the existence of what is termed a 'cause of action,' ie, of a right on the part of one person (the plaintiff), combined with the violation of, or infringement upon, such right by another person (the defendant). ... There goes, it should be noticed, to make up the cause of action at once the 'existence' and the 'violation' of a right, and the expression cause of action means (in strictness) the whole cause of action, ie, all the facts which together constitute the plaintiff's right to maintain the action".

Under a system of strict common law pleading, "the question of [the] plaintiff's standing merged with the legal merits"[86]. Hence the statement by Gaudron, Gummow and Kirby JJ in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*[87]:

> "In private law there is, in general, no separation of standing from the elements in a cause of action."

The result is that when a resident of one State sues a resident of another State in tort or contract, federal jurisdiction under s 75(iv) is attracted, but no distinct question of standing arises.

93 In any event, the common law courts were not limited to the trying of civil actions to vindicate disputes as to private rights and liabilities. Further, in criminal prosecutions, the Crown was not the only competent moving party. Reference has been made earlier in these reasons to the importance placed upon the role of the common informer by Deane J in his analysis of s 80 in *Phelps*. Reference must also be made to the writs of habeas corpus, *quo warranto* and prohibition.

94 Habeas corpus has been associated in the popular mind with relief against abuse of public power by wrongful deprivation of liberty. The association is correct, but the writ lay also in what now would be called family law disputes[88]. However, where the complaint was of the wrongful imprisonment of a person,

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85 *A Treatise on the Rules for the Selection of the Parties to an Action*, (1870) at 6-7.

86 Chayes, "The Role of the Judge in Public Law Litigation", (1976) 89 *Harvard Law Review* 1281 at 1290.

87 (1998) 194 CLR 247 at 264.

88 *Barnado v McHugh* [1891] AC 388.

then, in the words of Madden CJ, "[a]nybody in the community who knows that a person is wrongfully imprisoned has a right to have the writ to discharge that person out of the imprisonment"[89]. In *Ex parte Walsh and Johnson; In re Yates*, Isaacs J rejected the proposition that when habeas corpus was sought in this Court in aid of a case of alleged constitutional invalidity, there was no cause "between parties"[90].

95 Likewise, in the Court of King's Bench, a proceeding by way of information in the nature of *quo warranto* lay at the instance of private persons where there had been usurpation of an office of a public nature or an office "substantive in character"[91]. In his judgment in *R v Speyer*, in which he accepted these propositions respecting *quo warranto*, Lord Reading CJ observed that a "stranger to the suit can obtain prohibition"[92]. In this Court, there is a body of authority that, even in the absence of a legal interest, a "stranger" to an industrial dispute has standing as prosecutor to seek an order for prohibition under s 75(v) of the Constitution; this is so although in such cases the discretion to refuse the remedy may be greater than would otherwise be the case. Authority for these propositions respecting s 75(v) was collected in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*[93].

96 In Chancery, the position was different from that with respect to common law actions. There, the plaintiff by the bill sought to lay out the facts and circumstances demonstrating the equity to the relief claimed. That equity might arise from the violation or apprehended violation of rights secured in the exclusive jurisdiction, or by reason of the inadequacy of legal remedies available to vindicate the plaintiff's legal rights, or as a defensive equity to resist the legal claims made against the plaintiff by the defendant in an action the defendant pursued at law[94].

97 The legal rights, interests and remedies in question might be derived not from the common law but from statute. A law might, upon its proper

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89 *R v Waters* [1912] VLR 372 at 375.

90 (1925) 37 CLR 36 at 75.

91 *R v Speyer* [1916] 1 KB 595 at 609.

92 [1916] 1 KB 595 at 613; but cf Tracey, "Certiorari and Prohibition" in Stein (ed), *Locus Standi*, (1979) 56 at 62-64.

93 (1998) 194 CLR 247 at 263-264.

94 See the discussion by Deane J in *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 434-435.

construction, confer rights upon the plaintiff but provide no remedies or inadequate remedies. In those circumstances, Chancery might intervene to protect the plaintiff's statutory rights[95]. On the other hand, rather than conferring rights upon the plaintiff, statute might impose obligations upon administrators or particular sections of the community, or upon the community at large. Statute might confer franchises or privileges with particular limitations upon them. In either case, the statute might provide no means, or inadequate means, for enforcement of the obligation or to restrain ultra vires activity. This led to the engagement of the equity jurisdiction in matters of public law. That subject is traced in the judgments in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd*[96]. As is there explained, the Attorney-General was treated as a competent party (with or without a relator) to seek enforcement of the statutory prohibitions by equitable remedies, particularly the injunction. The Attorney-General also had traditional functions in the exclusive jurisdiction of Chancery with respect to matters involving a public element, in particular the enforcement of charitable trusts.

98 The question arose as to the competency of parties other than the Attorney-General to proceed without the Attorney-General's fiat to seek enforcement of statutory regimes or obligations of a public nature. Here lies the genesis of the modern concept of "standing", in its translation from legislative to judicial proceedings. The litigious activity did not involve the exercise by a plaintiff of personal rights bestowed upon the plaintiff by statute. Rather, it involved the use of the auxiliary jurisdiction in equity to fill what otherwise were inadequate provisions to secure the compliance by others with particular statutory regimes or obligations of a public nature.

99 The result is that, at the time of the adoption of the Constitution, and with respect to a range of disputes which might thereafter attract federal jurisdiction, there was no single theory as to what always would be required to render competent the institution of proceedings by a particular party. In particular, there was no general rule which prescribed the adequacy in any given case of the connection between the instituting party and the subject-matter for determination in that case. Further, in matters of what now would be called public law there was no single criterion as to the need for, or the content of, a standing requirement.

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95 *Fejo v Northern Territory* (1998) 195 CLR 96 at 123.

96 (1998) 194 CLR 247. See also the further discussion by Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5 at [57]-[58].

100 All of this suggests the need for considerable caution in extrapolating to Ch III generally narrow rules of standing from the fields of public law under consideration: namely, where a statute was silent and equity intervened (a discourse which was still evolving in 1900) and the new field of judicial review for constitutional validity referred to above. It would be incautious to adopt a criterion for standing which would restrict the means available to the Parliament under s 76(ii) of the Constitution to enforce or induce by new remedies compliance with legislative norms of conduct. Such an extrapolation would deny the avowed design of Ch III. This involved employing "matter" as a comprehensive term, established by usage, to describe every possible kind of judicial procedure which could arise under Ch III[97].

Standing and Chapter III

101 The usage in equity of the term "standing" and the concepts which were involved helped provide a foundation for the development of the modern constitutional doctrine of standing[98]. In Australia, this was concerned in particular with the operation of ss 75(iii), (v) and 76(i) of the Constitution. In the *Union Label Case*[99], the question arose as to the competence of the Attorney-General of a State to sue the Commonwealth under s 75(iii) to protect the public from the operation of an invalid federal law. O'Connor J said[100]:

> "In a unitary form of government, as there is only one community and one public which the Attorney-General represents, the question which has now been raised cannot arise. It is impossible, therefore, that there can be any decision either in England or in any of the Australian Colonies before Federation exactly in point. But it seems to me that in the working out of the federal system established by the Australian Constitution an extension of the principle is essential."

102 Later, in *Tasmania v Victoria*, Dixon J explained that the competence accorded in this Court to Attorneys-General of the States and the Commonwealth

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97 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507-508.

98 Winter, "The Metaphor of Standing and the Problem of Self-Governance", (1988) 40 *Stanford Law Review* 1371 at 1418-1425.

99 *Attorney-General for NSW v The Brewery Employés Union of NSW* (1908) 6 CLR 469.

100 (1908) 6 CLR 469 at 552.

to sue for relief against the operation of valid laws and executive acts was a development of the principle that[101]:

> "[i]t is an ordinary function of the Attorney-General, whose office it is to represent the Crown in Courts of Justice, to sue for the protection of any public advantage enjoyed under the law as of common right."

Rich J stated[102]:

> "In a matter of public right the Attorney-General sues on behalf of the public. There is no reason why his right to do so should be confined to matters of exclusively domestic concern. On the contrary there is every reason in a Federal system that this principle should be applied to allow him to maintain proceedings to vindicate the rights conferred upon his public by a provision of the Constitution."

103 From this reasoning there developed the practice of the Court whereby the validity of laws and delegated legislation made thereunder may be challenged not only by Attorneys-General but also by persons claiming declarations of invalidity in support of a sufficient interest which is not abstract or hypothetical. *Croome v Tasmania*[103] was an action brought in this Court under s 30(a) of the Judiciary Act as a matter arising under the Constitution or involving its interpretation. The provisions of the legislation said to be rendered invalid by the operation of s 109 of the Constitution affected the plaintiffs not as to their property rights but in their person. The Tasmanian statute imposed duties requiring the observance of particular norms of conduct and attaching criminal liability to prosecution and subsequent punishment for disobedience. In *Croome*, Gaudron, McHugh and Gummow JJ, in rejecting the case put by Tasmania for the striking out of the action, observed[104]:

> "The submission made in the present case, to the effect that a proceeding in which a citizen seeks a declaration of invalidity of a law of a State, by reason of the operation of the Constitution, is liable to be struck out unless there is attempted enforcement of the State law against the citizen, indicates the interdependence of the notions of 'standing' and of 'matter'."

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101 (1935) 52 CLR 157 at 186.

102 (1935) 52 CLR 157 at 171.

103 (1997) 191 CLR 119.

104 (1997) 191 CLR 119 at 133.

104 However, it is necessary to keep clearly in view the range over which ss 75 and 76 of the Constitution operate. This particularly is so with respect to s 76(ii), the paragraph in issue here. Not all "matters" which attract the exercise of the judicial power of the Commonwealth involve the assertion by the plaintiff of a recognised private right against apprehended or actual violation by the defendant. The Crimes Act is replete with examples to the contrary. The present applicant thus is not unique in this respect, nor doomed to failure because of it.

105 In *R v Davison*[105], Dixon CJ and McTiernan J referred to statements indicating the necessity for (i) a controversy between subjects or between the state and a subject, (ii) the determination of existing rights and liabilities as distinguished from the creation of new ones, and (iii) the submission by the parties to adjudication and enforcement of the judgment. Their Honours went on to refer to various examples in which one or more of these elements was entirely lacking, even though the proceedings fell within the jurisdiction of various courts of justice in English law. In particular, these examples deny any universal requirement for reciprocity or mutuality of right and liability between plaintiff and defendant.

106 In *Davison*, Dixon CJ and McTiernan J said[106]:

> "In the administration of assets or of trusts the Court of Chancery made many orders involving no *lis inter partes*, no adjudication of rights and sometimes self-executing. Orders relating to the maintenance and guardianship of infants, the exercise of a power of sale by way of family arrangement and the consent to the marriage of a ward of court are all conceived as forming part of the exercise of judicial power as understood in the tradition of English law. Recently courts have been called upon to administer enemy property. In England declarations of legitimacy may be made. To wind up companies may involve many orders that have none of the elements upon which these definitions insist. Yet all these things have long fallen to the courts of justice. To grant probate of a will or letters of administration is a judicial function and could not be excluded from the judicial power of a country governed by English law."

107 After those observations were made, the Parliament enacted s 92 of the *Marriage Act* 1961 (Cth) which confers federal jurisdiction with respect to the making of declarations of legitimacy. That provision was held to be within the authority conferred on Parliament by the joint operation of s 76(ii) and (iii) of the

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105 (1954) 90 CLR 353.

106 (1954) 90 CLR 353 at 368.

Constitution[107]. Section 13D of the *Trading with the Enemy Act* 1939 (Cth) conferred jurisdiction on this Court with respect to the administration of enemy property and was not challenged as being beyond s 76(ii) of the Constitution[108]. Further, the welfare of a child of a marriage is a "matter" which may arise under the *Family Law Act* 1975 (Cth) for the purposes of s 76(ii) of the Constitution[109].

United States authorities

108 At the time s 80 was first enacted, there was significant United States authority which would indicate that, as construed in *Phelps*, such a provision was valid. As long ago as 1943, when giving the decision of the Court of Appeals for the Second Circuit in *Associated Industries v Ickes*, Judge Frank had said[110]:

> "While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."

109 However, the respondent placed particular reliance upon more recent United States decisions. They are *Lujan, Secretary of the Interior v Defenders of*

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107 *Connolly v Connolly* (1966) 115 CLR 166 at 168.

108 See *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370.

109 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.

110 134 F 2d 694 at 704 (1943) (footnote omitted).

Wildlife[111], *Bennett v Spear*[112] and *Steel Co v Citizens for a Better Environment*[113]. The cases appear to suggest that there is a "core requirement" with respect to all matters of federal jurisdiction under Art III of the United States Constitution. This will deny standing to such a "stranger", even where Congress has expressly authorised "citizen suits" to enforce certain laws of the United States in federal courts.

110 Article III, s 2 of the United States Constitution, so far as material, provides:

> "The Judicial Power shall extend to *all Cases, in Law and Equity, arising under* this Constitution, *the Laws of the United States*, and Treaties made, or which shall be made, under their Authority;– to all Cases affecting Ambassadors, other public Ministers and Consuls;– to all Cases of admiralty and maritime Jurisdiction;– to Controversies to which the United States shall be a Party;– to Controversies between two or more States;– between a State and Citizens of another State;– between Citizens of different States;– between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> *In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.* In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (emphasis added)

The similarity between the grant in respect of "all Cases, in Law and Equity, arising under ... the Laws of the United States" and the text of s 76(ii) will be readily apparent. However, there is no counterpart in Art III of s 75(v). That, for present purposes, is significant.

111 One reason for the inclusion of s 75(v) was to avoid the gap in the original jurisdiction of the United States Supreme Court disclosed by the actual decision in *Marbury v Madison*[114]. The discussion of s 75(v) by Quick and Garran[115]

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111 504 US 555 (1992).

112 137 L Ed 2d 281 (1997).

113 523 US 83 (1998).

114 1 Cranch 137 (1803) [5 US 137].

115 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 778-779.

indicates that the provision was included with an eye to overcoming the position in the United States. In *Marbury v Madison*, the Supreme Court held invalid legislation which purported to enlarge the original jurisdiction of the Supreme Court beyond that stipulated in Art III by authorising the issue of mandamus.

112 In each of the three recent Supreme Court decisions, the laws in question, the *Endangered Species Act* 1973 (US) and the *Emergency Planning and Community Right-To-Know Act* 1986 (US), authorised "any person" to commence a civil action or suit "on his own behalf" in a United States District Court to compel compliance with the regulatory regime established by the law. Another example of Congress conferring standing "solely to assure that government officials obey the law"[116] was found in the *Clean Air Act* 1970[117]. Earlier authority in the Supreme Court suggested that the "injury required by Art III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing'"[118]. In *Bennett v Spear*[119], Scalia J, delivering the opinion of the Court, referred to statutory schemes "to rely on private litigation to ensure compliance with the Act" and said that "the obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general'". That understanding is consistent with the reasoning of the Second Circuit in *Associated Industries v Ickes*, where the term "private Attorney Generals" had been coined[120], and with the construction given to s 80 by Bowen CJ in *Phelps* in the passage set out earlier in these reasons.

113 However, the effect of the recent United States decisions appears to be that federal laws containing provisions for "citizen suits" will be read down so as to deny constitutional competence to a plaintiff who does not meet the "irreducible constitutional minimum" of standing. This minimum is stated by Scalia J to require[121]:

> "(1) that the plaintiff have suffered an 'injury in fact' – an invasion of a judicially cognizable interest which is (a) concrete and particularized and

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116 Tushnet, "The New Law of Standing: A Plea for Abandonment", (1977) 62 *Cornell Law Review* 663 at 667.

117 42 USCS §1857h-2(a)(2) (transferred to 42 USCS §7604(a)(2)).

118 *Warth v Seldin* 422 US 490 at 500 (1975); *Linda R S v Richard D* 410 US 614 at 617 n3 (1973).

119 137 L Ed 2d 281 at 297 (1997).

120 134 F 2d 694 at 704 (1943).

121 *Bennett v Spear* 137 L Ed 2d 281 at 298 (1997).

(b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision[122]."

114 This formulation appears to be directed to "standing" in respect of all cases and controversies in federal jurisdiction. It is not said to derive from any established line of authority dealing with the creation by Congress of standing with respect to cases arising under the laws of the United States. Nor is the "irreducible constitutional minimum of standing" avowedly derived from an examination of the intentions of the Framers of Art III. I have sought to demonstrate that such an examination with respect to the state of affairs in Australia in 1900 would not support any analogous formulation with respect to Ch III.

115 In *Lujan, Secretary of the Interior v Defenders of Wildlife*[123], Scalia J, delivering the opinion of the Court on this point, supported the decision that the plaintiffs lacked standing on the grounds that the engagement of the courts in the way stipulated by Congress to vindicate the public interest, in the observance by the executive branch of the Constitution of laws made by Congress, would exceed the constitutional role of the third branch of government. Like the *Chevron* doctrine[124], considered in *Corporation of the City of Enfield v Development Assessment Commission*[125], *Lujan* appears to provide in the United States a battleground for competing theories respecting the proper roles of the three branches of government in supervising the regulatory state. In particular, there is the view that because the President is, or is to be seen to be, in charge of the execution of policy by federal agencies, they have, as Professor Sunstein has described this view, "a kind of democratic pedigree, certainly a better one than the courts"[126]. However, the powers of federal agencies may impinge upon activities otherwise within the domain of the States. The basic dispute may be

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122 *Lujan, Secretary of the Interior v Defenders of Wildlife* 504 US 555 at 560-561 (1992).

123 504 US 555 at 576-577 (1992).

124 After *Chevron USA Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984).

125 [2000] HCA 5.

126 Sunstein, "Must Formalism Be Defended Empirically?", (1999) 66 *University of Chicago Law Review* 636 at 660.

characterised as the fixing of the balance between the three branches of the federal government in the exercise of federal authority over that State domain. More recently, in his dissenting judgment[127] in *Federal Election Commission v Akins*, Scalia J explained his position as being that the judicial branch of government was "designed not to protect the public at large but to protect individual rights" and that the "primary responsibility" of compelling "Executive compliance with the law" was given by the United States Constitution to the President.

116 However, in Australia, the executive power specified in s 61 of the Constitution "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". Section 75(v) of the Constitution confirms, if confirmation were needed, that it is a prime function of the judicial branch, when its jurisdiction is properly enlivened, to secure execution of the laws of the Commonwealth according to their tenor and not otherwise. In any event, the observance required by the provisions of the Act here in question is from those actors in trade and commerce to whom s 52 of the Act applies, not the executive branch of government.

117 The reasoning in the recent United States decisions respecting statute-based "citizen suits" has been both criticised[128] and praised[129] by commentators. Moreover, the case law is not static. The debate may be expected to continue in the light of the 1998 decision of the Supreme Court in *Federal Election Commission v Akins*. Breyer J, delivering the opinion of the Court, considered the requirement for standing of an "injury in fact". His Honour held that this "injury" was established by the inability of a group of electors to obtain information respecting donors to an organisation which lobbied elected officials and disseminated information about candidates for public office[130]. On the view of the laws advanced by the group of electors, statute obliged the organisation to make this information public. It was decided that Congress had the constitutional power to authorise the vindication of this "informational injury" in the federal courts by declaratory relief[131]. The effect of the holding in *Akins* appears to be

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127 With whom O'Connor J and Thomas J joined: 524 US 11 at 36 (1998).

128 Sunstein, "What's Standing after *Lujan*? Of Citizen Suits, Injuries, and Article III", (1992) 91 *Michigan Law Review* 163; Nichol, "Justice Scalia, Standing, and Public Law Litigation", (1993) 42 *Duke Law Journal* 1141.

129 Breger, "Defending *Defenders*: Remarks on Nichol and Pierce", (1993) 42 *Duke Law Journal* 1202.

130 524 US 11 at 20 (1998).

131 524 US 11 at 24-25 (1998); see also *Friends of Earth Inc v Laidlaw Environmental Services (TOC), Inc* 68 USLW 4044 (2000).

"that Congress by statute can create rights that would not otherwise exist and the alleged violation of those rights is sufficient for standing, even under a broad citizen suit provision and even where the injury is widely shared in society"[132].

118 The *False Claims Act*[133], first enacted by Congress in 1863 and since amended, provides for a civil penalty and treble damages in respect of the making of false or fraudulent claims for payment by the United States Government. A civil action may be brought in a United States district court, as a *qui tam* action, by "a person" in the name of the United States government and this "relator" may receive up to 30 percent of the proceeds or settlement[134]. There is a division of opinion between the Circuits on various aspects of the interpretation and validity of this legislation. In particular, there is a dispute as to whether the *qui tam* provisions violate Art II of the United States Constitution by usurping the power of the Executive branch to execute its laws. Further, there is a difference of opinion as to whether a *qui tam* relator suffers the "injury-in-fact" required by *Lujan*. The authorities are collected in the dissenting judgment of Judge Weinstein in *United States v State of Vermont Agency of Natural Resources*[135].

119 Upon the merits of the continuing debate in the United States this Court cannot enter. It is sufficient to say that, in the context of the Australian Constitution and for the reasons given above, the recent United States decisions do not supply the support which the respondent sought to derive from them in demonstrating that ss 80 and 163A cannot be supported by s 76(iii) of the Constitution.

Conclusions

120 What is involved in the requirement imposed by ss 80 and 163A that courts exercising jurisdiction under the Act accept the competence of "any person" to institute and prosecute a proceeding for relief under those sections? It may be that this competence is a "power" enjoyed by each member of an innominate and universal class, to the exercise of which by the institution of a legal proceeding

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132 Chemerinsky, *Federal Jurisdiction*, 3rd ed (1999) at 96. See the observations to like effect in Breyer, Stewart, Sunstein and Spitzer, *Administrative Law and Regulatory Policy*, 4th ed (1998) at 946.

133 31 USCS §3729-3731.

134 The terms of the legislation are analysed in *United States ex rel Kelly v The Boeing Company* 9 F 3d 743 at 745-747 (1993).

135 162 F 3d 195 at 219-221 (1998). An appeal to the United States Supreme Court has been heard and judgment is reserved: (1999) 68 USLW 3343.

under Ch III the respondent is "liable". However that may be, it is unnecessary for there to be a "matter" that there be imposed upon the respondent any obligation or "duty" not to contravene any of those Parts of the Act stipulated in ss 80 and 163A by injuring or threatening to injure the personal, economic or other individual interests or "rights" of that "person" who actually sues for contravention of the Act.

121 It is not the case that the only members of the class who may institute and prosecute proceedings under ss 80 and 163A are those who complain of such an injury. As Bowen CJ explained in *Phelps*, the relevant injury is that to the public interest in the observance of the requirements of the Act. The competence of the applicant and the liability of the respondent to adjudication of the alleged contravention of the Act are manifested at different levels in the process of the adjudication of the "matter" arising under the Act.

122 Moreover, Ch III does not impose a universal requirement for adjudication under it of mutual or reciprocal relations between right and duty, power and liability, each the correlative of the other. The notion of "standing" is an implicit or explicit element in the term "matter" throughout Ch III, identifying the sufficiency of the connection between the moving party and the subject-matter of the litigation. However, it would be an error to attribute to this notion a fixed and constitutionally mandated content across the spectrum of Ch III. In particular, for Parliament to provide a remedy for enforcement of its laws by federal courts and courts exercising federal jurisdiction which, in effect, removes the need for the Attorney-General's fiat, is not to go beyond what may be a matter arising under a law made by the Parliament for the purposes of s 76(ii).

123 In such a case there is an immediate liability to be established against the respondent. The declaration under s 163A is a means to that end. Further, an injunction sought under s 80 would enforce that liability or go to rectify the consequences of failure to observe the law.

124 Reference was made in argument to the decision in 1921 in *In re Judiciary and Navigation Acts*[136]. In the joint judgment, the relevant reasoning appears in the following passage[137]:

> "All these opinions indicate that a matter under the judicature provisions of the Constitution must involve *some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law.* The adjudication of the Court may be sought in proceedings *inter partes* or

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136 (1921) 29 CLR 257.

137 (1921) 29 CLR 257 at 266-267.

> *ex parte*, or, if 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." (emphasis added)

There is a disjunction drawn in this passage, removed from notions of mutuality or reciprocity, between what the law gives and what the law inhibits. That disjunction was inevitable, given the nature of the criminal law and the proposition established by *R v Kidman* in 1915 that, as Isaacs J put it[138], "'[m]atters' include all justiciable causes of suit, whether civil or criminal."

125 The declaration of a particular contravention of a provision of Pts IV, IVA, IVB or V of the Act[139] and the making of orders, injunctive in nature, against one or more of the actors identified in s 80, involves the "prevention" and "redress" if not the punishment "of some act inhibited by law". This is none the less so where the moving party is a person who comes to the court not with the fiat of the Attorney-General under traditional procedures, but by statutory entitlement.

126 The question set out at the commencement of this judgment should be answered "no". It is unnecessary to answer the other questions. The costs of the case stated should be the costs of the cause in this Court, to be decided by a Justice of the Court before the cause is returned to the Federal Court.

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138 (1915) 20 CLR 425 at 444.

139 cf *Bass v Permanent Trustee Co Ltd* (1999) 73 ALJR 522 at 532-535; 161 ALR 399 at 413-417.

127 KIRBY J. The meaning of the word "matter" in Ch III of the Constitution, is elusive[140]. These proceedings require examination of the extent to which the concept imports a particular requirement about standing to sue. The doctrine of standing is itself "a house of many rooms"[141]. This Court should not accept the attempt to use the constitutional notion of "matter" to erode significantly the legislative powers of the Federal Parliament and to import a serious and unnecessary inflexibility into the Constitution[142].

The facts, proceedings and applicable legislation

128 The facts and course of proceedings[143] and the relevant legislation[144] are set out in the reasons of the other members of the Court. It would be pointless to repeat them. Truth About Motorways Pty Limited (the applicant) commenced proceedings in the Federal Court of Australia contending that representations contained in a prospectus issued by Macquarie Infrastructure Investment Management Limited (the respondent) contravened the *Trade Practices Act* 1974 (Cth) ("the Act"), ss 52, 53(aa) and 53(c)[145]. The respondent filed a defence pleading that the applicant had no standing to bring the proceedings. So far as ss 80 and 163A of the Act purported to confer standing on the applicant, the respondent asserted that those provisions were constitutionally invalid. The applicant denied that the impugned provisions of the Act contravened the Constitution. It thus tendered, in a Case Stated, the principal constitutional question now for decision. It was agreed during the hearing that, if the principal question were decided in favour of the applicant, it would be unnecessary for the Court to resolve the other questions.

129 Because I am of the view that the respondent fails on the principal question, it is undesirable to embark upon the resolution of other issues, the answers to

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140 *Abebe v The Commonwealth* (1999) 73 ALJR 584 at 626; 162 ALR 1 at 57-58 (hereafter "*Abebe*").

141 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 280 per McHugh J (hereafter "*Bateman's Bay*").

142 *Abebe* (1999) 73 ALJR 584 at 629; 162 ALR 1 at 62.

143 See Gaudron J at [23-24]; Gummow J at [55-58]; Callinan J at [186-190].

144 See Gleeson CJ and McHugh J at [6-10]; Gaudron J at [27-28] and [34-35]; Gummow J at [59-66]; Callinan J at [191].

145 As well as the equivalent provisions of the *Fair Trading Act* 1987 (NSW), ss 42, 44(b) and 44(e).

which would be of no more than theoretical interest. I would hold that the applicant had standing to bring the proceedings in the Federal Court pursuant to ss 80 and 163A of the Act[146]. Those provisions are constitutionally valid. They were otherwise sustained by heads of legislative power conceded to be sufficient[147]. They are not cut down or restricted by any limitation on the power of the Parliament to enact laws, implied from the requirement that the jurisdiction of a federal court may only be conferred in respect of a "matter"[148]. Nor does any implication derived from Ch III require a contrary conclusion.

130 There are obvious defects in the form of the order sought by the applicant for a mandatory injunction directed to the respondent. However, such defects are in my view matters for the Federal Court. If it is established that that Court has jurisdiction and that there is no constitutional impediment to its exercise of such jurisdiction, such questions can be left to that Court, at least in the first instance. The declaration sought is subject to a similar comment. I do not believe that this Court, in these proceedings, should condescend to such questions unless they were essential to the constitutional question that is before us.

Varied standing rights under Australian federal legislation

131 For some years the Australian Law Reform Commission has been considering reform of the law of standing in federal jurisdiction[149]. In the course of its examination of the subject, the Commission has reviewed the standing provisions contained in Australia's federal legislation[150]. Its analysis demonstrates that much federal legislation reflects the general rule of the common law (to which, however, there are a number of exceptions). This rule states that a party, invoking the jurisdiction of a court in respect to an alleged interference with a public right, must show either that some private right of that party has been interfered with at the same time, or that such party has suffered

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146 Which, in turn, enabled the applicant to enlist the jurisdiction of the Federal Court of Australia. See *Federal Court of Australia Act* 1976 (Cth), ss 19(1) and 23.

147 See eg Constitution, s 51(xx) and (xxxix). This was conceded by the respondent; cf *Fencott v Muller* (1983) 152 CLR 570 at 583, 598-599.

148 Constitution, s 77(ii).

149 Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27, (1985); Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78, (1996).

150 Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78, (1996) at 87-97 (Appendix C).

"special damage peculiar to himself"[151]. Thus, it is common in federal legislation to require that the party invoking the jurisdiction of a court must show that it is "aggrieved" by the conduct complained of[152].

132 Sometimes the legislation adopts another formulation, affording standing to a person who, by name or description necessarily has a special or personal interest[153]. Many federal statutes reflect the special standing which was accorded by English law to the Attorney-General to initiate or authorise court proceedings, in effect for the Crown, so that right might be done according to law[154]. Particularly in recent times, numerous statutory provisions have been enacted by which standing is accorded to other Ministers, statutory agencies or office-holders[155]. Sometimes standing is conferred on a Minister as an alternate to a

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151 *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114 per Buckley J; affirmed *Gouriet v Union of Post Office Workers* [1978] AC 435; applied *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; *Bateman's Bay* (1998) 194 CLR 247 at 281.

152 Explained in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 526, 548. See eg *Administrative Decisions (Judicial Review) Act* 1977 (Cth), ss 5(1), 6(1), 7(1); *Bankruptcy Act* 1966 (Cth) s 303; *Child Support (Assessment) Act* 1989 (Cth), s 106; *Companies (Acquisition of Shares) Act* 1980 (Cth), s 60A; *Copyright Act* 1968 (Cth), s 202; *Designs Act* 1906 (Cth), s 32C(1); *Patents Act* 1990 (Cth), s 128; *Securities Industry Act* 1980 (Cth), ss 35, 42, 134; *Trade Marks Act* 1995 (Cth), s 129; cf *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 555, 557.

153 eg a "creditor" or "bankrupt" under *Bankruptcy Act* 1966 (Cth), ss 104, 178; a "candidate" under *Commonwealth Electoral Act* 1918 (Cth), s 383(1) and (2); a company or company member or person from whom shares are acquired under *Companies (Acquisition of Shares) Act* 1980 (Cth), s 45; the "owner of the copyright" under *Copyright Act* 1968 (Cth), s 115; the "owner" under *Designs Act* 1906 (Cth), s 40B; the "holder of a licence" under *Olympic Insignia Protection Act* 1987 (Cth), s 8; the "party to a franchise agreement" under *Petroleum Retail Marketing Franchise Act* 1980 (Cth), s 21(1).

154 See eg *Crimes Act* 1914 (Cth), s 30AA(8); *Diplomatic and Consular Missions Act* 1978 (Cth), s 4; *Environment Protection (Sea Dumping) Act* 1981 (Cth), s 33(1); *Foreign Evidence Act* 1994 (Cth), s 45; *Foreign Proceedings (Excess of Jurisdiction) Act* 1984 (Cth), s 8(2); *World Heritage Properties Conservation Act* 1983 (Cth), s 14.

155 *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) s 26(1); *Air Navigation Act* 1920 (Cth) s 11B(1); *Banking Act* 1959 (Cth), s 69; *Building Industry Act* 1985 (Cth) s 5(12); *Hazardous Waste (Regulation of Exports and Imports) Act* 1989 (Cth), s 41; *Industrial Chemicals (Notification and Assessment)*

(Footnote continues on next page)

person or body with a specified interest[156]. Increasingly in recent years, federal legislation has purported to expand standing rights so as to permit proceedings to be brought by any "interested person"[157] or "person affected"[158]. In many federal statutes provision has been made for a self-defining class of persons, usually described as a "claimant" or "complainant", to bring proceedings for some benefit under federal law and to have standing by virtue of such claim[159].

133 Finally, there is legislation of the kind attacked in this case. Statutes, in some instances, confer rights on "a person" or "any person" to seek judicial remedies without the expression of a statutory requirement for a specific grievance, interest or effect[160]. Sometimes, as in s 163A(1) of the Act under consideration in these proceedings, the jurisdiction to provide relief is expressly accorded in the context of the existence of a "matter". Such provisions necessarily incorporate any requirements of standing that are inherent in that constitutional notion. More commonly, the statutory provision permitting "a person" or "any person" to bring proceedings exists in conjunction with a right conferred on a public or private body which is also authorised to initiate a claim for judicial relief[161]. The provisions of s 80(1) of the Act are of this kind. They

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Act 1989 (Cth), s 83(1); *Weapons of Mass Destruction (Prevention of Proliferation) Act* 1995 (Cth), s 16(1).

156 eg *Banking Act* 1959 (Cth), s 69 ("Treasurer or a bank ...").

157 *Endangered Species Protection Act* 1992 (Cth), s 131; *Environment Protection (Sea Dumping) Act* 1981 (Cth), s 33(1); *Olympic Insignia Protection Act* 1987 (Cth), s 8; *Securities Industry Act* 1980 (Cth), s 149; *Workplace Relations Act* 1996 (Cth), ss 257, 258, 259 ("any other person having an interest"); *World Heritage Properties Conservation Act* 1983 (Cth), s 14.

158 The Corporations Law s 1324; *Futures Industry Act* 1986 (Cth), s 157; *Great Barrier Reef Marine Park Act* 1975 (Cth), s 38N; *Liquid Fuel Emergency Act* 1984 (Cth), s 37; *Superannuation Industry (Supervision) Act* 1993 (Cth) s 315.

159 eg *Disability Discrimination Act* 1992 (Cth), ss 105, 105D; *Lands Acquisition Act* 1989 (Cth), ss 72(1), 100; *Privacy Act* 1988 (Cth), s 55; *Racial Discrimination Act* 1975 (Cth), ss 25ZC, 25ZCC; *Sex Discrimination Act* 1984 (Cth), ss 83A, 83D.

160 eg *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth), ss 31(3)(c), 102(2)(c), 142V(2)(c); *Agricultural and Veterinary Chemicals Code Act* 1994 (Cth), s 130(1); *Trade Practices Act* 1974 (Cth), ss 44ZZE, 80(1), 163A.

161 eg *Moomba-Sydney Pipeline System Sale Act* 1994 (Cth), s 114 ("the Commission or any person ..."); *Trade Practices Act* 1974 (Cth), s 80(1); *Workplace Relations Act* 1996 (Cth), ss 260(2), 261(7) ("a person", "a person who is or desires to become the employer of the person" or "the organisation").

permit the Australian Competition and Consumer Commission ("the Commission") "or any other person" to seek an injunction. Most commonly, the provisions confer standing on a Minister but provide that, alternatively or additionally, "any other person" may seek the relief enacted as relevant to the case[162].

Significance of varied standing provisions

134 The foregoing review of federal legislation is by no means exhaustive. However, it demonstrates three points. First, the variety of standing provisions which exist under federal legislation respond to the will of the Parliament at the time of the identified enactment as to the appropriate degree of particularity and specificity (if any) of the interest that is established as a pre-condition to an entitlement to initiate a claim for remedies under the Act.

135 Secondly, the examples illustrate, in a general way, a trend in federal legislation away from a universal requirement of a special personal interest or individual grievance to authorise the invocation of judicial relief. Whilst provisions to that effect have been maintained in many instances, in others, a broader standing right has been adopted by the Parliament as considered apt to the particular case. In this respect, the Parliament has simply reflected a trend also noticeable in common law decisions under which the formulation of the prerequisites to standing have been relaxed, in part at least[163]. As is so often the case, statute and common law march in step.

136 Thirdly, the legislation illustrates the importance for federal legislation of the point argued in this case. If that point were to succeed, it would have a significance far beyond ss 80 and 163A of the Act under special scrutiny. Plainly, it would have consequences for the expanding number of federal statutory provisions in which standing is accorded to "any person". It could possibly have effect beyond that class on other statutory categories which do not

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162 *Motor Vehicle Standards Act* 1989 (Cth), s 35; *National Health Act* 1953 (Cth), s 67A(1); *Ozone Protection Act* 1989 (Cth), s 56; *Petroleum Retail Marketing Sites Act* 1980 (Cth), s 12(1).

163 cf *Australian Conservation Foundation Inc v South Australia* (1989) 52 SASR 288; *Ex parte Helena Valley / Boya Association (Inc)* (1990) 2 WAR 422; *Tectran Corp Pty Ltd v Legal Aid Commission of New South Wales* (1986) 7 NSWLR 340; *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520; *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127; *Ogle v Strickland* (1987) 13 FCR 306. See Australian Law Reform Commission, *Beyond the Doorkeeper: Standing to Sue for Public Remedies*, Report No 78, (1996) at 27-31.

meet the suggested prerequisites of the notion of standing at common law said to be imported by the use in Ch III of the word "matter".

137 To impose upon the expanding categories of standing under federal laws the narrower conception of standing which generally prevailed in English law when the Constitution came into force, would involve a significant disruption and a substantial inhibition upon the power of the Parliament to enlarge or contract standing as, in the particular case, it considered appropriate. This is not a reason for refusing relief to the respondent. Constitutional decisions sometimes have inconvenient and unwelcome outcomes[164]. But the inconvenience and inflexibility inherent in the respondent's view of the requirements of the word "matter" and of the implications of Ch III of the Constitution necessitate very close examination of the argument in order to ascertain whether past authority or current understandings of the language and structure of the Constitution demand such a disruptive result.

Meaning and scope of the statutory provisions

138 Before embarking upon a consideration of the constitutional validity of a law, it is usually appropriate, if not necessary, to consider the meaning and application of the law. If, properly construed, the suggested constitutional defect is shown to be illusory, the constitutional problem does not arise[165].

139 The respondent did not suggest that the words "any other person" in s 80(1) or "a person" in s 163A(1) should be given a limited construction. Indeed, that was contrary to its constitutional argument by which it sought to strike down, or narrow the application of, the two sub-sections. In *Phelps v Western Mining Corporation Ltd*[166] the Full Court of the Federal Court held that the words "any other person" in s 80(1) of the Act were to be given an unlimited ambit. The respondent pointed out that this holding was arrived at in a context in which that Court was concerned only with the construction of the section and not with its constitutional validity. In another early case in that Court[167], it was held that a person claiming relief under s 80 did not need to show that a proprietary interest

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164 As was the case in *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839; 163 ALR 270; and as would have been the case if the dissenting opinion had prevailed in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1355-1356; 165 ALR 171 at 214-215.

165 *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 650.

166 (1978) 20 ALR 183.

167 *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 186, 194 and 198.

was affected or that any special damage, or any damage at all, was suffered. A similar view was taken to the ambit of the words "any other person" when s 80(1) came before this Court for the first time[168]. In that case, this Court confirmed that the words were not limited, by the context or otherwise, to consumers. They would extend to include a competitor of the party against whom relief was sought. In my opinion these cases were correctly decided. Nothing in the language or context of s 80(1) warrants a reading down of the scope of the phrase used. This view is further reinforced by a consideration of s 80(1) in the context of the other federal legislation considered above. The expression is deliberately open-ended. Subject to the Constitution, no attempt should be made to import unexpressed restrictions.

140 So far as s 163A of the Act is concerned, the reference to "a person" appears in a context of the institution of proceedings "in the Court"[169]. The section is, in terms, limited to a proceeding "in relation to a matter arising under this Act". The word "matter" in that context obviously carries the same meaning as that word bears when appearing in the Constitution[170]. In the course of decisions in the Federal Court, a difference of opinion has arisen as to the scope of s 163A. In some decisions, it has been held that the section is concerned with the meaning and operation of the Act and not with whether particular conduct has breached the Act[171]. In others, it has been held that the section extends to the issue of whether conduct has contravened, or would contravene, provisions of the Act[172]. It is unnecessary for the present proceedings to resolve that difference. In either case, s 163A purports to confer authority on the applicant as a "person" to invoke the jurisdiction of the Federal Court to secure a declaration in respect of alleged contraventions of the Act for which, it is conceded, it would not enjoy standing sufficient at common law.

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168 *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113.

169 Meaning relevantly, the Federal Court of Australia. See the Act, s 86(1), *Federal Court of Australia Act* 1976 (Cth), ss 19(1), 23 and *Judiciary Act* 1903 (Cth), s 39B(1).

170 cf *Re Trade Practices Act 1974 (s 163A)* (1978) 19 ALR 191 at 206 per Brennan J.

171 *Polgardy v Australian Guarantee Corporation Ltd* (1981) 34 ALR 391 at 395 per Toohey J; *Westpac Banking Corporation v Northern Metals Pty Ltd* (1989) 14 IPR 499 at 511; *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89 at 111.

172 *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at 640 per Deane J; *O'Keeffe Nominees Pty Ltd v BP Australia Ltd* (1992) 38 FCR 85 at 89-93.

141 The fact that, because of the reference to the necessity of a "matter", it would be possible to read s 163A down in its operation should that course be constitutionally required, does not alter the anterior question about the ambit of the section. It is deliberately cast in the widest of terms. There is no acceptable way of confining or narrowing the purported conferral of standing on "a person", to institute proceedings for a declaration of the kind sought by the applicant. This conclusion is also strengthened when that sub-section is viewed in the context of the varied standing provisions of federal legislation that I have described. By contrast with other expressions in the Commonwealth's statute book, it must be accepted that the Parliament deliberately chose here a wide standing provision. By inference, it did so, both in ss 80 and 163A of the Act for the purpose of furthering the achievement of the public policy which the Act is designed to implement[173]. It is a public policy larger than the protection of particular consumers. Relevantly, it is one aimed at promoting a culture of honesty in the representations made by trading corporations and the elimination of misleading and deceptive conduct from their dealings.

142 Accordingly, the respondent's submissions about the point of construction should be accepted. Properly understood, the language of ss 80(1) and 163A(1) of the Act purports to confer standing on any person invoking the jurisdiction of the Federal Court for a specified contravention of the Act or in relation to the validity of any act or thing done under the Act. It is this that the respondent asserts exceeds the Parliament's authority. The respondent's constitutional objections must therefore be addressed.

143 The respondent accepted that no authority of this Court established, at least as a binding rule, the proposition which it advocated. However, it drew attention to observations by a number of members of this Court in disposing of related questions[174]. It also called to notice opinions expressed in the Full Court of the Federal Court[175]. To advance its argument, the respondent addressed its submissions to two considerations: (1) the inferences to be drawn from the decisional authority of this Court on the meaning of "matter"; and (2) the support

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173 cf *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12 at 36; 158 ALR 333 at 366 referring to the Act, s 2 where the object is stated to include enhancing "the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

174 See eg *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 551 per Mason J; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 78 per Gaudron and Gummow JJ.

175 *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 19 FCR 469 at 475.

to be derived from recent decisions of the Supreme Court of the United States of America in elucidating the meaning of Art III of the United States Constitution. It was suggested that that Article was indistinguishable from, or analogous to, Ch III of the Australian Constitution. Each of these arguments fail. There is no inconsistency between ss 80(1) and 163A(1) of the Act on the one hand, and Ch III of the Constitution on the other. Furthermore, the United States authorities are distinguishable or should not be followed.

Arguments from past authority on "matter"

144 The respondent's primary contentions went thus. Chapter III is an exhaustive statement of the original jurisdiction of this Court and of other federal courts ("federal courts") created by the Parliament[176]. Accordingly, notwithstanding the apparently ample terms in which the Parliament is empowered to make laws, eg by s 51 of the Constitution, such power is, by express language[177] and by the structure of the Constitution[178], subject both to express and implied restrictions on the conferral of original jurisdiction on this Court and other federal courts. Those restrictions are stated or implicit in the provisions of Ch III[179].

145 Two express provisions within Ch III, it was submitted, gave rise to the limitation on the lawmaking power of the Parliament critical for the present proceedings. The first were the words "matter" and "matters" appearing in several of the sections of the Chapter[180]. The second was the expression "judicial power" in s 71 of the Constitution. In addition to the meaning of, and inferences to be derived from, these words, the respondent relied on the structure of the Constitution by which the Judicature is created in which is vested the "judicial power of the Commonwealth". It is a branch of government separate from the other branches which exercise the legislative power and executive power of the Commonwealth. This separation was said to be fundamental to the interpretation

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176 Pursuant to the Constitution, ss 75 and 76; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839; 163 ALR 270.

177 The opening words of the Constitution, s 51 include the expression "subject to this Constitution".

178 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; cf *Attorney-General v Breckler* (1999) 73 ALJR 981 at 992; 163 ALR 576 at 590-591.

179 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

180 Constitution, ss 73, 75, 76, 77 and 78. See reasons of Gaudron J at [42-50]; Gummow J at [77-87].

of Ch III since the earliest days of the Commonwealth[181] and up to the present time[182].

146 The respondent therefore argued that a consistent extension of the established authority of this Court required acceptance of the proposition that the pre-existence of standing (in the sense of a special or personal interest in the subject matter of a controversy between parties) was essential to (1) the existence of a "matter"; (2) the invocation of the "judicial power of the Commonwealth" in this Court or other federal courts; and (3) the engagement of the Judicature as the independent branch of government in functions apt to it, and to it alone.

147 There is no explicit reference in the Constitution to the standing of the party initiating proceedings. In a well known passage in *In re Judiciary and Navigation Acts* the majority of this Court expressed the opinion that "there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court ... [the Parliament] cannot authorise this Court to make a declaration of the law divorced from any attempt to administer that law"[183]. The respondent submitted that the decision of the Court in that case had emphasised the requirement of a "justiciable controversy". This, in turn, could not arise unless the person invoking the jurisdiction of federal courts had a sufficient interest to bring the action[184]. Although the notions of "standing" and of "matter" are distinct, the respondent pointed to several cases in which the concepts had been entwined in an objection by one party to the attempt of another to invoke the judicial power and to assert a "matter" for determination by the Judicature[185].

148 One of the hallmarks of the exercise of judicial power is the existence of a "justiciable controversy". This together with the requirement of a "matter", as elaborated in the decisions of this Court, made it insufficient, so the respondent urged, that the parties disagreed about a subject, even one having its origin in the

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181 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

182 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 844-845 per Gleeson CJ; 163 ALR 270 at 278.

183 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267.

184 cf *Croome v Tasmania* (1997) 191 CLR 119 at 126; *Abebe* (1999) 73 ALJR 584 at 593; 162 ALR 1 at 12.

185 See eg *Croome v Tasmania* (1997) 191 CLR 119 at 132-133; *Abebe* (1999) 73 ALJR 584 at 590-591; 162 ALR 1 at 9 citing *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 675; *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767 at 771, 779; 144 ALR 677 at 681-682, 692.

law[186]. Not all disagreements were apt to invoke the jurisdiction of a federal court, still less to secure orders requiring the enforcement of the law[187]. Nor was it enough that a party has commenced proceedings in a federal court[188]. That fact might establish that a "controversy" in a broad sense of that word existed. But it did not establish that the anterior requirements of a "matter" or of a "justiciable controversy" existed which alone could authorise the invocation of the judicial power in a federal court that would be consonant with the court's functions as part of the Judicature.

149 It was by this reasoning that the respondent attempted to lead this Court to a conclusion that, inherent in the words used, the structure and the purposes of Ch III, was the requirement of standing on the part of the party purporting to invoke federal jurisdiction. That standing, in the sense of having some special or personal interest, was implicit in the words, structure and purposes of Ch III. It was thus anterior to any purported attempt by the Parliament to confer broader standing rights on persons who would otherwise lack the constitutional interest necessary for the existence of a "matter", the invocation of "judicial power" and the engagement of the jurisdiction of a federal court.

150 The necessity of a special or personal interest was required (so it was put) out of the wisdom and prudence of our legal system. Such an interest was necessary, according to the respondent (1) to ensure the refinement and proper contest of an issue in the mode of trial which the common law followed; (2) to confine the coercion of the courts over other people, inherent in the exercise of judicial power, to cases that can be justified on a legitimate basis[189]; (3) to avoid the diversion of the courts into the resolution of theoretical or academic rather than real and genuine legal disputes; (4) to prevent the misuse or unnecessary deployment of the publicly funded courts into disputes having no, or low, priority in calls on their resources; and (5) to discourage "busy-bodies" who might otherwise seek court orders when nobody with the requisite interest (private or public) had bothered to do so.

151 The respondent submitted that the present was a case which well illustrated the need to adhere to a classical standing requirement and to hold it to be inherent in Australia's constitutional arrangements. It suggested that the applicant was no more than a corporate "busy-body". It had no rights, special to itself, which it

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186 *Abebe* (1999) 73 ALJR 584 at 626-627; 162 ALR 1 at 58.

187 *Bateman's Bay* (1998) 194 CLR 247 at 282-283 per McHugh J.

188 *Abebe* (1999) 73 ALJR 584 at 596; 162 ALR 1 at 16-17.

189 Gewirtz, "On 'I Know It When I See It'" (1996) 105 *Yale Law Journal* 1023; cf *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 99.

was seeking to vindicate in the Federal Court. The respondent accepted that the Commission, named in s 80(1), had standing under the Act. To that extent, s 80(1) was a valid law on the footing that the conferral of jurisdiction to grant an injunction at the suit of the Commission "would arise at least by analogy with the traditional role fulfilled by the Attorney-General, as ... the body entrusted by the executive government to enforce this part of the public law of the Commonwealth"[190]. But the Parliament had no power to confer that right on "any other person". Section 80(1) was, to the extent of the offending phrase, constitutionally invalid. Likewise, s 163A(1) would be invalid unless read down because of the presence of the reference to a "matter" contained within it. As so read down, it would have no application to the applicant. The attempt by the applicant to invoke the jurisdiction of the Federal Court was therefore invalid. Like "busy-bodies" in the past, the applicant should be sent on its way. The proceedings should be terminated, certainly so far as the Federal Court and the invocation of federal laws were concerned.

The constitutional requirements are satisfied

152 *An immediate right or duty:* There is nothing in the word "matter", appearing in Ch III of the Constitution, which demands a particular requirement as to standing, as expressed in the common law at the time the Constitution was adopted or in later decisions. There is no holding of this Court to that effect in the many decisions which have addressed the requirements of Ch III. In several cases where such a rule has been urged, this Court has refrained from adopting it[191].

153 When in *In re Judiciary and Navigation Acts*[192] this Court postulated a legal proceeding involving "some immediate right, duty or liability to be established by the determination of the Court" as essential to the existence of a "matter" for the purposes of Ch III, the majority went on to express in very broad terms, the entitlement of the Parliament to prescribe rights and procedures[193]:

> "If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose

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190 Respondent's submissions referring to *Bateman's Bay* (1998) 194 CLR 247 at 276-277 per McHugh J.

191 See eg *Croome v Tasmania* (1997) 191 CLR 119 at 132-133; *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767 at 771; 144 ALR 677 at 682.

192 (1921) 29 CLR 257 at 265.

193 (1921) 29 CLR 257 at 266.

may, we think, adopt any existing method of legal procedure or invent a new one."

154 The prohibition expressed was that of making "a declaration of the law divorced from any attempt to administer that law"[194]. To judge whether that prohibition applies in a particular case, it is necessary to find the content of the law in question and to decide whether it is otherwise within the lawmaking power of the Parliament and tenders for resolution the declaration and enforcement of rights, duties or liabilities "as they stand on present or past facts and under laws supposed already to exist"[195].

155 When, in the present case, the law in question is examined, it prescribes a legal entitlement that may be enforced by "any other person" or "a person". It does so in a way agreed to be otherwise within the lawmaking powers of the Parliament. To that entitlement are attached various remedies as contained in the Act some of which the applicant now seeks from the Federal Court. Relevantly, they involve the provision of an injunction and the making of a declaration. Each of these remedies is judicial in character. Each is indisputably a proper function of courts, as much at the time of federation as today. Therefore, there is no attempt by the Parliament in either of the impugned sections, to authorise or require the Federal Court to grant remedies divorced from a "justiciable controversy" (ie from the determination of "some immediate right, duty or liability" to be established by the decision of the Court)[196]. In providing the remedies permitted under the section, the Federal Court is not determining "abstract questions of law without the right or duty of any body or person being involved"[197]. Nor is it impermissibly giving an advisory opinion[198]. Still less is it affording remedies divorced from any attempt to apply the law to facts and hence to "administer the law"[199]. To the contrary, all that the Federal Court is asked to do is to apply the law, as expressed by the Parliament, to the facts as found.

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194 (1921) 29 CLR 257 at 266.

195 *Prentis v Atlantic Coast Line Co* 211 US 210 at 226 (1908) applied *R v Davison* (1954) 90 CLR 353 at 370 per Dixon CJ and McTiernan J; cf *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

196 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-267.

197 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.

198 Forbidden by the Constitution as explained in *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

199 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303.

156 *Deliberately broad approach:* The word "matter" within Ch III of the Constitution is, in any case, an ordinary word of common usage in the legal context[200]. It is undesirable that the word should be subjected to excessive refinement or submitted to inappropriate elaboration leading to unnecessary constitutional rigidity[201]. From the start, it was intended to use a word of wider meaning than the words "cases and controversies" appearing in the United States Constitution. That this is so, was made clear by the Chairman of the Convention Judiciary Committee at the Melbourne Convention of 1898. He said: "[w]e want the very widest word we can procure in order to embrace everything which can possibly arise within the ambit of what are comprised under the sub-section ... it would be of no use to adopt the word 'case' or 'controversy'"[202]. To like effect was the contemporary exposition by Quick and Garran[203]. Numerous judicial statements in this Court since that time have reinforced this approach[204].

157 There are reasons of principle for maintaining this interpretation remembering that the word "matter" and the phrase "judicial power", as well as the conception of the functions of the "federal courts" within the Judicature appear in a Constitution extremely difficult to amend formally and intended to endure indefinitely[205]. Given that rational reasons may sustain different standing provisions for the enforcement of legislation in different circumstances, it would require much more of the word "matter" (or of the phrase "judicial power" or of the inferences from the nature of "federal courts" in the Judicature) than can reasonably be derived, to suggest that it is necessarily incompatible with the terms of the Constitution or the proper functions of the Judicature which the Constitution establishes or recognises.

158 *Historically broad standing rights:* It is also incompatible with legal history, both in Australia and England, to suggest that a universal and rigid

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200 cf *State of South Australia v State of Victoria* (1911) 12 CLR 667 at 675.

201 *Abebe* (1999) 73 ALJR 584 at 627-628; 162 ALR 1 at 59-60.

202 Sir Josiah Symon in *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 319.

203 *Annotated Constitution of the Australian Commonwealth* (1901) at 765.

204 See eg *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507-508.

205 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 877-878; 163 ALR 270 at 323-324; *Sue v Hill* (1999) 73 ALJR 1016 at 1027 per Gleeson CJ, Gummow and Hayne JJ citing *Martin v Hunter's Lessee* 14 US 141 at 151 (1816); 163 ALR 648 at 663.

common law rule of standing, necessitating an interest "special" or personal to a party, is inherent in the performance by courts of functions proper only to them. Yet that is the logic of the respondent's argument that standing in the general common law acceptation of that term is so deeply embedded in the notions of the Judicature in 1900, that it must be taken to be inherent in the concept of "matter" in Ch III of the Constitution (and in the phrase "judicial power" as well as the functions proper to "federal courts" created by or under the Constitution)[206]. Even assuming that this is an appropriate approach to constitutional elaboration, many historical references demonstrate how untenable the proposition is.

159 From the earliest times of English legal history, accusations initiating criminal proceedings could be brought, at common law, by private individuals[207]. Although the position altered over time, the private individual enjoyed large rights to set the criminal law in motion in the courts, without any necessity to establish a special or personal interest such as would satisfy a modern common law test of standing[208]. In the case of crimes triable on indictment, the Crown could intervene to take over the prosecution or to stay it by entering a *nolle prosequi*[209]. In England and in Australia, many proceedings by criminal information came to require the leave of a court before a private individual could prosecute them[210]. In such a legal context, it is unthinkable that the choice of the word "matter" (or of the phrase "judicial power" or the concept of "federal courts" in the Judicature there provided) imports a rigid universal rule necessitating that every "matter" or invocation of "judicial power" before such "courts" required, as a pre-condition to validity, a special or personal interest in the subject matter of the litigation. It would be astonishing if the supposed universal rule were now to be imposed. It would be even more surprising if this were done on such a flimsy basis, in the face of the declarations of the drafters of Ch III as to their contrary objective, and in the light of the contrary developments in the law of standing up to the present time.

160 In civil law there has been no such universal rule. The Attorney-General long enjoyed standing to seek an injunction for breach of a statute. At least he did

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206 cf *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

207 Stephen, *A General View of the Criminal Law of England*, 2nd ed (1890) at 11-13; Radcliffe and Cross, *The English Legal System*, 6th ed (1977) at 3-7, 35-36; Pollack and Maitland, *History of English Law*, 2nd ed (1923), vol 2 at 449-451.

208 See generally *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477, 521; cf *Gouldham v Sharrett* [1966] WAR 129 at 132-134, 137.

209 *Gouldham v Sharrett* [1966] WAR 129 at 132-134.

210 *R v Norris* (1758) 2 Keny 300 [96 ER 1189].

so in the absence of express language of the statute excluding such a remedy. And wherever the Attorney-General could seek such relief, he could grant a fiat to any person to bring proceedings in his name at the relation of the grantee of the fiat. Such relator did not need any personal interest in the controversy, save that of being a member of the public[211]. This is the law on this subject, both in England[212] and in Australia[213]. The established right of the Attorney-General denies the suggestion that there is something essential about the common law requirement for standing so as to make it a universal prerequisite to the application of Ch III.

161 The willingness of the respondent to concede that the Commission's statutory standing was constitutionally valid because it had inherited, by analogy, the powers of the Attorney-General to defend the public's interest in the enforcement of a law of general application involves a proposition as unhistorical as it is unconvincing. It pays no regard to the special historical functions of the Attorney-General. And it accepts for constitutional purposes, that the word "matter", the phrase "judicial power" and the concept of "federal courts" can change with time, different legislative needs and altered statutory provisions. If such a change is permissible to acknowledge the valid conferral of standing on a body such as the Commission, there is no logical ground for contending that the Constitution forbids a similar expansion of standing rights, in particular areas and for particular purposes, by which the Parliament might permit "any person" or "a person" to initiate court proceedings, in effect, on behalf of the public. It is unlikely that the Constitution implicitly embalmed as immutable, a rule by which only the Attorney-General or other specified Executive functionary holds the keys that unlock the doors of the independent federal courts. This is not the way in which Australian statute law has developed; and that for good reason.

162 In addition to the foregoing, legal history is replete with examples of public law remedies which have permitted persons with no "special interest to protect" to invoke the jurisdiction of the courts. Thus it was in England in relation to the remedy of prohibition[214]. So it has been in respect of that remedy in Australian

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211 *Attorney-General v Vivian* (1826) 1 Russ 226 at 236 [38 ER 88 at 92]; *Attorney General v Logan* [1891] 2 QB 100 at 103, 106.

212 *Attorney-General and Spalding Rural District Council v Garner* [1907] 2 KB 480 at 485; *Attorney-General v Crayford Urban District Council* [1962] Ch 575 at 585, 590.

213 *Attorney-General (Q); Ex rel Duncan v Andrews* (1979) 145 CLR 573.

214 De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed (1995) at 99-101, 109-110; cf *Re Forster v Forster & Berridge* (1863) 4 B & S 187

(Footnote continues on next page)

courts throughout the past century[215]. Although it has been suggested that a stranger could only obtain the remedy of prohibition at the discretion of a court (*ex debito justitiae*) it has never been doubted that, in a proper case, the remedy is available to a stranger, ie a person without standing in the sense of a special or personal interest. Before the Constitution was adopted, the same was true in England in respect of certiorari[216]. It has likewise been held to be the law in Australia[217]. The same may also be said of habeas corpus which was available at the suit of a stranger[218]. In the circumstances of this legal history (which is by no means exhaustive) and of Australian judicial practice to the present time, it would be a serious error to suggest that a universal rule of standing, expressed in terms of the "special" or "personal" interests of a party is inherent in, or essential to, the existence of a "matter", to the invocation of "judicial power" or to the jurisdiction of "federal courts" as provided in the Constitution.

163 *Benefits of flexibility*: Whilst it is correct to say that, outside the areas reviewed, a general requirement of the common law expressed in terms of "special interest" has been adopted by our law, this too has altered somewhat in recent times in recognition of what may constitute such a "special interest"[219]. The number, variety and importance of the exceptions are such as to deny an attempt to stamp on the Constitution such a universal characterisation of justiciable proceedings. Yet, if the stamp of such a universal requirement cannot be imposed, this strikes at the heart of the respondent's suggestion that the language, purpose and structure of Ch III of the Constitution implicitly forbid the enactment by the Parliament of the broad standing rights adopted in ss 80(1) and 163A(1) of the Act. If the implied prohibition is not sustained, these provisions are left fully supported by legislative power conferred on the Parliament by s 51 of the Constitution. This is hardly a surprising conclusion. Not only does much federal legislation demonstrate the existence of variable preconditions for

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at 199 [122 ER 430 at 435]; *Worthington v Jeffries* (1875) LR 10 CP 379 at 381-384; *Farquharson v Morgan* [1894] 1 QB 552 at 556.

215 *R v Graziers' Association of NSW; Ex parte Australian Workers' Union* (1956) 96 CLR 317 at 327; *R v Watson; Ex parte Australian Workers' Union* (1972) 128 CLR 77 at 81-82, 97.

216 *R v Surrey Justices* (1870) LR 5 QB 466 at 473.

217 *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482 at 517-518.

218 *Ex parte West* (1861) 2 Legge 1475.

219 See discussion in Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78, (1996) at 25-34.

standing. Common sense, and a reflection on the differing kinds of public rights evidenced in the legislation reviewed (including the Act) indicate why, within sensible constitutional arrangements, such variable standards will often be justified.

164 To take the present sections as an illustration, the explanation for the provisions of ss 80(1) and 163A(1) of the Act is not difficult to find. Bodies such as the Commission might, on occasion, have insufficient funds to pursue contraventions of the Act, even those which, objectively, are serious. As well, public bodies sometimes come too readily to reflect the perspectives of the Executive Government. At a time when so many other activities, formerly performed by Ministers or public authorities are being "privatised" or "outsourced", it may be more efficient to leave it to "persons" other than a public body to seek relief in respect of designated contraventions of the Act. In ss 80(1) and 163A(1) of the Act, the Parliament has identified those contraventions of the Act in respect of which a "person" of the community at large may invoke the jurisdiction of the Federal Court and secure the remedies (relevantly) of injunction and declaration. By inference, the conclusion has been reached that it is appropriate, in such cases, to have the law invoked by a private individual. In the past, in England, this was done long ago by the Attorney-General. There is no valid reason why in Australia today, under its Constitution, it should not be done by a "person" who has the will and the means to do so.

165 *Busy-bodies*: To the complaint about "busy-bodies", there are many answers. The obligations to find legal costs including, where appropriate, security for costs, and to submit to orders as to costs of failed proceedings represent substantial hurdles in the path of meritless proceedings[220]. In any case, the remedies provided under the legislation are not at large. They are afforded by reference to established principles[221]. Courts retain significant powers to bring obviously meritless claims to a speedy conclusion or to impose strict conditions on their continuance[222].

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220 Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78, (1996) at 19.

221 *Cardile v LED Builders Pty Ltd* (1999) 73 ALJR 657 at 663-666, 679-684; 162 ALR 294 at 303-307; *Pelechowski v Registrar, Court of Appeal* (1999) 73 ALJR 687 at 696; 162 ALR 336 at 348; cf *Bass v Permanent Trustee Co Ltd* (1999) 73 ALJR 522 at 531-535, 543-544; 161 ALR 399 at 412-418, 429.

222 *Phelps v Western Mining Corp Ltd* (1978) 20 ALR 183 at 187 per Bowen CJ; *Croome v Tasmania* (1997) 191 CLR 119 at 127; *Bateman's Bay* (1998) 194 CLR 247 at 263; *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1988) 19 FCR 469 at 475.

United States decisions on "citizen suit statutes"

166 To reinforce its arguments, the respondent drew attention to a line of recent authority in United States courts which, it claimed, afforded guidance to the approach which this Court should take. These decisions, in a federal system which was relevantly the model for our own, provide (so it was argued) analogies to fill the gaps in the elaboration of Ch III of the Australian Constitution.

167 The language of Ch III is different from that of Art III of the United States Constitution. In the latter the words "Cases" and "Controversies" are used. For the reasons stated, those words were rejected by the drafters of the Australian Constitution in favour of the broader word "matter"[223]. Further, the Judicature envisaged by Ch III is differently organised. From the start, the respective roles of the Federal Supreme Courts and of federal courts generally have been different in each country. Nevertheless, the separation of the judicial power is fundamental to both Constitutions[224]. The limitations upon the subjects proper to federal jurisdiction have, from early days of the Australian Commonwealth followed similar but not identical lines[225]. Basic to each Constitution is the acceptance that the sole function of federal courts is the determination of "justiciable controversies" or "legal controversies"[226]. Such courts are not places which can be turned into "judicial versions of college debating forums"[227], nor a vehicle for the vindication of the "value interests of concerned bystanders"[228]. Nor may they give advisory opinions or answer questions divorced from concrete

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223 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551; *Croome v Tasmania* (1997) 191 CLR 119 at 133; *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 264-265.

224 *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 550-551 per Mason J.

225 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

226 *Ainsworth v Criminal Justice Commissioner* (1992) 175 CLR 564 at 582.

227 *Valley Forge Christian College v Americans United for Separation of Church and State Inc* 454 US 464 at 473 (1982); see also *Spencer v Kemna* 140 L Ed 2d 43 (1998); *Lujan v Defenders of Wildlife* 504 US 555 at 560-561 (1992).

228 *United States v Students Challenging Regulatory Agency Procedures* 412 US 669 at 687 (1973).

cases[229] which involve an "immediate right, duty or liability" ascertained by reference to pre-existing law[230].

168 A study of recent decisions of the Supreme Court of the United States certainly bears out the respondent's proposition that that Court has established a general rule that, to invoke the jurisdiction of a federal court, one of the elements a party must show is the existence of standing in the sense of an "injury in fact". It must demonstrate an invasion of a legally protected interest of the party in question which is "concrete and particularised" and "actual or imminent, not 'conjectural' or 'hypothetical'"[231]. The foundation for this reasoning is not expressed solely in terms of the notion of "cases" or "controversies" but depends on notions of the separation of the federal judicial power from executive and legislative power. It also draws upon a reflection about the activities considered constitutionally appropriate to the separate federal courts in that system of government. It rests on considerations about the conduct of such courts in the ways by which their judicial orders are likely to impinge upon the autonomy of persons who are made subject to them[232].

169 Accordingly, at the heart of the idea accepted on this issue in the United States is the notion that courts should only be involved in the resolution of "cases" and "controversies" between parties having a requisite interest. They should leave broader concerns of social policy and law enforcement to the actions of the legislature and the executive. The respondent submitted that, in our system of government, similar considerations apply making equally applicable the remarks of Scalia J in *Steel Co v Citizens for a Better Environment*[233]:

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229 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37.

230 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303.

231 *Lujan v Defenders of Wildlife* 504 US 555 at 560 (1992). See Funk, "Standing in the Supreme Court and Circuits: October Term 1997", (1999) 51 *Administrative Law Review* 343.

232 *Valley Forge Christian College v Americans United for Separation of Church and State Inc* 454 US 464 at 472-473 (1982); *Spencer v Kemna* 140 L Ed 2d 43 (1998); *Lujan v Defenders of Wildlife* 504 US 555 at 559-560 (1992).

233 523 US 83 at 102-104 (1998) citing *Lujan v Defenders of Wildlife* 504 US 555 at 560 (1992); see also *Warth v Seldin* 422 US 490 at 505 (1975); *Simon v Eastern Kentucky Welfare Rights Organization* 426 US 26 at 41-42 (1976); *Valley Forge Christian College v Americans United for Separation of Church and State Inc* 454 US 464 at 472 (1982); *Allen v Wright* 468 US 737 (1984).

> "The 'irreducible constitutional minimum of standing' contains three requirements ... First and foremost, there must be alleged (and ultimately proven) an 'injury in fact' - a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical"' ... Second, there must be causation - a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant ... And third, there must be redressability - a likelihood that the requested relief will redress the alleged injury ... This triad of injury in fact, causation, and redressability comprises the core of Article III's case or controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence."

170 Were such a test applied to the Australian statute in issue in this case, the provisions to which the respondent takes exceptions would fail. According to the respondent, they purport to render justiciable what are no more than generalised grievances. The enforcement of the applicable provisions of a public law should be left (so it was put) to the relevant agency of the Executive Government, in this case the Commission[234].

United States authorities are inapplicable

171 Because of the parallels between Ch III of the Australian Constitution and Art III of the United States Constitution, it is certainly appropriate to consider developments in the United States concerning the latter. However, for a number of reasons I am not persuaded that the United States decisions require this Court to adopt a conclusion contrary to that which the foregoing analysis of the law applicable in Australia would otherwise suggest.

172 First, the language of Art III, s 2 confines the "judicial Power" of the United States to specified "Cases" and "Controversies". The word "matter" in Ch III has a wider meaning and this is deliberate. The way in which this differentiation has occasioned different outcomes has been noted in several decisions of this Court[235]. The integrated features of the federal and State judiciaries in Australia made it far less essential in this country, than in the United States, to confine federal causes narrowly. When, therefore, the Parliament is empowered by the Australian Constitution[236] to make laws conferring original jurisdiction on a

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234 cf *Steel Co v Citizens for a Better Environment* 523 US 83 at 125 (1998).

235 See eg *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507 per Mason J; *Abebe* (1999) 73 ALJR 584 at 611 per Gaudron J; 162 ALR 1 at 36-37.

236 Constitution, ss 76(ii), 77(i).

federal court "in any matter arising under any laws made by the Parliament" that power, from its language and purpose, has an extremely wide operation. There is no room for an implication confining the "matters arising" upon which laws may be made, to those in which a particular requirement of standing can be proved in the limited sense of a "special" or "personal interest".

173 Secondly, the foundation of much of the reasoning of the majority in the decision principally relied upon by the respondent, *Lujan v Defenders of Wildlife*[237], rests upon the separation of powers between the legislature, executive and the judiciary in the United States. This model of governance has no application to Australia. Ministers of the Executive Government in Australia must, within a short interval, sit in the Parliament[238]. To that extent, risks that may arise in the United States of the enactment of laws by Congress inimical to the Executive Government that must be measured in federal courts against the standard of the Constitution, can rarely, if ever, arise in Australia. This point is made good by reference to *Lujan*. There the Supreme Court of the United States explained a fundamental objection to the legislation considered in that case[239]:

> "To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art II, s 3. It would enable the courts, with the permission of Congress, 'to assume a position of authority over the governmental acts of another and co-equal department'[240] ... and to become "'virtually continuing monitors of the wisdom and soundness of Executive action.'"[241]"

174 Thirdly, and in any case, the decision and reasoning of the majority in *Lujan* (and like cases) has been the subject of strongly expressed dissent within the Supreme Court of the United States[242] and scholarly criticism[243]. In that

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237 504 US 555 (1992).

238 Constitution, s 64.

239 *Lujan v Defenders of Wildlife* 504 US 555 at 577 (1992).

240 *Massachusetts v Mellon* 262 US 447 at 489 (1923).

241 *Allen v Wright* 468 US 737 at 760 (1984) quoting from *Laird v Tatum* 408 US 1 at 15 (1972).

242 *Lujan v Defenders of Wildlife* 504 US 555 at 589 (1992) per Blackmun J (with whom O'Connor J joined).

criticism it is argued that the current doctrine constitutes a departure from earlier holdings and a move towards a direction strongly disputed when it was first mooted[244]. Within the tests applicable to proceedings in federal courts in Australia[245] there is no real risk of a "matter" which would warrant the description of a mere vindication of the "value interests of concerned bystanders" or "college debating forums"[246]. Certainly, those epithets could not be applied to proceedings brought by a "person" under ss 80(1) or 163A(1) of the Act, to vindicate the public interest in the standards of corporate conduct required by that Act. Clearly, they could not be applied to the present applicant's proceedings. Far from being alien to the "notions of democratic legitimacy"[247] to uphold such legislative provisions, doing so sustains the entitlement of the Parliament to choose the particular standing right appropriate to the enforcement of specified laws and the mixture of public and private enforcement which it deems to be necessary and likely to be effective. For these reasons the United States authorities, relied on by the respondent, do not suggest a need to reconsider the conclusion to which the law applicable in Australia would otherwise take this Court in the elaboration of the Australian Constitution.

175 Fourthly, a most significant difference between the law in Australia and in the United States affecting the Judicature of each country concerns the orders as to costs, including security for costs, that are commonly made. Such orders remain an important inhibition and sanction available to federal courts in the Australian Judicature which is not available to the same degree in federal courts

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243 Sunstein, "What's Standing after *Lujan?* Of Citizen Suits, 'Injuries,' and Article III", (1992) 91 *Michigan Law Review* 163 at 193 tracing the development from Scalia J's dissenting opinion in *Morrison v Olson* 487 US 654 (1988); Peters, "Adjudication as Representation", (1997) *Columbia Law Review* 312 at 421-430.

244 cf Tribe, *American Constitutional Law*, 2nd ed (1988) at 112, 117; Jaffe, "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff", (1968) 116 *University of Pennsylvania Law Review* 1033 at 1043. One of the criticisms is that it misinterprets the extent to which English law, at the time of the adoption of the United States Constitution, permitted standing before the courts in particular cases although a party had no special interest in the outcome.

245 Following *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

246 *Valley Forge Christian College v Americans United for Separation of Church and State Inc* 454 US 464 at 473 (1982). In *Lujan v Defenders of Wildlife* 504 US 555 at 566 (1992) Scalia J for the Court cited earlier authority to the effect that standing is not "an ingenious academic exercise in the conceivable": *United States v Students Challenging Regulatory Agency Procedures* 412 US 669 at 688 (1973).

247 Respondent's submissions.

in the United States. This practical difference affects the approach to questions such as those argued in this case.

Conclusion: legislation and proceedings valid

176 The result of this analysis is that the respondent's attack on the validity of ss 80 and 163A of the Act fails. So far as those sections confer standing on a "person", they are valid laws. No negative implication from the language, structure or purpose of Ch III of the Constitution requires a contrary conclusion. United States decisions do not suggest the need for a different result.

177 My opinion does not hold that in every case the standing of a party invoking the jurisdiction of this Court or of other "federal courts" is irrelevant for constitutional purposes. This case has been concerned, and concerned only, with statutory provisions governing standing to enforce a law made by the Parliament with the ostensible purpose of achieving large social and economic purposes. Because most federal laws have national objectives, it is likely that similar results would flow in other cases where a federal statute has empowered "any person" or "a person" to vindicate its provisions in a federal court. But it is unnecessary in the present case to contemplate an extreme instance of legislation having a limited and particular operation which contained a standing provision that would not yield a concrete instance affecting "some immediate right, duty or liability" of the litigant that would be "established by the determination of the Court"[248].

178 Such a case is much more likely to arise in circumstances where the party invoking the jurisdiction of a federal court cannot point to any statutory provision affording that party standing to enforce federal law. It is in such a case that the inability of the party to show standing, in the sense of some "special interest" or personal stake in the outcome of the proceedings, may constitute an indication that the cause propounded is not of a kind that may be determined by a federal court. It may indicate that it is not a "matter"; that it does not constitute an exercise of the "judicial power"; that it is inappropriate of its character to the functions proper to "federal courts" as contemplated by Ch III of the Constitution.

179 It is cases of the last-mentioned kind in which it could be said that "[q]uestions of standing cannot be divorced from the notion of a 'matter'[249]." In such cases, it is likely that standing will be one of several indications that might lead a court to a conclusion that there is no "matter". In default of a statutory

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248 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

249 *Abebe* (1999) 73 ALJR 584 at 592 per Gleeson CJ and McHugh J; 162 ALR 1 at 12.

standing right conferred by the Parliament, the inability of the party to demonstrate standing according to general principles may then contribute to a conclusion that that party is unable to show an "immediate right, duty or liability" of others, or is seeking "a declaration of the law divorced from [an] attempt to administer that law"[250]. It is unnecessary, and undesirable, in this case, which concerns an express statutory provision conferring standing rights, to explore the relevance of that notion to cases where no such statutory provision exists[251].

180 Nor is it necessary in these proceedings to consider the case where a bare declaration is sought as to a past breach of the Act which has, in the particular case, no relevance to the present rights and obligations of the parties. In such circumstances it might be appropriate or necessary to refuse relief. Whilst recording this point, it is undesirable to develop it as it would take this Court beyond the question asked in the Case Stated and beyond the matters so far litigated in the Federal Court. That is where, jurisdiction being established, such an issue falls to be decided in the first instance.

Orders

181 I agree in the orders proposed by Gleeson CJ and McHugh J.

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250 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

251 As was the case in *Croome v Tasmania* (1997) 191 CLR 119 and *Thorpe v The Commonwealth [No 3]* (1997) 71 ALJR 767; 144 ALR 677.

182 HAYNE J. The circumstances in which this proceeding comes before the Court are set out in the reasons of other members of the Court. I do not repeat them. I agree that the first question in the Case Stated for the consideration of the Full Court should be answered "No". The other questions need not be answered. The respondent should pay the costs of the Case Stated in this Court.

183 The respondent's contention, that there is no "matter" arising under a law made by the Parliament, unless the applicant in the proceeding in the Federal Court of Australia for orders pursuant to ss 80 and 163A of the *Trade Practices Act* 1974 (Cth) has a "special interest" in the subject matter of the claim, should be rejected. It is a contention which seeks to read "matter" (when used in Ch III of the Constitution) as requiring that the parties to litigation have correlative (in the sense of mutual or reciprocal) interests in rights and duties that are in issue in the litigation. That is, the contention is that the "immediate right, duty or liability to be established by the determination of the Court"[252] must be a right, duty or liability in which the opposing parties have correlative interests. In many kinds of criminal proceedings, the prosecutor and the defendant do not have correlative interests in the right, duty or liability which the proceeding seeks to vindicate. That is reason enough to deny the validity of any universal proposition that reciprocity of right, duty or obligation is an essential element of a "matter" as that term is used in Ch III.

184 And no satisfactory basis was given for confining the application of the proposition for which the respondent contends to some kinds of proceeding. To what kinds of proceeding would the alleged principle apply? If criminal proceedings are put to one side, it is clear that the alleged principle does not apply in some kinds of civil proceeding. As the reasons of other members of the Court show, in some claims for prerogative relief there is no reciprocity of rights and duties between the parties. Yet s 75(v) shows that claims for prerogative relief fall within the constitutional concept of "matter".

185 In Ch III, the word "matter" is used to describe a very wide variety of controversies. In the present case, the applicant contends (and the respondent denies) that the respondent has acted in breach of a statutory norm of conduct (s 52 of the *Trade Practices Act*). The absence of reciprocity of right and duty between these parties does not take this controversy outside the constitutional concept of "matter".

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252 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

186 CALLINAN J. The respondent is the manager of two unit trusts (Infrastructure Trust of Australia (I) and (II)) ("the ITA group"). In November 1996 the respondent issued a prospectus and a supplementary prospectus, inviting the public to purchase stapled securities in the ITA group. The prospectus which invited subscriptions for units in trusts stated that one of the four "seed assets" of the ITA group was the "Eastern Distributor", a project for a toll road in Sydney. The prospectus said of this project:

> "Traffic volume on the Eastern Distributor is anticipated to build up rapidly, as a consequence of the existing traffic volumes and the current congestion in the corridor, to an average daily volume of nearly 60,000 vehicles by 2006. Thereafter traffic volume on the Eastern Distributor is forecast to increase more slowly."

187 The applicant in this matter brought a claim against the applicant in the Federal Court, alleging that various statements in the prospectus, particularly the one quoted, were made in breach of ss 52, 53(aa) and 53(c) of the *Trade Practices Act* 1974 (Cth) and ss 42, 44(b) and 44(e) of the *Fair Trading Act* 1987 (NSW), and seeking relief pursuant to s 80 of the *Trade Practices Act* by way of declarations and corrective advertising. Declaratory and injunctive relief was also sought pursuant to ss 21 and 23 of the *Federal Court of Australia Act* 1976 (Cth).

188 It is the respondent's case that the applicant has no standing to seek relief under these Acts, and that, in so far as they purport to confer standing on the applicant in these proceedings, ss 80 and 163A of the *Trade Practices Act*, s 65 of the *Fair Trading Act* and ss 21 and 23 of the *Federal Court of Australia Act* are invalid.

189 The proceedings were removed from the Federal Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth)[253] by Gaudron J who reserved the following questions for the Full Court:

> "1. Are sections 80 and 163A of the *Trade Practices Act 1974 (Cth)* invalid insofar as they purport to confer standing on the applicant to bring the present proceedings?

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253 Section 40(1) relevantly provides:

> "Any cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court other than the High Court or in a court of a State or Territory may, at any stage of the proceedings before final judgment, be removed into the High Court under an order of the High Court, which may, upon application of a party for sufficient cause shown, be made on such terms as the Court thinks fit ..."

2. Does the applicant have standing to bring proceedings in the Federal Court in respect of the subject matter of these proceedings:

(a) for an injunction in reliance upon section 65 of the *Fair Trading Act 1987 (NSW)* and in purported reliance upon the accrued or pendent jurisdiction of the Federal Court;

(b) for an injunction in reliance upon section 23 of the *Federal Court of Australia Act 1976 (Cth)*;

(c) for a declaration that another person has engaged in misleading and deceptive conduct in contravention of section 52 of the *Trade Practices Act* or section 42 of the *Fair Trading Act*?

3. Is section 65 of the *Fair Trading Act* a law of a State:

(a) for the purposes of section 109 of the *Constitution*, inconsistent with the *Trade Practices Act*; or

(b) in conflict with Chapter III of the *Constitution* in purporting to confer standing on the applicant to bring the proceedings in the Supreme Court of New South Wales against the respondent?

4. If the Federal Court has no jurisdiction in respect of these proceedings, should the proceedings be remitted to a court of a state?

5. By whom should the costs of the proceedings in the Full Court be borne?"

190 It was agreed that if question (1) were answered "no" then it would be unnecessary to answer any of the other questions in the case stated. As I am of the view that ss 80 and 163A validly confer standing on the applicant, it is unnecessary for me to deal with the respondent's arguments in relation to, or to answer the other questions.

191 Section 80 of the *Trade Practices Act* relevantly provides as follows:

"(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of any of the following provisions:

(i) a provision of Part IV, IVA, IVB or V;

(ii) section 75AU;

(b) attempting to contravene such a provision;

(c) aiding, abetting, counselling or procuring a person to contravene such a provision;

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision;

the Court may grant an injunction in such terms as the Court determines to be appropriate.

...

(2) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).

(3) The Court may rescind or vary an injunction granted under subsection (1) or (2)."

Section 163A is in these terms:

"(1) Subject to this section, a person may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, the making of:

(a) a declaration in relation to the operation or effect of any provision 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, and the Court has jurisdiction to hear and determine the proceeding.

(2) Subject to subsection (2A), the Minister may institute a proceeding in the Court under this section and may intervene in any proceeding instituted in the Court under this section or in a proceeding instituted in any other court in which a party is seeking the making of a declaration of a kind mentioned in paragraph (1)(a) or (aa) or an order of a kind mentioned in paragraph (1)(b).

(2A) Subsections (1) and (2) do not permit the Minister:

(a) to institute a proceeding seeking a declaration, or an order described in paragraph (1)(b), that relates to Part IV; or

(b) to intervene in a proceeding so far as it relates to a matter that arises under Part IV.

(3) The Commission is not entitled to institute a proceeding in the Court under this section but may intervene in a proceeding instituted in the Court or in any other court, being a proceeding:

(a) that involves a matter arising under Part IV other than a matter arising under section 48; and

(b) in which a party is seeking the making of a declaration of a kind mentioned in paragraph (1)(a) or (aa).

(4) The jurisdiction of the Court to make:

(a) 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 by the Tribunal; or

(b) an order of a kind mentioned in paragraph (1)(b) directed to the Tribunal;

shall be exercised by not less than 3 Judges.

(5) In this section, '**proceeding**' includes a cross-proceeding."

192 The respondent's argument starts with the proposition that the Federal Court as a court established under Ch III of the Constitution may exercise only the "judicial power of the Commonwealth"[254], and then only in respect of a "matter"[255]. The respondent contends that there can be no exercise of the "judicial power of the Commonwealth", and no "matter" within the meaning of those words in Ch III of the Constitution unless the party commencing proceedings has a relevant standing to do so. A party will only have such standing, on the respondent's argument, if it has a "special interest" in the proceedings of the kind sufficient to confer standing at common law[256]. Because the applicant concedes that it does not have a "special interest" in the proceedings, the respondent's argument, if accepted, would compel the conclusion that ss 80 and 163A are invalid in so far as they purport to give the applicant standing in these proceedings.

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254 Section 71 of the Constitution provides:

> "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction ..."

255 Section 76(ii) of the Constitution provides:

> "The Parliament may make laws conferring original jurisdiction on the High Court in any matter –
> ...
> (ii) Arising under any laws made by the Parliament."

Section 77(i) provides:

> "With respect to any of the matters mentioned in the last two sections the Parliament may make laws –
> (i) Defining the jurisdiction of any federal court other than the High Court."

256 cf *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262.

193 The respondent's contention is that the high water mark of decisions of this Court with respect to the grant of declaratory relief is *Ainsworth v Criminal Justice Commission*[257], in which it was held that the appellant was entitled to a declaration, notwithstanding that an injunction was not available (as the conduct of which the appellant complained was in all respects complete) and notwithstanding that the appellant had no right to damages. The Court held that a declaration would nonetheless be of utility to the appellant because it would go some way towards dispelling or reducing the harm that the unlawful conduct had done to the appellant. The instant case, the respondent submitted, was not one in which the applicant could advance arguments and point to facts of the kind which led to the decision in *Ainsworth*.

194 The respondent referred to the history of relator actions in the United Kingdom. Reliance was placed upon a number of the statements made in the speeches of their Lordships in *Gouriet v Union of Post Office Workers*[258], and in particular statements made by Lord Wilberforce, in which his Lordship pointed out that the discretionary role of the Attorney-General in deciding whether to lend his or her name to an action for the enforcement of the law in the civil courts was not merely formal, but involved important social and political considerations: to allow a litigant such as the applicant in this case who has in no way been personally adversely affected by the conduct of the respondent to bring proceedings for a declaration, or to compel the respondent to correct or answer for its misconduct, amounts to an unwarranted and unlawful circumvention of legal principle and the sound underlying policy reasons for relator actions. Relevantly, the respondent argued, the Commission established under the *Trade Practices Act* stood in the shoes of, and had a like role to the Attorney-General in enforcing the *Trade Practices Act*. Accordingly the principles traditionally applied to attempts by ordinary members of the public to enforce the law in situations in which they had no interest over and above that of any other person, and the discretionary but exclusive right of the Attorney-General to do so, should be applied here, and to the Commission as a statutory alter ego of the Attorney-General.

195 I point out at this stage that s 80 itself evinces a clear legislative intention that neither the Minister, the Commission nor any other person should in all cases have an exclusive right of enforcement, or the same rights or obligations in making claims for relief pursuant to the section.[259]

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257 (1992) 175 CLR 564.

258 [1978] AC 435.

259 For example: ss 80(1), 80(1AAA), 80(6) and 80(7).

196 Reference was made by the respondent to three cases in this Court: *Australian Conservation Foundation v The Commonwealth*[260]; *Onus v Alcoa of Australia Ltd*[261]; and *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*[262], all of which, it was claimed, reinforced the notion that the existence of a special interest was required to support proceedings of the kind brought by the applicant.

197 Counsel for the respondent also sought to call in aid cases in the United States in which strong majority opinions have been expressed, and which, if they were to be adopted here, would be determinative of the case on the first question in the respondent's favour. Particular reference was made to *Lujan v Defenders of Wildlife* in which Scalia J in delivering the opinion of the majority in the United States Supreme Court said this of the jurisdiction of federal courts of that country to determine "cases" and "controversies"[263]:

> "Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized[264] and (b) 'actual or imminent, not "conjectural" or "hypothetical"'[265]. Second, there must be

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260 (1980) 146 CLR 493.

261 (1981) 149 CLR 27.

262 (1998) 194 CLR 247.

263 *Lujan v Defenders of Wildlife* 504 US 555 at 560-561 (1992),

see also Art III, s 2 of the Constitution of the United States:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. ..."

264 See *Warth v Seldin* 422 US 490 at 508 (1975); *Sierra Club v Morton* 405 US 727 at 740-741 n 16 (1972).

265 See *Los Angeles v Lyons* 461 US 95 at 102 (1983).

a causal connection between the injury and the conduct complained of – the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'[266] Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

The party invoking federal jurisdiction bears the burden of establishing these elements[267]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, ie, with the manner and degree of evidence required at the successive stages of the litigation."

198 Right from the time of the decision of this Court in *In re Judiciary and Navigation Acts*, it has been stressed, the respondent further submitted, that the separation of judicial power from the legislative and executive powers of the Commonwealth has been a fundamental Constitutional doctrine; and that judicial power is only exercisable in respect of a controversy, that is a "matter" correctly so defined; or, as was said in *In re Judiciary and Navigation Acts*, there must be in existence "some immediate right, duty or liability to be established by the determination of the Court"[268]. It was a key part of the respondent's argument that for the Parliament to seek to invest in a Federal Court jurisdiction to determine the applicant's claim in the absence of standing by reason of a special interest, would be to do what this Court held to be impermissible in *R v Kirby; Ex parte Boilermakers' Society of Australia*[269], as an attempted investiture of non-judicial functions in Ch III courts.

199 The respondent accepted that in advancing the arguments which it did, it was necessary to meet and deal with the express language of ss 52, 53, 163A and in particular s 80(1) of the *Trade Practices Act*.

200 Sections 52 and 53 proscribe conduct of the kind of which the applicant here complains, that is, misleading or deceptive conduct in trade or commerce, inter alia, either in, or in connexion with the supply of services.

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266 *Simon v Eastern Kentucky Welfare Rights Organization* 426 US 26 at 41-42 (1976).

267 See *FW/PBS, Inc v Dallas* 493 US 215 at 231 (1990).

268 (1921) 29 CLR 257 at 265.

269 (1956) 94 CLR 254.

201 Sub-section (1) of s 80, however, expressly contemplates that an application may be made by the Commission (established by the Act) *or any other person* in respect of the conduct as prescribed. Section 163A is concerned with the jurisdiction of the (Federal) Court to make declarations and orders.

202 Confronted with the express language of these two sections, and in particular s 80(1), the respondent submits that each section is wholly invalid or should be read down to exclude the making of an application by any person other than one who has a special interest or, to put it another way, the equivalent of common law standing to make a claim.

203 Finally, on this aspect of the case, the respondent argues that there is no relevant justiciable controversy determinable by a Federal Court unless there is some reciprocity between the parties, and that can only exist, if, in effect, there is some relationship of cause and effect between the actions of the respondent and the applicant.

204 There is no case in this Court in which any argument as far reaching as that advanced by the respondent has been upheld. Nor was the respondent able to point to any statements in this Court which go nearly as far as the arguments advanced. Perhaps the closest any Justice of this Court came to suggesting anything as far reaching as the respondent's propositions was Isaacs J whose language in *The State of South Australia v The State of Victoria*[270] implicitly suggests a need for some degree of reciprocity between parties in order for there to be in existence a "matter" fit for determination by a Ch III court. His Honour said[271]:

> "In my opinion, ['matters' in s 75 of the Constitution], used with reference to the judicature, and applying equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties."

205 The invalidation of s 80 of the *Trade Practices Act* or its reading down would seriously curtail its intended operation as explained in *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd*[272]:

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270 (1911) 12 CLR 667.

271 (1911) 12 CLR 667 at 715.

272 (1978) 142 CLR 113 at 131.

"[to read 'any other person' as 'a person aggrieved'] would lead to frequent investigations and arguments, resulting in waste of public time and resources (as has occurred elsewhere) in determining who was and who was not aggrieved ... Also, experience shows that enforcement agencies in environmental and consumer protection (as well as those in occupational safety and health) often become unable or unwilling to enforce the law (because of inadequate resources or because they tend to become too close to those against whom they should be enforcing the law). Section 80 expresses the policy that such tendency to non-enforcement or limited enforcement should be overcome ..."

206 In *Victoria v The Commonwealth and Hayden*, Gibbs J said that it was[273]:

"somewhat visionary to suppose that the citizens of a State could confidently rely upon the Commonwealth to protect them against unconstitutional action for which the Commonwealth itself was responsible".

207 And in *Bateman's Bay*, Gaudron, Gummow and Kirby JJ made some similar observations[274]:

"[It is] 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible".

208 These statements may have a particular relevance now that, as a result of the insertion of s 2A of the *Trade Practices Act* in 1977, the Act binds the Crown in right of the Commonwealth to the extent that it may be carrying on a business. It may perhaps be doubted whether the Commonwealth, one of its agencies or a member of the executive would in all situations be anxious to enforce legislation against the Commonwealth in respect of any business activities that it might carry on.

209 In *The State of South Australia v The State of Victoria*, Griffith CJ said[275]:

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273 (1975) 134 CLR 338 at 383.

274 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 262-263.

275 (1911) 12 CLR 667 at 675.

> "The word 'matters' was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice ... a matter ... in order to be justiciable ... must be such that it can be determined upon principles of law."

210 His Honour may very well have had in mind what had been said by Josiah Symon QC at the 1898 Melbourne Convention as the Chairman of the Convention Judiciary Committee[276]:

> "We want the very widest word we can procure in order to embrace everything which can possibly arise within the ambit of what are comprised under the sub-section ... it would be of no use to adopt the word 'case' or 'controversy'".

211 It is not accurate to say that for all classes of proceedings the law required that the moving party have a real, or actual, or special interest in the outcome. At common law, any person could prosecute for breaches of the criminal law by information unless the relevant statute on its true construction confined prosecutors to particular persons[277]. Also, at common law, any person could obtain leave to file an information relating to the common law crime of conspiracy[278]. The Attorney-General always had standing to seek an injunction for breach of a statute unless the statute in terms excluded the remedy. Before Federation it was well established that a relator need not have any personal interest in the controversy[279], and an absence of a special interest, or of a particular grievance does not preclude a grant of prohibition or certiorari

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276 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 319. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 765; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507-508, per Mason J.

277 *Steane v Whitchell* [1906] VLR 704 at 705-706; approved in *Brebner v Bruce* (1950) 82 CLR 161 at 173.

278 See *R v Norris* (1758) 2 Keny 300 [96 ER 1189], where Lord Mansfield said that an information could be filed "from what quarter soever".

279 *Attorney-General v Vivian* (1826) 1 Russ 226 at 236 [38 ER 88 at 92]; *Attorney General v Logan* [1891] 2 QB 100 at 103, 106; *Attorney-General and Spalding Rural Council v Garner* [1907] 2 KB 480 at 485; *Attorney-General v Crayford Urban District Council* [1962] Ch 575 at 585, 590; *Attorney-General (Q); Ex rel Duncan v Andrews* (1979) 145 CLR 573 at 582 per Gibbs J.

respectively[280]. A stranger may seek habeas corpus[281] and quo warranto may be granted at the suit of either the Attorney-General ex officio, or any other person[282].

212 If the respondent's submissions were correct, Parliament might not be able to enact a statute codifying those parts of the common law to which I have referred and conferring jurisdiction upon the Federal Court to grant those remedies without infringing Ch III of the Constitution, to say the least, a rather unlikely conclusion.

213 So far as the cases in the United States are concerned, it is sufficient for present purposes to point out that the word "matter" was chosen as the appropriate expression for Ch III of the Australian Constitution as opposed to either "case" or "controversy" (the United States' choices) because "matter" was an expression which was thought to have, and indeed is clearly capable of having a wider meaning than the words chosen in that country.

214 In my opinion the respondent's challenge to the legislation must fail. First, even if I were to assume that "matter" is to be confined to a case in which the initiating party has standing to commence the case, there does not seem to be any reason why there may not be a statutory conferral of standing by legislation enacted under an appropriate Commonwealth head of power. The *Trade Practices Act* is such a statute, and it has conferred, in express terms standing upon *any* person to seek enforcement or relief under, or with respect to some of its provisions. Secondly, as the examples to which reference has been made show, there have always been some exceptions to any general rule that a litigant must have some special interest to protect or vindicate, in seeking to enforce legislation. Thirdly, according to its ordinary meaning, to the understanding of its meaning by the framers of the Constitution, and its interpretation by Justices of this Court in the cases to which reference has been made, the word "matter" is capable of embracing a case of the kind here in respect of which the Federal

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280 With respect to prohibition, see *Re Forster v Forster and Berridge* (1863) 4 B & S 187 at 199 [122 ER 430 at 435]; *Worthington v Jeffries* (1875) LR 10 CP 379 at 381-384; *Farquharson v Morgan* [1894] 1 QB 552 at 556; *R v Licensing Court and McEvoy; Ex rel Marshall* [1924] SASR 421. With respect to certiorari, see *R v Justices of Surrey* (1870) LR 5 QB 466 at 473; *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482 at 517-518 per Isaacs and Rich JJ.

281 *Ex parte West* (1861) 2 Legge 1475.

282 *R v Speyer; R v Cassel* [1916] 1 KB 595 at 609, 613.

legislature, within power, has enacted that any person may bring proceedings under s 80 of the *Trade Practices Act*.

215 It is unnecessary therefore to express any view upon competing considerations of mixed law and policy of the kind referred to in *Gouriet*[283] regarding the desirability or otherwise of the undertaking of a filtering exercise by the Attorney-General, or the risk of the inundation of the courts by a multiplicity of suits by persons who have been described, in other contexts, as busy-bodies or "phantom litigants"[284] or whether law enforcement (conventional civil remedies apart) should be a matter for officious, or other members of the public.

216 The claims of the applicant are for:

> "1. An order pursuant to s 80 of the Trade Practices Act 1974 (Cth) (the Act) or alternatively s 65 of the Fair Trading Act 1987 (NSW) or s 23 of the Federal Court of Australia Act 1976 (Cth) that the Respondent publish corrective advertising, in a form and manner approved by the court, so as to provide an accurate estimate of likely future traffic volumes on the Eastern Distributor, and so as to correct the estimates of such traffic volume made in the prospectus for the Infrastructure Trust of Australia Group ("ITA") dated 22 October 1996.
>
> 2. A declaration that the Respondent, in making the traffic volume forecasts for the Eastern Distributor in the Prospectus, has engaged in misleading and deceptive conduct contrary to s 52 of the Act and or in breach of s 42 of the *Fair Trading Act* 1987 (NSW).
>
> 3. Such further or other order as the Court thinks fit."

217 Nothing that I have said should in any way be taken as foreclosing, or trammelling the exercise by the Court of the usual discretions which a court entertaining claims of these kinds may exercise, whether to grant relief at all, or relief in some other or more limited form as may be appropriate.

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283 [1978] AC 435.

284 cf *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 260-264 per Gaudron, Gummow and Kirby JJ, 275-280 per McHugh J.

218 I would accordingly answer question 1 as follows:

"Are sections 80 and 163A of the *Trade Practices Act 1974 (Cth)* invalid insofar as they purport to confer standing on the applicant to bring the present proceedings?"

Answer: no.

219 It is unnecessary to answer any other of the questions in the case stated. The proceedings should be remitted to the Federal Court and the respondent should pay the applicant's costs in this Court.

TITLE 47. *Habeas Corpus.*

An Act to provide for issuing the writ of Habeas Corpus.

SECT. 1. BE *it enacted by the Senate and House of Representatives, in General Assembly convened,* That any judge of the superior court, or the county court, when in session, or the chief judge thereof, when said court is not in session, shall have power to issue the writ of habeas corpus, and proceed thereon according to law: and when any trial shall be before a single judge, the court fee shall be two dollars, and when before a court in session, no fee shall be paid. Who may issue the writ of habeas corpus. Fee on trial.

SECT. 2. When application is made to such court or judge, for a writ of habeas corpus, and the facts are verified, by the affidavit of the person in whose favor the application is made, or of any other person, in which he or she alleges, that he or she verily believes the person on whose account such writ is prayed for, is illegally confined, or deprived of his lawful liberty, it shall be the duty of such court or judge, to grant a writ of habeas corpus, directed to some proper officer, to serve and return; who shall receive and make due service of the same, by putting into the hands of the person, who has the custody of the body of him or her, who is directed to be brought up on said writ, a true and attested copy of the same; and shall make immediate return of said writ, with his doings thereon, on pain of forfeiting fifty dollars, to the use of the person so held in custody, to be recovered by action on the case. When and how to be issued. How to be served.

SECT. 3. If any person, having the custody of the body of any one directed to be brought up, on a writ of habeas corpus, duly served, shall fail or neglect to bring up the body, according to the command in the writ; or shall refuse to accept the copy offered in service of the same; or shall, in any way, fraudulently avoid bringing up the body, according to the command in the writ; or, having brought up the body, shall neglect or refuse to make return of the cause of detaining such person, so held in custody; he shall be deemed guilty of a contempt of court, and may be punished, by said court or judge, by commitment, for such contempt, and shall also forfeit and pay to the person so held in custody, two hundred dollars. Penalty for disobedience.

SECT. 4. When any facts contained in such return shall be contested, by the applicant, such court or judge may hear testimony, and examine and decide upon the truth, Trial.

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Unconstitutional by Boumediene v. Bush, U.S., June 12, 2008

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2241

§ 2241. Power to grant writ

Effective: January 28, 2008

Currentness

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Pub.L. 89-590, Sept. 19, 1966, 80 Stat. 811; Pub.L. 109-148, Div. A, Title X, § 1005(e)(1), Dec. 30, 2005, 119 Stat. 2741; Pub.L. 109-163, Div. A, Title XIV, § 1405(e)(1), Jan. 6, 2006, 119 Stat. 3477; Pub.L. 109-366, § 7(a), Oct. 17, 2006, 120 Stat. 2635; Pub.L. 110-181, Div. A, Title X, § 1063(f), Jan. 28, 2008, 122 Stat. 323.)

VALIDITY

<The United States Supreme Court has held a provision of this section, as added and amended by section 1005(e)(1) of Pub.L. 109-148 and section 7(a) of Pub.L. 109-366 (28 U.S.C.A. § 2241(e)), denying federal courts jurisdiction to hear habeas corpus action by an alien detained and determined to be enemy combatant, or awaiting such determination, an unconstitutional suspension of the writ of habeas corpus under the Suspension Clause, Art. I, § 9, clause 2. Boumediene v. Bush, U.S.2008, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41.>

Notes of Decisions (1885)

28 U.S.C.A. § 2241, 28 USCA § 2241
Current through P.L. 116-66.

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CT S. Tran., 5/28/2009

Connecticut Senate Transcript, May 28, 2009

May 28, 2009
Connecticut Senate
2009

THE CONNECTICUT GENERAL ASSEMBLY

SENATE

Thursday, May 28, 2009

The Senate was called to order at 12: 30 p. m. , Senator Coleman of the 2nd in the Chair.

THE CHAIR:

Would the Connecticut State Senate please come to order. Would the Senate please come to order.

Good morning, ladies and gentlemen. Before we start off business, I like to call upon Rabbi Lazowski to lead us in prayer.

DEPUTY CHAPLAIN RABBI PHILIP LAZOWSKI:

Our thought for today is from the prophet Haggai, chapter 1, verse 7.

This is what the Lord of hosts says, quote, give careful thought to your ways, end of quote.

Let us pray. Almighty God, listen to the prayer of Your Senators assembled here in this circle. Provide them with wisdom, courage and integrity. Strengthen their resolve and enable them to use their talent You have provided them to be a source of strength and comfort when they wrestle with the decisions to do the right thing.

Your blessing upon all who serve and work in the government of this state and nation. Protect our defenders of freedom. Hear us as we pray, and let us all say, amen.

THE CHAIR:

Senator Handley, would you be so kind as to grace us with your presence at the dais, to lead us in the Pledge of Allegiance.

SENATOR HANDLEY:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all.

THE CHAIR:

Mr. Clerk, is there any business on your desk?

THE CLERK:

Thank you, and through you, Mr. President. In the amendment, you call for the trust protector to provide services to the animal. It begs the question that certainly I have, which is there's a wide range of levels of standards of care, and I want to make sure that we aren't getting too carried away, so for legislative intent purposes, can you give us a few phrases on what level of care you had in mind in this particular bill?

THE CHAIR:

Senator McDonald?

SENATOR McDONALD:

Well, thank you, Mr. President. The role of a trustee and of a trust protector is well defined in the law and is a fiduciary relationship which requires the fiduciary to put the interests of the individual or, in this case, the animal over their own personal interests. It is the highest standard of responsibility under the law.

THE CHAIR:

Senator Frantz?

SENATOR FRANTZ:

Just as a follow-up, I said two questions. This is two and a half questions if that's okay, Mr. President, and that is that the -- given that there are errors, testator's errors, there could be potential beneficiaries given special circumstances, I just want to be sure that we're talking about the same levels that would apply to those of us with two legs, regardless of whether we have four or wings or spears on our heads, or whatever.

THE CHAIR:

Senator McDonald?

SENATOR McDONALD:

Thank you, Mr. President. Yes, the general principles of trust law would apply. This was merely creating a separate framework to deal with the situation of animals as beneficiaries of a trust, but the legal responsibilities of the trustee would be very familiar to our courts.

SENATOR FRANTZ:

Thank you very much, Senator McDonald. It's a great amendment and a great bill, and I now sit in favor of it. Thank you.

THE CHAIR:

Thank you, sir. Any remarks further" Senator Boucher?

SENATOR BOUCHER:

Thank you, Mr. President. Mr. President, I rise in strong support of this amendment, and I also would like to thank Senator McDonald, the Attorney General, Representative Hetherington, Representative Morin, for their really strong advocacy support testimony on this initiative for pets and pet owners of Connecticut.

Many Connecticut residents invest a great deal of time and care for their pets and consider them like their human loved ones. There is research that shows pets can extend a person's life, help victims recover from tragedy or abuse, provide companionship for those who have lost a loved one, and generally improve the quality of one's life. There are now more childless couples and an older population who are increasingly attached to their pets, and as one of my constituents noted, pets are essential to my life just as friends, families, and spouses are. They embody every aspect of each of these.

The question of who cares for a pet after the death of its owner is troubling to a lot of folks. Some pets, like parrots, by the

Connecticut General Statutes Annotated
Constitution of the State of Connecticut 1965 Annotated as Amended (Refs & Annos)
Article First. Declaration of Rights (Refs & Annos)

C.G.S.A. Const. Art. 1, § 12

§ 12. Writ of habeas corpus

Currentness

Sec. 12. The privileges of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature.

Notes of Decisions (5)

C. G. S. A. Const. Art. 1, § 12, CT CONST Art. 1, § 12
The statutes and Constitution are current through the 2019 January Regular Session and the 2019 July Special Session.

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