THE HUMBLE DECLARATION AND THE EXECUTIVE BRANCH: EVOLVING PRINCIPLES IN AUSTRALIAN PUBLIC LAW

*Margaret Allars**

* Professor, Sydney Law School, Senior Counsel, NSW Bar.

INTRODUCTION

The remedy of declaration originates in equitable principles of the English Court of Chancery, inherited in Australia, and to an extent accommodated and reinforced by the implied requirements of the Commonwealth Constitution with respect to the judicial branch. In public law, restrictive approaches have not obviously intruded upon the discretionary principles applying to the declaration. The physical drama of certiorari quashing a decision, prohibition preventing further action, and mandamus compelling action, eludes the declaration. It humbly offers no more than a "non-coercive," binding declaration of the rights and obligations of the applicant and the executive branch decision-maker.[1] The declaration was established at a time when the remedial benefits of the prerogative writs were understood, but the potential of the modern executive branch to exceed, abuse, and act unfairly in exercising its power could not have been anticipated, nor the development of administrative law standards reflected in the grounds of review. A liberal approach to the discretionary principles associated with the declaration has persisted. Tentatively, the remedy is maturing, driven by liberalisation of administrative law concepts that are neighbours to remedies, namely justiciability and standing. Yet the idea of what it is to bind and who is bound remains embryonic.

I. HISTORICAL ORIGINS

A. Inherited Jurisdiction and Powers of State Supreme Courts

The Supreme Court of each State, and of the Northern Territory and the Australian Capital Territory, is a superior court of general jurisdiction.[2] In 1828, the Supreme Courts of New South Wales ("NSW") and Van Dieman's Land were given jurisdiction that included such jurisdiction as the Court of Queen's

---

[1] *See* A.T. Scotford, *Declaratory Judgments in New South Wales: The Old and the New*, 5 SYD. L. REV. 454, 463 (1967) (providing an early analysis of the potential for the declaration in public law in Australia); *see generally* LORD WOOLF & JEREMY WOOLF, ZAMIR & WOOLF: THE DECLARATORY JUDGMENT (4th ed. 2011).

[2] *See, e.g.*, *Supreme Court Act 1970* (NSW) ss 22, 23.

Bench had in England.[3] These Supreme Courts were also Courts of Equity, with power to do all things necessary for the due execution of such equitable jurisdiction as the Chancellor could lawfully do within the realm of England and in the exercise of his common law jurisdiction. Similar jurisdiction was subsequently conferred on other State Supreme Courts. By Section 22 of the Supreme Court Act 1970 (NSW) ("Supreme Court Act"), the NSW Supreme Court, formerly established as "the superior court of record in New South Wales," was continued.[4] By Section 23, it has "all jurisdiction which may be necessary for the administration of justice in New South Wales."[5] Limits on the jurisdiction of the Supreme Courts followed from the Commonwealth Constitution, which established a federal system and provided for the judiciary in Chapter III. However, the common law constitutional underpinnings and description of the jurisdiction and powers of the Supreme Courts explain why they are understood to be courts of unlimited jurisdiction. All Australian courts are created by statute and therefore do not have jurisdiction that can truly be described as "inherent."[6] Nonetheless, the "supervisory jurisdiction" of the NSW Supreme Court over inferior courts, tribunals and other State administrators, is often referred to as its "inherent" jurisdiction.[7] The supervisory jurisdiction was additionally continued in s 69(1) of the Supreme Court Act, which gives jurisdiction to grant, by judgment or order, the relief or

---

[3] *Charter of Justice 1823* (Imp) s 2 (by its enabling statute, *New South Wales Act 1823* (Imp) (9 G 4, c 96)); *Australian Courts Act 1828* (Imp) (9 Geo IV c 83) s 3 (conferring the same jurisdiction and authority as the Courts of King's Bench, Common Pleas and Exchequer at Westminster); *id.* s 11 (conferring a full equity jurisdiction with the same powers as the Lord High Chancellor in England); *see also Kirk v Indus Ct of NSW* (2010) 239 CLR 531, 580.

[4] *Supreme Court Act 1970* (NSW) s 22; *see also Supreme Court Act 1935* (WA) s 6 (1-2). With slightly different words, see *Constitution Act 1975* (Vic) s 85 (1, 3).

[5] *Supreme Court Act 1970* (NSW) s 23. For similar provisions in other States, see *Constitution Act 1975* (Vic) s 85(1) (different words referring to "unlimited jurisdiction," discussed in *Wingfoot Austl Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 491-2); *Constitution of Queensland Act 2001* (Qld) s 58(1) (extended by reference to unlimited jurisdiction in s 58(2)); *Supreme Court Act 1933* (ACT) s 20(1)(a); *Australian Capital Territory (Self-Government) Act 1998* (Cth) s 48A(1). See *Supreme Court Act 1935* (SA) section 17 where the general jurisdiction is granted in different words.

[6] *Kirk v Indus Ct (NSW)* (2010) 239 CLR 531, 580-1[98]-[99].

[7] *Assistant Comm'r Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 60-3[40]-[46].

remedy that the Court formerly had jurisdiction to grant by way of writ, whether prohibition, mandamus, certiorari or other writ.[8]

A quick look back is warranted to see what power was conferred on the Supreme Courts to grant declarations. The power to grant declarations was first granted to the Court of Chancery by Section 50 of the Court of Chancery Procedure Act 1852 (Eng).[9] The power was construed narrowly, applying where consequential relief would have been granted but was not sought.[10] After 1850 and until 1883, the existing practice of the former Court of Chancery tended to be followed so that declarations were granted only if some right to relief was established.[11] Hence, the humble origins and self-negating infancy of the power. The power was enlarged by Order XXV Rule 5 of the Rules of the Supreme Court for England and Wales 1883 (Eng) ("1883 Rules (Eng)"), in that no action or proceeding was open to objection on the ground merely that a declaration of right or order was sought without consequential relief being sought.[12] In addition, Section 24(7) of the Judicature Act 1873 (Eng) ("Judicature Act (Eng)"), re-enacted in Section 43 of the Supreme Court of Judicature (Consolidation) Act 1925 (Eng), provided that in the exercise of jurisdiction, the High Court and Court of Appeal in England shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them seem just, all such remedies whatsoever as the parties may appear to be entitled to, in respect of every legal or equitable claim brought forward by them in the matter, so that as far as possible, all matters in controversy

[8] *Supreme Court Act* (n2) s 69(1); *see also Supreme Court Act 1935* (SA) s 17(2)(ii) (vesting the Supreme Court of South Australia with the like jurisdiction to that formerly vested in the English courts, including the Court of Queen's Bench, with power to issue the prerogative writs); *Pub Serv Ass'n of S Austl Inc v Indus Rels Comm'n of S Austl* (2012) 249 CLR 398, 412-13 [29]-[30], 414-15 [35]; *Supreme Court Act 1935* (WA) s 16(1)(a).

[9] *Court of Chancery Procedure Act* 15 & 16 Vic ch 86 s 50; *Dyson v Att'y Gen* [1911] 1 KB 410, 417. On one view, the declaration is strictly a statutory remedy rather than an equitable remedy. *Tito v Waddell* (No 2), [1977] Ch 106, 259; *Mayfair Trading Pty Ltd v Dreyer* [1958] 101 CLR 428, 454 [19].

[10] *Rooke v Lord Kensington* (1856) 2 K & J 753; *Walsh v Alexander* (1913)16 CLR 293, 304-05; *Dyson v Att'y Gen* [1911] 1 KB 410, 417.

[11] *Austl Competition & Consumer Comm'n v MSY Tech Pty Ltd* (2012) 201 FCR 378, 381 [10].

[12] *Rules of the Supreme Court 1883*, O. XXV, r. 5 (Eng.); *see also Court of Chancery Procedure Act* 15 & 16 Vic ch 86 s 50.

between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of such matters be avoided.[13] This reflected the fundamental principle of the Judicature Act (Eng) procedure, the avoidance of multiplicity of proceedings by accepting a broad basis for the availability of remedies.

In Australia, analogues to Order XXV Rule 5 of the 1883 Rules (Eng) were adopted in all the Supreme Courts of the States and Territories, expressed in common terms as "[n]o proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether any consequential relief is or could be claimed or not".[14] The word "right" in the expression "declaration of right" in these provisions, is used in a sense that is "wide and loose," and includes what might be described as privileges, powers, and immunities.[15] However, it was not until 1880 that a version of Section 50 of the Court of Chancery Procedure Act 1852 (Eng) was introduced in NSW by Section 10 of the Equity Act 1880 (NSW), re-enacted as Section 10 of the Equity Act 1901 (NSW).[16] On one analysis, subsequent statutory amendments did not give the NSW Supreme Court plenary power to grant declarations until 1965.[17] This was largely due to the functional separation of the administration of the Court's equity

---

[13] *In the Goods of Tharp* (1878) 3 PD 76, 81.

[14] *Supreme Court Act 1970* (NSW) s 75. The power to grant declarations was introduced in the State Supreme Courts later than in England. The current versions are: *Supreme Court Act 1970* (NSW) s 75 (the first NSW version of Order XXV rule 5 of the 1883 Rules (Eng), being enacted in s 10 of the *Equity Act 1901* (NSW)); *Supreme Court Act 1986* (Vic) s 36; *Supreme Court (General Civil Procedure) Rules* 2015 (Vic) r 23.05; *Civil Proceedings Act 2011* (Qld) s 10; *Supreme Court Act 1935* (SA) s 31; *Supreme Court Act 1935* (WA) s 25(6); *Rules of the Supreme Court 1971* (WA) O 18 r 16; *Supreme Court Rules 2000* (Tas) r 103(1),(2); *Court Procedures Rules 2006* (ACT) r 2900; *Supreme Court Act 1979* (NT) s 18; *Supreme Court Rules 1987* (NT) r 23.05.

[15] *Sankey v Whitlam* (1978) 142 CLR 1, 23 (referring to the *Supreme Court Act 1970* (NSW) s 75).

[16] *Kaldas v Barbour* (2017) 107 NSWLR 341, 386[191].

[17] *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) (amending s 10 of the *Equity Act 1901* (NSW)); *see* DYSON HEYDON, MARK LEEMING & PETE TURNER, MEAGHER, GUMMOW, AND LEHANE'S EQUITY: DOCTRINES AND REMEDIES (5th ed. 2015) 612[19-035], 615[19-070] (adopting the analysis in *Forster v Jododex Austl Pty Ltd* (1972) 127 CLR 421, 435, followed in *Kaldas v Barbour* (2017) 107 NSWLR 341, 385-86 [187]-[194]). As to the history of the power of the Supreme Court of Victoria to grant declarations, see *Ambridge Invs Pty Ltd v Baker* [2010] VSC 59 [61]-[72].

jurisdiction and common law jurisdiction, the judicature system not yet having been adopted.[18] The object of the statutory amendments in 1965 was to remove restrictions, even if they were only a matter of judicial perception,[19] and at odds with the position in the High Court.[20] These provisions have been regarded as conferring a broad discretion, which it is neither possible nor desirable to fetter, save for the operation of certain well-settled discretionary principles relating to the availability of a declaration.

B. High Court of Australia: A Constitutional Dimension

At the federal level, the origins and availability of declarations is affected by the constitutional setting. Section 75(v) of the Commonwealth Constitution vests in the High Court jurisdiction to issue prohibition, mandamus, or an injunction against an officer of the Commonwealth. These remedies have more recently been described, in the context of their issue under Section 75(v), as the constitutional writs, and the constitutional injunction.[21] Section 75(iii) of the Constitution confers original jurisdiction on the High Court in matters in which the Commonwealth, or a person being sued on behalf of the Commonwealth, is a party. Section 75(v) was included in the Constitution to avoid the position in the United States, exposed by the case of *Marbury v. Madison*,[22] where the United States ("U.S.") Supreme Court held that the U.S. Constitution did not give it original jurisdiction to issue mandamus to non-judicial officers of the U.S. government.[23] In Australia in 1901, the framers of the Commonwealth Constitution were concerned to safeguard against the possibility that Section 75(iii) would be construed narrowly, by reference to U.S. case-law, as not including a matter in which a writ of mandamus was sought against an

[18] The judicature system was introduced in NSW by the *Supreme Court Act 1970* (NSW), which commenced in 1972.

[19] *Forster v Jododex Austl Pty Ltd* (1972) 127 CLR 421, 435 (Gibbs, J,).

[20] *See infra* text accompanying note 36.

[21] *Re Refugee Rev Tribunal*; *Ex parte Aala* (2000) 204 CLR 82.

[22] 5 U.S. 137 (1803); *see also R v Commonwealth Ct of Conciliation & Arb; Ex parte the Bris Tramways Co Ltd* (1914) 18 CLR 54, 82; *Deputy Comm'n of Tax'n v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179.

[23] *Marbury*, 5 U.S. at 176.

officer of the executive branch.[24] Section 75(v) was included in the Commonwealth Constitution "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power."[25] These may be excesses not just of constitutional power but also of power conferred by statute on executive branch decision-makers. The Commonwealth Constitution could only be amended by a demanding referendum procedure, not by an ordinary act of the Commonwealth Parliament.[26] Section 75(v) hence provided an "entrenched minimum provision of judicial review" of administrative action.[27]

Section 75(v) of the Constitution is silent as to the declaration.[28] The framers of the Constitution were not troubled as to whether the High Court could issue declarations as to excess of constitutional or statutory power by the executive branch. This is unsurprising. The power to grant a declaration, first granted to the Court of Chancery in 1852,[29] was at the time a "dormant jurisdiction . . . unearthed" only in 1911, in the English Court of Appeal decision in *Dyson v. Attorney-General*.[30] In *Dyson*, a

---

[24] *Ah Yick v Lehmert* (1905) 2 CLR 593, 608-09; *Plaintiff M68-2015 v Minister for Immigr & Border Pro*, (2016) 257 CLR 42, 95 [126]; *Ex parte Aala* (2000) 204 CLR 82, 92 [18].

[25] *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 363 (cited with approval in *Att'y Gen (Cth) v T & G Mut Life Soc'y Ltd* (1978) 144 CLR 161, 189); *Deputy Comm'n of Tax'n v Richard Walter Pty Ltd* (1995) 183 CLR 168, 178-79; *Ex parte Aala* (2000) 204 CLR 82, 138; *Bodruddaza v Minister for Immigr & Multicultural Affs* (2007) 228 CLR 651, 668; *MZXOT v Minister for Immigr & Citizenship* (2008) 233 CLR 601, 614; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 345-46[53]; *Plaintiff M68-2015 v Minister for Immigr & Border Pro*, (2016) 257 CLR 42, 346; *Constr Forestry Mining & Energy Union v Dir of the Work Bldg Indus Inspectorate* (2016) 91 ALJR 1, 8-9; *Smethurst v Comm'n of the Austl Fed Police* (2020) 272 CLR 177, 221.

[26] *Australian Constitution* s 128.

[27] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513[103]; *Bodruddaza v Minister for Immigr & Multicultural Affs* (2007) 228 CLR 651, 668-69.

[28] *See* JOHN QUICK & ROBERT RANDOLPH GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 783 (1901).

[29] *Court of Chancery Procedure Act* 15 & 16 Vic ch 86 s 50 (enlarged by *1883 Rules* (Eng) O. XXV, r. 5 which provided that no objection to jurisdiction was to be made on the ground that merely declaratory judgment was sought).

[30] [1911] 1 KB 410, 415-16, 423 (referring to earlier authority in Pawlett v. Att'y-Gen. (1668) 145 Eng. Rep. 550); Hodge v. Att'y-Gen. 3 Y&C Ex 342, 160 Eng. Rep. 734. When the case came on for trial, the Court granted a declaration that the notice was ultra vires and invalid. Dyson v. Att'y-Gen. [1912] 1 Ch 158; *see also* Wolfgang

declaration was granted against the Crown (represented by the Attorney-General) in respect of a notice issued by the Commissioners of Inland Revenue in excess of statutory power. Non-compliance by a recipient with a notice attracted a fine. The Court held that the action, brought by one taxpayer recipient of a notice, purely for a declaration as to the construction of the statute which imposed burdensome and expensive inquiries, could be maintained. The modern use of the declaration was established when the Court in *Dyson* held that it was not necessary for the plaintiff to proceed by petition of right. The Court granted a declaration as to the invalidity of the notice. It was "highly convenient," "conven[ient] in the public interest," and "of the greatest public importance" for the Court to determine "the true limit of the power of inquisition vested in the Commissioners [of Inland Revenue]," by granting a declaration against the Attorney-General.[31] The Court's reference to the public interest, reflecting the interests of many other recipients of the notice, suggests that it viewed this as a test case that would resolve the question of excess of power for the public at large. The remedy was a binding declaration of the rights and obligations of the parties to the action, namely Dyson and the Attorney-General, but the Court implicitly expected that the executive branch would regard itself as bound more generally, to treat identical notices issued to eight million other members of the public as invalid.

While the declaration was not mentioned, the constitutional assumption as to the nature of jurisdiction exercised by a Chapter III court,[32] established principles that supported and defined the ambit of the declaration, without inconsistency with its origins. A central requirement for jurisdiction under Section 75(iii) or 75(v) derives from the constitutional requirement that there be a "matter," a concept appearing throughout the provisions in

Friedmann, *Declaratory Judgments and Injunctions as Public Law Remedies*, 22 AUSTL. L.J. 446, 451 (1949).

[31] [1911] 1 KB 410 at 417 (followed in *Toowoomba Foundry Pty Ltd v Commonwealth* (1945) 71 CLR 545, 570); *Crouch v Commonwealth* (1948) 77 CLR 339, 348-49, 358-59.

[32] A Chapter III court is a court vested directly with original jurisdiction by Chapter III (being the High Court) or a federal court created pursuant to authority given by Chapter III (such as the Federal Court of Australia), or a state court vested with federal jurisdiction.

Chapter III of the Constitution dealing with the judicial branch and its jurisdiction. A "matter" involves the existence of a controversy as to some immediate right, duty, or liability to be established by the determination of the court.[33] "Matter" has two elements: First, the subject matter itself as defined by reference to the heads of jurisdiction in Chapter III of the Constitution; and secondly, the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy.[34] This includes that the plaintiff has a sufficient interest in the subject matter of the action, and the subject matter consists in a controversy between the plaintiff, asserting that a purported law is invalid, and the government responsible for administering the law.[35] It will be necessary to return to consider the recent understanding of these concepts of justiciability and standing.

Jurisdiction, the authority to decide, is conceptually distinct from the power to grant a remedy.[36] Section 75(v) of the Commonwealth Constitution implies ancillary or incidental authority for the effective exercise of the jurisdiction. The High Court has acknowledged that a matter cannot exist in the abstract, so that if there is no legal remedy for a wrong, there can be no matter.[37] In short, a legally enforceable remedy is as essential to the existence of a matter as is the right, duty, or liability that gives rise to the remedy. This does not mean that the order must be capable of enforcement by execution.[38] Section 31 of the Judiciary Act 1903 (Cth) ("Judiciary Act") gives the Court power to make and pronounce all such judgments (defined in

---

33 *Re Judiciary & Navigation Acts* (1921) 29 CLR 257, 265; *Fencott v Muller* (1983) 152 CLR 570; *Abebe v Commonwealth* (1999) 197 CLR 510, 555, 570, 585. *Cf. id.* at 524. *See also Truth About Motorways Pty Ltd v Macquarie Infrastructure Mgmt Ltd* (2000) 200 CLR 591, 610-11 [43]; *Unions NSW v New South Wales* (2023) 277 CLR 627, 638 [15].

34 *Hobart Int'l Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519, 536 [26].

35 *Toowoomba Foundry Pty Ltd v Commonwealth* (1945) 71 CLR 545, 570; *Croome v Tasmania* (1997) 191 CLR 119, 125-26, 136-37; *Ha v New South Wales* (1997) 189 CLR 465.

36 *Ex parte Aala* (2000) 204 CLR 82, 139[156]-[157]; *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey, J.); *Rizeq v Western Australia* (2017) 262 CLR 1, 34[84]-[87], 47-50[125]-[134]; *Hobart*, 276 CLR at 555[77].

37 *Abebe v Commonwealth* (1999) 197 CLR 510, 527 [31].

38 *Hobart*, 276 CLR at 543[48].

Section 2 as including orders) as are necessary for doing complete justice in any cause or matter pending before it, and power to issue process for the execution of any such judgment.[39] Very soon after *Dyson* was decided, the High Court, in similar circumstances, identified an excess of statutory power by a royal commission in issuing a notice for the production of information.[40] The Court granted a declaration, holding that it had jurisdiction and power to do so by reason of Section 31 of the Judiciary Act, Order IV of the Rules of the High Court (reflecting Order XXV Rule 5 of the Judicature Act (Eng)) and the authority of *Dyson*. [41]

Section 32 of the Judiciary Act empowers the High Court in the exercise of its original jurisdiction to grant all such remedies as the parties are entitled to, in respect of any legal or equitable claim properly brought forward, so that as far as possible, all matters in controversy between the parties may be completely and finally determined and multiplicity of legal proceedings concerning any such matter avoided.[42] Where the prerogative remedies are not available or are inutile, the ancillary remedy of declaration is available under Section 75(v), on a similar discretionary basis as at common law.[43] In exercising its original jurisdiction, the source of the High Court's general power to grant a declaration is Section 31.[44] The Court has never doubted its power to issue declarations as to the constitutional validity of a statute. Here, there is a constitutional foundation for the implication of equitable principles associated with the availability, ambit, and discretionary nature of a declaration.

---

[39] *Colonial Sugar Refining Co v Att'y-Gen (Cth)* (1912) 15 CLR 182, 193, 204-05.

[40] *Id.* at 192-93, 204-05.

[41] *Id.*

[42] Its terms are derived from s 24(7) of *The Supreme Court of Judicature Act 1873* (Eng) 36 & 37 Vict c 66. *See Plaintiff S297/2013 v Minister for Immigr & Border Prot* (2015) 255 CLR 231, 249[44]; *Smethurst v Comm'r of the Austl Fed Police* (2020) 272 CLR 177, 237-38[145]-[146].

[43] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359[101], [103]; *Plaintiff M76/2013 v Minister for Immigr, Multicultural Affs & Citizenship* (2013) 251 CLR 322, 391-92[234]-[240] (referring to *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564 (concerning availability of declarations in the Supreme Court of Queensland)).

[44] *Judiciary Act 1903* (Cth) s 31; *Colonial Sugar Refining Co v Att'y Gen* (Cth) (1912) 15 CLR 182, 193, 204-05.

A declaration may be granted without a grant of other relief under Section 75(v).[45] While the principles of jurisdictional error control the constitutional writs, that is not true of the constitutional injunction, and the position is the same for the declaration.[46] Like a constitutional injunction under Section 75(v), the ancillary remedy of declaration under Section 75(v) may be granted to declare the invalidity of administrative action, even if the legal error is not a jurisdictional error.[47] In a case of procedural error that does not result in invalidity of a decision, a declaration may be made that the decision-maker has acted in breach of the statute.[48] A declaration should not be expressed in terms that involve the reviewing court in trespassing on the merits of an exercise of statutory power.[49] The jurisdiction to grant declaratory relief is not confined to the grant of relief in respect of ultimate decisions and extends to declaring the rights and obligations of parties that are in issue in part-heard proceedings.[50]

C. *Federal Court of Australia: Statutory Sources*

The Federal Court of Australia was created in 1976 as a superior court of record and a court of law and equity.[51] The Court has only such jurisdiction as is conferred upon it by statute.[52] The Court is vested with judicial review jurisdiction at general law, under Section 39B(1) of the Judiciary Act, [53] and under a judicial review procedure statute, the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("ADJR Act"). Judicial review under Section 39B(1) of the Judiciary Act is parallel to that of the High Court under Section 75(v) of the Commonwealth Constitution,

---

45 *Cf. Combet v Commonwealth*, (2005) 224 CLR 494, 578-89[165].

46 *Project Blue Sky Inc v Austl Broad Auth* (1998) 194 CLR 355, 393[100]; *Fed Comm'r of Tax'n v Futuris Corp* (2008) 237 CLR 146, 162[47].

47 *See also Arthur Yates & Co Pty Ltd v Vegetable Seeds Comm* (1945) 72 CLR 37; *Church of Scientology v Woodward* (1982) 154 CLR 25, 55-58, 62, 71, 77; *Fed Comm'r of Tax'n*, 237 CLR at 162[47].

48 *Project Blue Sky Inc*, 194 CLR at 393[100].

49 *Att'y-Gen (NSW) v Quin* (1990) 170 CLR 1.

50 *Forster v Jododex Austl Pty Ltd*, (1972) 127 CLR 421, 438-39.

51 *Federal Court of Australia Act 1976* (Cth) ss 5(1)-(2).

52 *Id.* s 19; *Austl Competition & Consumer Comm'n v MSY Tech Pty Ltd* (2012) 201 FCR 378, 381[9].

53 *Judiciary Act 1903* (Cth) ss 39B(1), 39B(1A)(a).

with only the remedies of prohibition, mandamus, and injunction mentioned. However, in exercising this jurisdiction, the Court has power, where it is otherwise appropriate to do so, to grant a declaration, deriving from three sections of the Federal Court of Australia Act 1976 (Cth) ("FCA Act").

Pursuant to Section 21(1) of the FCA Act, in relation to a matter in which it has original jurisdiction, the Federal Court may make binding declarations of right, whether or not any consequential relief is or could be claimed.[54] A proceeding is expressly not open to objection on the ground that only a declaratory order is sought.[55] Section 21 replicates, for the Federal Court, Order XXV Rule 5 of the 1883 Rules (Eng), the major reform further liberalising the power to grant declarations that had been introduced in the Court of Chancery in the 1850s.[56] Section 23 of the FCA Act is more generally expressed, giving the Federal Court power, where it has jurisdiction, to make orders, including interlocutory orders, and to issue writs, as the Court thinks appropriate. This covers the declaration.[57] The relief by declaration is necessarily final, since an interlocutory declaration is not a form of relief known to the law.[58] The Court will not make a prospective declaration designed to leave existing authority unaffected for a specified period of time after its judgment. To do

[54] *See generally McLeish v Faure* (1979) 25 ALR 403, 414-16; *Aussie Airlines Pty Ltd v Austl Airlines Ltd* (1996) 68 FCR 406, 414 (approved in *Edwards v Santos Ltd* (2011) 242 CLR 421); *Austl Competition & Consumer Comm'n v MSY Tech Pty Ltd* (2012) 201 FCR 378, 380-82[8]-[11]. For declarations in representative proceedings, see FCA Act s 33Z(1)(c). A declaration which directly affects a person's rights or liabilities should not be made under section 21 unless that person is joined as a party, a principle whose application involves matters of degree and ultimately judgment. *Wellington Capital Ltd v Austl Sec & Inv Comm'n* (2014) 254 CLR 288, 316[59]. The power under section 21 includes the power to declare that a person has contravened a provision of the *Corporations Act 2001* (Cth). *Austl Sec & Inv Comm'n v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 587[56]; *see also Queensl Med Lab'y v Blewett* (1988) 84 ALR 615; *Dhillon v Minister for Immigr, Loc Gov't & Ethnic Affs* (1994) 48 FCR 107, 127; *Austl Workers' Union of Emps (Qld) v Etheridge Shire Council* (2009) 178 FCR 252, 268[57].

[55] *Federal Court of Australia Act 1976* (Cth) s 21(2).

[56] *Austl Competition & Consumer Comm'n v MSY Tech Pty Ltd* (2012) 201 FCR 378, 381-82[10]-[13].

[57] *Austl Competition & Consumer Comm'n v Pac Nat'l Pty Ltd* (2020) 277 FCR 49, 138[325] (Middleton & O'Bryan, JJ.); *Ho v Grigor* (2006) 151 FCR 236, 249[54].

[58] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 549; *Clarence City Council v Commonwealth* (2020) 280 FCR 265, 291[66], *affirmed on appeal*, *Hobart Int'l Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519.

so would be inconsistent with the exercise of judicial power, whose hallmark is the making of binding declarations of rights and obligations arising from the operation of law upon past events or conduct.[59] Finally, the Federal Court has a broad power under Section 22 of the FCA Act to grant, either absolutely or on such terms and conditions as it thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward, so that as far as possible all matters in controversy between the parties may be completely and final determined, and all multiplicity of proceeding concerning any of those matters avoided. Like Section 32 of the Judiciary Act, which applies to the High Court, Section 22 of the FCA Act reproduces, with immaterial variations, the provisions of Section 24(7) of the Judicature Act (Eng).[60] It is a power-conferring provision, which is to be construed liberally.[61] The provisions conferring power on the Federal Court to grant declarations do not empower the Federal Court to determine substantive matters between parties when the Court has no jurisdiction to hear those matters.[62]

There is more to say about the Federal Court's sources of judicial review jurisdiction. In addition to Section 39B(1) of the Judiciary Act, Section 39B(1A)(a) expressly vests the Court with jurisdiction in any matter in which the Commonwealth is seeking a declaration. Pursuant to Section 39B(1A)(c), the Court has jurisdiction in any matter arising under a law made by the Parliament. Here, remedies are not mentioned within the grant of

---

[59] *Ha v New South Wales* (1997) 189 CLR 465, 503-04. Section 23 does not extend to the making of penal orders. *Austl Building & Constr Comm'r v Constr, Forestry, Mining & Energy Union* (2018) 262 CLR 157, 194-95[114], 201[130] (where s 23 did not support the making of a non-indemnification order in respect of a pecuniary penalty because such an order is properly understood as a penal order).

[60] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 489, 505, 529; *Austl Rail, Tram & Bus Indus Union v Metro Trains Melbourne Pty Ltd* (2020) 276 FCR 172, 174-75[6].

[61] *McLeish v Faure* (1979) 25 ALR 403, 413-14; *Thomson Austl Holdings Ltd v Trade Pracs Comm'n* (1981) 148 CLR 150, 161; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 489-90, 505, 529; *Colin R Price & Assocs Pty Ltd v Four Oaks Pty Ltd* (2017) 251 FCR 404, 432-33[110]-[113].

[62] In particular, section 22 of the FCA Act does not enlarge the provisions of substantive law so as to authorize the award of damages for administrative error. *Park Oh Ho v Minister for Immigr & Ethnic Affs* (1989) 167 CLR 637, 645.

jurisdiction. Again, Sections 21, 22, and 23 of the FCA Act make it clear that in this jurisdiction the Court may grant a declaration. More generally, in any proceeding properly invoking its jurisdiction, the Federal Court has accrued jurisdiction to deal with the whole matter, and "associated" jurisdiction under Section 32 of the FCA Act, where again it has power to grant a declaration. Statutory provisions vesting civil enforcement jurisdiction in the Federal Court may confer specific power to make a declaration, founded on there being a real issue as to contravention of a regulatory provision.[63]

In review under the ADJR Act, there is no need to rely on Sections 21, 22, and 23 of the FCA Act, although an applicant can invoke those provisions for good measure. An object of the enactment of the ADJR Act was to provide for a simple procedure and remedial regime in federal judicial review, avoiding the technicalities of the medieval prerogative writs. Provided that the challenged decision or conduct is justiciable under the ADJR Act, the applicant has standing to seek review, and a ground of review is established, the Court may grant a stay under Section 15, and by way of final relief, one or more of the orders under Section 16.[64] Section 16 of the ADJR Act does not mention the prerogative remedies or injunction and declaration, but offers orders with the same remedial outcomes and added flexibility. The language of Section 16 of the ADJR Act, which confers the power to make substantive orders,[65] is to be given the liberal construction normally given to remedial legislation.[66] In particular, under Section 16(1)(c) of the ADJR Act, the Federal Court may make "an order declaring the rights of the parties in respect of any matter to which the decision relates." The equitable discretionary principles

[63] See for example, proceedings brought by the Australian Securities and Investments Commission for a declaration under section 1317E(1) of the Corporations Act 2001 (Cth), discussed in *ASIC v Mitchell [No. 3]* (2020) FCA 1604 [7]-[10], and proceedings brought by the Australian Energy Regulator for inter alia, a declaration under sections 204(1)(d) and 291 of the National Energy Retail Law (in the Schedule to the National Energy Retail Law Act 2011 (SA)), discussed in *Austl Energy Regulat v Energy Austl Pty Ltd* [2020] FCA 1647 [74]-[79].

[64] *Park Oh Ho v Minister for Immigr. & Ethnic Affs* (1989) 167 CLR 637, 644.

[65] Other than a stay, which is provided for in the ADJR Act s 15.

[66] *Minister for Immigr & Ethnic Affs v Conyngham* (1986) 11 FCR 528, 537; *Park Oh Ho v Minister for Immigr & Ethnic Affs* (1989) 167 CLR 637, 644-45; *Johns v Austl Sec Comm'n* (1993) 178 CLR 408, 458-59.

governing the availability of declarations at general law are applied in making orders under section 16(1)(c). However, the power is not to be restricted by undue technicality and allows for the making of an order declaring the rights of the parties in respect of any matter to which the decision relates, so as to avoid unnecessary re-litigation between the parties.[67] For example, in *Park Oh Ho v Minister for Immigration and Ethnic Affairs*,[68] the High Court upheld orders made by the Federal Court under Section 16(1)(c), declaring that seven South Korean citizens had been unlawfully detained. They had entered Australia illegally, innocently involved in a migration racket. The deportation orders were made for an improper purpose of detaining them in immigration detention for an extended period of time, so as to ensure they were available as witnesses in the pending prosecution of the organisers of the racket. By making a declaratory order in addition to quashing the deportation orders under Section 16(1)(a), the Court could finally resolve, as between the parties, the question whether the detention during the relevant period was unlawful.[69] The declaratory order had the consequence that in any separate tort action for damages for false imprisonment, the unlawfulness of the detention was established.

It is clear that the Federal Court's power to grant a declaration is sourced in statute. It was therefore surprising that in *Ainsworth v Criminal Justice Commission*,[70] the High Court stated that "[i]t is now accepted that superior courts have inherent power to grant declaratory relief." The context in *Ainsworth* was an appeal from the Supreme Court of Queensland, but the statement is expressed in general terms. While the Federal Court is a superior court of record and a court of law and equity, it is not a court of unlimited jurisdiction like a Supreme Court. Its power to grant a declaration is more correctly described as express statutory power. In *Hobart International Airport Pty Ltd v Clarence City Council*,[71] considered further below, Gageler and

---

[67] *Park Oh Ho*, 167 CLR at 644-45.

[68] *Id.* at 637.

[69] *Id.* at 644.

[70] (1992) 175 CLR 564, 581-82; *CGU Ins Ltd v Blakeley* (2016) 259 CLR 339, 346[13].

[71] (2022) 276 CLR 519.

Gleeson JJ sought to correct the statement. It was not to be taken to controvert the historical fact that the power to declare the existence or non-existence of a legal right or obligation is statutory in origin.[72] Until the series of statutory reforms that commenced in the United Kingdom in 1850, the declaration was not known to the courts of common law or of equity (save as prefatory to the making of another order capable of execution, or in certain proceedings against the Crown). *Hobart International* suggests that the declaration is not really an equitable remedy. Its origins are statute, not equity, notwithstanding that the statutory power was first given to the Court of Chancery.

II. DISCRETIONARY LIMITS

In the context of declaratory relief, the requirements of jurisdiction, justiciability, standing, remedial power, and discretion are conceptually different. It may be difficult to disentangle the stages of analysis.[73] The power of a superior court to grant a declaration is described as being "neither possible nor desirable to fetter . . . by laying down rules as to the manner of its exercise" and is beneficial and wide,[74] "confined by the considerations that mark out the boundaries of judicial power."[75] Within this broad compass, the discretionary principles limiting the grant of a declaration can readily be identified and have remained stable. The principles in accordance with which the wide discretion is to be exercised, summarised by Lord Dunedin in 1921 in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd*,[76] do not have a rigid content and are still accepted by Australian courts.[77] To maintain the discretionary

[72] *Id.* at 548[61].

[73] *IMF Ltd v Sons of Gwalia Ltd* (2004) 211 ALR 231, 243-44 [45]; *Edwards v Santos Ltd* (2011) 242 CLR 421, 435 [36]; *Kuczborski v Queensland* (2014) 254 CLR 51, 87 [98].

[74] *Forster v Jododex Austl Pty Ltd* (1972) 127 CLR 421, 435; *P & C Cantarella Pty Ltd v Egg Mktg Bd* [1973] 2 NSWLR 366, 382; *Harmsworth v State Coroner* [1989] VR 989, 991.

[75] *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 581-82; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359 [102].

[76] (1921) 2 AC 438 (HL) 448 (appeal taken from Eng.); *see Forster*, 127 CLR at 437-38.

[77] *Aussie Airlines Pty Ltd v Austl Airlines Ltd* (1996) 68 FCR 406, 414.

scope of the remedy, it is neither possible nor desirable to lay down rules as to the manner of the exercise of the court's power to grant declaratory relief. There are four key discretionary principles, which are not rigid rules,[78] are sometimes overlapping in their content, and are not clearly categorised as relating to availability or to discretion.[79] They are as follows.

A. Not an Abstract or Hypothetical Question

The first principle is that the question the court is asked to decide should not be abstract or hypothetical, since declaratory relief is directed to determining a legal controversy.[80] A declaration as to whether an entity is subject to regulatory provisions may be hypothetical because the conduct alleged to be a contravention has not yet taken place.[81] An advisory opinion differs from a declaration in that the former is not based on a concrete situation and does not amount to a binding decision raising res judicata between the parties. A question that is hypothetical should not be the subject of a declaration, divorced from the facts, and therefore not suitable for judicial resolution, because there may be no certainty that the general declaration will settle the dispute finally.[82]

---

[78] *Forster*, 127 CLR at 437; *Ainsworth*, 175 CLR at 581-82; *Plaintiff M61/2010E*, 243 CLR at 359 [102].

[79] *Forster*, 127 CLR at 437-38; *Hobart Int'l Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519, 537-38 [32].

[80] Russian Com & Indus. Bank v. British Bank for Foreign Trade Ltd (1921) 2 AC 438 (HL) 448 (appeal taken from Eng.); *Ainsworth*, 175 CLR at 581-82; *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643, 649, 651 (where a declaration was granted that the plaintiff were not liable to pay a particular tax and that payment of that tax by other entities had not been made on the plaintiff's behalf); *Forster*, 127 CLR at 437-38; *Bass v Permanent Tr Co Ltd* (1999) 198 CLR 334, 355-59 [46]-[56]; *Plaintiff M61/2010E*, 243 CLR at 359[103]; *Edwards v Santos Ltd* (2011) 242 CLR 421, 436-37[37], [39].

[81] *Bass*, 198 CLR at 355-59[46]-[56].

[82] *Id.* at 356-7 [48]; *see also Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corp* [1977] 1 NSWLR 43, 57-58, 59; *Jackson v Slattery* [1984] 1 NSWLR 599, 607 (where a declaration sought as to the jurisdiction of a special commission of inquiry was speculative, the report not yet having been presented to the Governor); *Elec Supply Ass'n Ltd v ACCC* (2001) 113 FCR 230, 263-66[131]-[138] (declining to grant a declaration that an error of law was made by the Australian Competition and Consumer Commission because it would be advisory, and would not quell any contractual dispute between a consumer and a supplier). In certain cases it may be inappropriate for the Federal Court to answer separate questions as declarations. *See,*

B. Foreseeable Consequences

Secondly, a declaration will be refused if it will produce no foreseeable consequences for the parties.[83] This principle is often stated in terms that overlap with the first principle: a declaration should not be claimed in relation to circumstances that have not occurred, and might never happen.[84] Where a plaintiff has a real interest (as required by the third principle), it is likely that this requirement of the declaration producing foreseeable consequences will also be met.[85] There may be no foreseeable consequences for the parties if the declaration is sought in respect of arrangements that are no longer in operation, or in respect of past transactions under a statute which has been repealed or amended.[86] Yet in some circumstances, a declaration may be made that conduct which has yet to take place will not be in breach of a law.[87] A declaration should not simply record, in a summary form, conclusions reached by the court in its reasons for judgment, since such a declaration would lack utility.[88]

e.g., *Dir of Fisheries (N Terr) v Arnhem Land Aboriginal Land Tr* (2001) 109 FCR 488, 519-20 [131]-[132]; *Harts Austl Ltd v Comm'r of Tax'n* (2001) 109 FCR 405, 413-14 [24]-[26]; *Kockums AB v Commonwealth* [2002] FCAFC 138, [38]-[40].

[83] *Gardner v Dairy Indus Auth of NSW* (1977) 52 ALJR 180; *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 581-82; *Ruhani v Dir of Police* (2005) 222 CLR 489, 577 [295]; *Plaintiff M61/2010E v Commonwealth*, (2010) 243 CLR 319, 359 [103]; *Minister for Immigr & Multicultural Affs v Ozmanian* (1996) 71 FCR 1, 31-33.

[84] *Univ of NSW v Moorhouse* (1975) 133 CLR 1, 10; *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 581-82; *Aussie Airlines Pty Ltd v Austl Airlines Ltd* (1996) 68 FCR 406, 414.

[85] *See Edwards v Santos Ltd*, (2011) 242 CLR 421, 436[37].

[86] *Gardner*, 52 ALJR at 188, 189.

[87] *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297, 305; *Edwards v Santos* (2011) 242 CLR 421, 435[37].

[88] *Rural Press Ltd. v Austl Competition & Consumer Comm'n* (2003) 216 CLR 53, 92[95]. In relation to declarations granted under FCA section 21, see *Warramunda Vill v Pryde* (2001) 105 FCR 437, 440[8]; *Austl Competition & Consumer Comm'n v MSY Tech Pty Ltd* (2012) 201 FCR 378, 388[35]. Compare the approach in civil enforcement proceedings. *See, e.g.*, *Cruse v Multiplex Ltd* (2008) 172 FCR 279, 298[53]; *Constr, Forestry, Mining & Energy Union v Milin Builders Pty Ltd* (2019) FCA 1070, 1080-85 (Snaden, J.); *Knowles v Sec'y, Dep't of Def* [2020] FCA 1328, 1360.

C. Real Interest

Thirdly, a person seeking a declaration must have a "real interest" in raising the questions to which the declaration goes.[89] The generous scope of the present understanding of this principle is illustrated by cases concerning anti-corruption tribunals that issue reports with no legal effect but with a practical effect of damaging a person's reputation. The person found to have engaged in corrupt conduct has a real interest and is entitled to a declaration if a ground of review, such as denial of procedural fairness, is established.[90] In *Johns v Australian Securities Commission*,[91] a declaration was granted, even though it was a "pyrrhic victory."[92] The denial of procedural fairness occurred when a regulatory agency lifted a suppression order on transcripts of a compulsory examination of a company director, which it had provided to a royal commission. This resulted in their disclosure in the Royal Commission's public hearings. It was too late to prevent damage to the director's reputation, but a declaration was granted. In *Sankey v Whitlam,*[93] a declaration was made that documents subpoenaed in criminal proceedings were not subject to public interest immunity.[94] In *Croome v Tasmania*,[95] the plaintiffs had standing to raise a justiciable controversy as to the validity of state criminal laws discriminating against homosexual people. Therefore, they could claim a declaration, and that satisfied the requirement of some right, duty, or liability to be established by

[89] Russian Com. & Indus. Bank v. British Bank for Foreign Trade, Ltd. [1921] 2 AC 438, 448 (Eng.); *Forster v Jododex Austl Pty Ltd* (1972) 127 CLR 421, 437-38; *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 581-82; *Aussie Airlines Pty Ltd. v Austl Airlines Ltd* (1996) 68 FCR 406, 414-15; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359[103].

[90] Chief Constable v. Evans [1982] UKHL 10, [1982] 1 WLR 1155 (Eng.); *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 581-82, 596-97; *Johns v Austl Sec Comm'n* (1993) 178 CLR 408.

[91] *Johns*, 178 CLR at 431 (Brennan, J.). Compare the view of Justice Deane in the minority in *Quin* that the courts have power to mould declaratory relief so as to protect a successful plaintiff, as the consequences of a denial of procedural fairness may become entrenched by the delays of litigation or a change in policy. *Att'y Gen (NSW) v Quin* (1990) 170 CLR 1, 45-48.

[92] *Johns v Austl Sec Comm'n* (1993) 178 CLR 408, 431 (Brennan, J.).

[93] *Sankey v Whitlam* (1978) 142 CLR 1.

[94] *Id.* at 48, 81, 102, 111.

[95] *Croome v Tasmania* (1997) 191 CLR 119, 127.

the determination of the court. A person who desires to act in contravention of the law may not in every case have a real interest so as to meet the principle. In *Edwards v Santos Ltd*,[96] registered native title claimants, representatives of the Wongkumara People, had a real interest, indeed a commercial interest, in seeking a declaration that a petroleum company was not entitled to apply for the grant of a petroleum lease. They claimed that the company's authority to prospect had expired, claimed that the Minister had no power to grant the lease, and sought an injunction to restrain the grant of a lease. Declaratory relief was available because it would enhance the claimants' prospects in native title negotiations.

D. Proper Contradictor

Fourthly, the person seeking the declaration must be able to secure a proper contradictor, being a person presently existing with a true interest in opposing the declaration sought.[97] There is no requirement that all defendants in an action claiming a declaration must oppose the plaintiff, or that the contradictor who is a party actually attend to resist the plaintiff's application.[98]

---

[96] *Edwards v Santos Ltd* (2011) 242 CLR 421, 436[37] .

[97] Russian Comm. & Indus. Bank v. British Bank for Foreign Trade Ltd. [1921] 2 AC 438 (HL) 448 (appeal taken from Eng.); *Dey v Victorian Rys Comm'rs* (1949) 78 CLR 62, 91; *Forster v Jododex Austl Pty Ltd* (1972) 127 CLR 421, 437; *Univ of NSW v Moorhouse* (1975) 133 CLR 1, 10; *Gardner v Dairy Indus Auth* (NSW) (1977) 52 ALJR 180; *Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corp* [1977] 1 NSWLR 43, 57-59 (Moffit, P.); *Re Tooth & Co Ltd* (1978) 31 FLR 314; *McGarrigle v Pub Serv Bd* [1979] 1 NSWLR 292; *Acs v Anderson* [1975] 1 NSWLR 212, 217-18; *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 581-82, 595-97; *Hollioake v W Austl Cricket Ass'n* (1994) 11 WAR 423, 426; *Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643, 648-50; *Aussie Airlines Pty Ltd v Austl Airlines Ltd* (1996) 68 FCR 406, 414; *IMF Ltd v Sons of Gwalia Ltd* (2004) 211 ALR 231, 244 [47]; *Austl Competition & Consumer Comm'n v MSY Tech Pty Ltd* (2012) 201 FCR 378, 382-88 [14]-[34].

[98] In *Forster v Jododex Austrlia Pty Ltd*. (1972) 127 CLR 421, the mining warden submitted to the order of the Court, but another party opposed the declaration, and the Court made a declaration binding upon the warden. *See also Oil Basins Ltd v Commonwealth* (1993) 178 CLR 643, 649-50; *Merit Prot Comm'r v Nonnenmacher* (1999) 86 FCR 112, 116[12].

III. EVOLVING IMPORTANCE IN JUDICIAL REVIEW

A. Shortcomings of Prerogative Writs

In its supervisory judicial review jurisdiction, a Supreme Court may make a binding declaration of right whether or not any relief by certiorari or mandamus is, or could be, claimed.[99] The declaration has become more important than the prerogative remedies.[100] The jurisdiction of a superior court to grant a declaration does not depend upon the establishment of legal error.[101] Where mandamus is not available in relation to a dispensing power, and there is therefore no utility in issuing certiorari to quash the erroneous decision, relief by declaration may be available.[102]

The quiet remedial reform achieved by the declaration has been particularly evident in judicial review of decisions made by anti-corruption tribunals.[103] Such tribunals make reports containing findings of corrupt conduct, with recommendations,

---

[99] Pyx Granite Co. v. Ministry for Hous. & Loc. Gov't [1960] AC 260 (HL) 290 (appeal taken from Eng.); *R v Pine Rivers Shire Council*; *Ex parte Raynbird* [1967] Qd R 384 (Austl.); *Green v Daniels* (1977) 51 ALJR 463; *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70-71; *Della-Vedova v State Energy Comm'n* (1990) 2 WAR 561; *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 580-81, 595-96. In a proceeding where a Supreme Court exercises federal jurisdiction, this power is picked up by section 79 of the Judiciary Act, and is applicable to the grant of declaratory relief. *See CGU Ins v Blakeley* (2016) 259 CLR 339, 346-47[13].

[100] This is so notwithstanding an observation by Justice Brennan, in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 31, that there is a need for caution on the part of a reviewing court in making a declaration in a case where the availability of a substantive remedy is doubtful. The observation is best understood as directed to the importance of formulating the declaration in terms that are not so wide that they trespass on the merits of the decision under review. Justice Brennan did not disapprove the making of a declaration by the NSW Court of Appeal, in proceedings that were a precursor to *Quin*, that the failure of the Attorney-General to recommend the appointment of a serving stipendiary magistrate as a magistrate of the newly created Local Court, was void for denial of procedural fairness. *Macrae v Att'y-Gen (NSW)* (1987) 9 NSWLR 268.

[101] *Forster v Jododex Austl Pty Ltd* (1972) 127 CLR 421, 435, 437-38; *Ainsworth v Crim Just Comm'n* (1992) 175 CLR 564, 581-82[38-39]; *Buttrose v Att'y Gen (NSW)* (2015) 324 ALR 562, 570 [39].

[102] *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 359[101].

[103] *See, e.g.*, *Ainsworth*, 175 CLR 564; *Greiner v Indep Comm'n Against Corruption* (1992) 28 NSWLR 125.

and refer evidence to prosecutorial authorities.[104] A report may damage personal and business reputation, but because it has no direct effect on legal rights, certiorari is not available. The humble declaration has come to the rescue. In *Ainsworth v Criminal Justice Commission*,[105] neither prohibition, certiorari, nor mandamus was available, but a declaration was made as to a denial of procedural fairness by the former Criminal Justice Commission ("CJC").[106] The CJC failed to afford procedural fairness before issuing a report recommending that Mr. Ainsworth and his companies should not be permitted to participate in the gaming machine industry in Queensland.[107] Certiorari could not be granted because the report by itself had no legal effect or consequence for legal rights, despite having the practical effect of blackening his reputation.[108] Mandamus was unavailable because the CJC was under no duty to investigate and report on the matter. If Mr. Ainsworth had had advance notice of the CJC's intention to report without observing procedural fairness, prohibition would have been available to prevent the issue of the report, but there was no such notice. However, the High Court granted a declaration that, in issuing its report, the CJC failed to observe procedural fairness. In *Greiner v Independent Commission Against Corruption*,[109] a report made by the Independent Commission Against Corruption, which led to the resignation of the NSW Premier, was declared to have been made in excess of jurisdiction and to be a nullity. In *Police Integrity Commission v Shaw*,[110] the NSW Court of Appeal referred to circumstances where a tribunal may be about to exceed its jurisdiction, with no effective relief because its report will not be subject to certiorari.[111]

---

[104] *See, e.g.*, *Independent Commission Against Corruption Act 1988* (NSW); *Independent Broad-Based Anti-Corruption Act 2011* (Vic); *National Anti-Corruption Commission Act 2022* (Cth).

[105] *Ainsworth*,175 CLR at 580-81[39-40].

[106] *Id.* at 579-82, 594-97.

[107] *Id.* at 571-2, 592-3.

[108] *Id.* at 580-1, 595.

[109] *Greiner*, 28 NSWLR 125.

[110] *Police Integrity Comm'n v Shaw* (2006) 66 NSWLR 446, 462[64]. However, in that case, the court concluded that there was no basis for a declaration that the Police Integrity Commission would exceed its jurisdiction to report on possible police misconduct if it were to make a finding as to the misconduct of an affected person.

[111] *Id.* at 462 [65]-[66].

A declaration may be crafted in a manner that does not prevent the tribunal from carrying out its statutory functions but merely states a limit to prevent jurisdiction being exceeded.[112]

B. Justiciability

The discretion to grant a declaration is inevitably liable to be expanded in line with the liberalisation of the tests of justiciability of administrative decisions. Privative clauses are designed to contract what is justiciable, although they may not be effective in the face of jurisdictional error. However clever the drafting of a statutory power may be, it may mean that by its very nature it is not amenable to certain remedies. This has emerged in the drafting of "dispensing powers," whose exercise is often a last-resort avenue for an immigrant who has exhausted all other avenues of review, or is entirely excluded from review.[113] A dispensing power is a statutory discretionary power, usually vested in a Minister, that must be exercised personally, may not be delegated, and for which the Minister expressly need not consider exercising.[114] Plainly, if the Minister declines to consider the matter, mandamus cannot issue.

In these cases, declarations have been made in relation to the conduct of departmental officers and external contractors to the department, who, without acting as delegates, assess applications and determine whether they will be referred to the Minister.[115] The Minister could not delegate the dispensing power, the assessor was not a delegate and did not exercise statutory power.[116] By reason of the nature of a dispensing power, mandamus was not available to compel the Minister to consider or reconsider exercising the power, or to make fresh inquiries about matters. As a consequence, there was no utility in granting certiorari to quash the assessment. Since there was no present

---

[112] *Id.* at 462 [64].

[113] See, for example, the provisions considered in *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319.

[114] *Plaintiff S10/2011 v Minister for Immigr & Citizenship* (2012) 246 CLR 636, 647-48 [28].

[115] *See, e.g.*, *Plaintiff M61/2010E*, 243 CLR 319; *Davis v Minister for Immigr, Citizenship, Migrant Servis & Multicultural Affs* (2023) 279 CLR 1; *Minister for Immigr & Border Prot v SZSSJ* (2016) 259 CLR 180.

[116] *Plaintiff M61/2010E*, 243 CLR at 345 [51].

threat of removal, it was not necessary to consider the grant of an injunction.[117] The High Court overcame the obstacle of non-justiciability by simply stating that the assessment was directed to a possible exercise of a statutory power by the Minister. The availability of a remedy was then readily resolved. It was settled that the non-availability of a prerogative remedy did not prevent the applicants from obtaining a declaration against the assessor. The humble declaration stepped into the remedial void with justiciability of the assessor's decision as the bridge. The discretionary principles associated with the declaration were almost met. Whether there was an error of law, or a denial of procedural fairness, was not an abstract or hypothetical question. The applicants had a real interest in seeking to establish that the Minister's possible exercise of the dispensing power would be infected by a legal error made in the assessment.[118] The case for the declaration having practical consequences for the future was slight, but this did not stand in the way of the grant of the remedy. The assessor's failure to refer the applications to the Minister had the foreseeable consequence that the Minister would not lift the bar on granting the visas.[119] The Court granted a declaration that the assessor erred in law and denied procedural fairness. [120]

A recklessly liberal approach to justiciability cannot alleviate the established substantive limitations on the availability of the prerogative remedies. However, without doubt, it leaves a decision exposed to declaratory relief, whose purely discretionary limitations are easily navigated.

C. Standing

Standing limits the persons entitled to invoke the jurisdiction of a court in order to obtain a remedy. In private law, it is implicit in the definition of the elements of a common law cause of action that the person has standing to seek the remedy. The person's legal right to recover damages or enforce a duty carries with it a

---

117 *Id.* at 334[8].
118 *Id.* at 359[103].
119 *Id.* at 356 [89], 359 [103].
120 *Id.* at 359-40 [101]-[105].

right to apply to the court to enforce that right.[121] In public law, judicial review as a cause of action is available where a decision or conduct is justiciable, a ground of legal error is established, and a remedy is available, but the proceedings must be brought by an individual with standing.[122] The rules of standing evolved in the context of remedies available in judicial review under general law, with a distinct test of standing being associated with each remedy. Australian rules of standing are not based on a distinction between "private law" and "public law."[123] The test of standing to seek a declaration or injunction is that the applicant has a special interest in the subject matter of the action.[124] That test has tended to influence tests of standing to seek the prerogative remedies and has also become more flexible in its application as a result of cases decided under the similar ADJR Act test.[125] Where equitable relief is sought, the special interest in the subject matter of an action must be related to the relief claimed, in that it warrants the grant of the relief.[126] Standing reinforces the discretionary requirement that declaratory relief be granted only where there is an actual controversy between parties requiring the determination of rights, duties, liabilities, or obligations, rather than a question that is academic or hypothetical.[127] In judicial review commenced under Section 75(v) of the Constitution, the High Court appears to take a more relaxed approach to standing, often speaking of an applicant

---

[121] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Inv Mgmt* (2000) 200 CLR 591, 626-27[92]; *Hobart Int'l Airport Pty Ltd. v Clarence City Council* (2022) 276 CLR 519, 546[57].

[122] MARGARET ALLARS, AUSTRALIAN ADMINISTRATIVE LAW para 6.1 (2026).

[123] *Hobart*, 276 CLR at 550-51[67].

[124] *Austl Conservation Found Inc v Commonwealth* (1980) 146 CLR 493, 511[25].

[125] *Austl Conservation Found Inc v Minister for Resources* (1989) 19 ALD 70; *N Coast Env't Council Inc v Minister for Res* (1994) 55 FCR 492; *Tas Conservation Tr Inc v Minister for Res* (1995) 55 FCR 516; *Animals' Angels e.V. v Sec'y, Dep't of Agric* (2014) 228 FCR 35.

[126] *Id.*; *Truth About Motorways Pty Ltd*, 200 CLR at 612[47]; *Re McBain; Ex parte Cath Bishops Conf* (2002) 209 CLR 372, 459[244]. The matters that a standing test requires to be established should not be assumed to define the grounds that an applicant raises as to the invalidity of the decision. *R v Dixon; Ex parte Ridler* (1993) 2 Tas R 42, ¶ 18. *Cf. Re Warden French; Ex parte Serpentine-Jarrahdale Ratepayers & Residents Ass'n* [1994] WASC 37; (1994) 11 WAR 315, 321-22.

[127] *Kuczborski v Queensland* (2014) 254 CLR 51, 108-09[183]-[184]; *Unions NSW v New South Wales* (2023) 277 CLR 627, 16, 21-22.

having a "sufficient interest."[128] In this federal constitutional context, it is said that standing is "subsumed within the constitutional requirement of a 'matter.'"[129] The interest which gives the person standing, often constitutes the right, duty, or liability that gives rise to a "matter," and hence a justiciable controversy.[130]

Standing may be established on the basis of a commercial interest in a decision that benefits a competitor, although there are remoteness limits to this.[131] Justiciability and standing to seek a declaration can even be established in relation to the terms of a contract, where the applicant does not have privity of contract with the respondent decision-maker.[132] A person who has no legal or equitable interest at stake may have standing to seek a declaration as to the content of a contractual obligation.[133] These standing cases expand the ambit of the declaration. In *Aussie Airlines Pty Ltd v Australian Airlines Ltd*,[134] a company formed for the express purpose of operating a domestic airline business had a real commercial interest in obtaining a declaration that it was a "new entrant to the domestic aviation industry" within the meaning of a clause in a lease entered into by a federal statutory authority with other entities.[135] The proceedings were a judicial review action seeking a declaration, which proceeded by case stated, and then an appeal to the Full Federal Court. The company had standing, although it had no rights under the head lease enforceable against the head lessee.[136] The Full Court upheld the first instance decision to make a declaration in the

---

128 *See, e.g.*, *Unions NSW*, 277 CLR at 640 [21].

129 *Hobart Int'l Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519, 537[31], 543-44[49].

130 *Robinson v W Austl Museum* (1977) 138 CLR 283, 327. In some cases there may be a matter because there is some immediate right, duty or liability in issue, but this may not suffice to establish that the person seeking to bring the proceeding has standing. *See, e.g.*, *Kuczborski v Queensland* (2014) 254 CLR 51, 60-61[5]; *Hobart*, 276 CLR at 537[31].

131 *Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty Benefit Fund Pty Ltd* (1998) 194 CLR 247; *Argos Pty Ltd v Corbell* (2014) 254 CLR 394.

132 *Hobart*, 276 CLR 519.

133 *Id.* at 553[72].

134 *Aussie Airlines Pty Ltd v Austl Airlines Ltd* (1996) 68 FCR 406.

135 *Id.* at 415 (approved in *Edwards v Santos Ltd* (2011) 242 CLR 241, 436[38]).

136 *Id.* at 414-16, 420.

terms sought by the applicant. Discretionary considerations were met, as the question was not hypothetical; its resolution was of real practical importance to the applicant, which had a real commercial interest, and there was obviously a real controversy.[137] Plainly, some of the discretionary considerations pertaining to the grant of a declaration had already been addressed in determining whether the applicant had standing to seek a declaration.

In *Hobart International Airport Pty Ltd v Clarence City Council*,[138] local councils that levied rates sought declarations that lessees of shops at Hobart and Launceston airports were required under their long leases with the Commonwealth to pay rates to the councils.[139] Following land valuations, the councils had increased the rates, giving rise to a dispute as to the construction of the clause in the lease describing the lessees' obligations, owed to the Commonwealth, to pay the rates to the councils. The councils brought proceedings in the Federal Court seeking only a declaration under Section 21 of the FCA Act, with respect to the proper construction of the clause in the leases and the lessees' obligations to make payments for several financial years.[140] The councils joined the lessee and the Commonwealth as parties. The rights, duties, and liabilities in issue were private law rights, duties, and liabilities, but had "a 'public' dimension or complexion" because the leases were granted pursuant to statute and the key clause in the lease gave effect to a governmental policy.[141] There was a justiciable dispute and a "matter." While there was no privity of contract between the councils and the lessees, the councils were not complete outsiders to the contract. The councils had a "sufficient" or "real" interest in seeking declaratory relief, giving them standing, because there were exceptional circumstances of a "real commercial interest" rather than a "mere commercial interest."[142] Another way of characterising the interest

---

[137] *Id.* at 415.

[138] *Hobart*, 276 CLR 519. The arrangement by which the obligation to pay the rates was placed upon the lessees under their leases with the Commonwealth is explained by the fact that the airports were sited on Commonwealth land, which under section 114 of the Commonwealth Constitution cannot be taxed by a State.

[139] *Id.* at 529 [3].

[140] *Id.* at 534[16].

[141] *Id.* at 535[24].

[142] *Id.* at 538-41 [34]-[41].

was as "governmental" rather than "practical," and as "fiscal" rather than "commercial." The interest was distinctive, substantial, and squarely within the scope of the third-party interest sought to be advanced by the Commonwealth in the public interest through the provisions of the leases.[143] This did not mean that having a commercial interest in obtaining a declaration about the meaning and effect of a contract, to which the applicant is not a party, on its own will give rise to a sufficient or real interest.[144] *Hobart International* was an exceptional case because of a combination of circumstances.[145] The plurality expressly put aside whether the councils had a sufficient interest to find standing to seek an injunction, damages, or specific performance.[146] As in *Aussie Airlines*, the discretionary factors pertaining to a declaration were satisfied on a similar basis to standing.[147] The councils had a real commercial interest in obtaining a declaration. Success in obtaining the declaration would advance their interests in the negotiation process contemplated by clauses in the lease, including in relation to the option to renew.[148] Each lessee was plainly a contradictor.

IV. BINDING FORCE

A. Constitutional Underpinnings

The classic definition of "judicial power [of the Commonwealth]," referred to in Section 71 of the Commonwealth Constitution, is a power to decide controversies between subjects, or between government and subjects, whether the rights in issue relate to life, liberty or property.[149] Judicial power is thus exercised by making a determination which settles for the future as between defined persons or classes of persons, a question as to the existence of a right or obligation.[150] The unique and essential

143 *Id.* at 554 [74].
144 *Id.* at 541 [41].
145 *Id.* at 541 [41].
146 *Id.* at 541 [41].
147 *Id.* at 538-42 [33]-[43].
148 *Id.* at 544-45[52]-[53].
149 *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330, 357.
150 *R v Trade Pracs Tribunal; Ex parte Tas Breweries Pty Ltd* (1970) 123 CLR 361, 374.

function of judicial power is to quell controversies between parties about existing legal rights or obligations, by ascertainment of the facts, by application of the law, and by exercise, where appropriate, of judicial discretion.[151] The determination is binding and authoritative (whether subject to appeal or not), with the decision-maker having been called upon to take action.

Absent a federal constitutional dimension, the declaration has been hailed as protective of the rule of law in a common law constitutional sense. In *Church of Scientology v Woodward*,[152] it was alleged that ASIO acted in excess of its statutory power. Justice Brennan said that the remedy of declaration was available in such a case to define the limits of executive powers or functions in the particular case, stating that "[j]udicial review is neither more nor less than the enforcement of the rule of law over executive action"[153] and, therefore, "the remedies of the law can be moulded to enforce the law so expressed [by statute.]"[154] According to Gaudron, J. in *Corporation of City of Enfield v Development Assessment Commission*,[155] the rule of law requires that courts in judicial review be equipped with power to provide effective remedies:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[156]

Such broadly expressed statements, as to the importance of remedies in judicial review in securing conformity to the rule of

---

151 *Fencott v Muller* (1983) 152 CLR 570, 608; *SDCV v Dir-Gen of Soc Sec* (2022) 277 CLR 241, 287[115].

152 *Church of Scientology v Woodward* (1982) 154 CLR 25, 70; *see also Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216, 229[18]-[19].

153 *Church of Scientology*, 154 CLR at 70.

154 *Id.* at 70.

155 *City of Enfield v Dev Assessment Comm'n* (2000) 199 CLR 135.

156 *Id.* at 157[56] (footnote omitted).

law, have not disabused some government decision-makers of the conviction that compliance with a declaration is optional, being no more than a matter of goodwill or acting as a "model litigant." That would place government above the law, by comparison with members of the public. Intermediate appellate courts have said that "it is inconceivable that a government would not comply with an order of the court."[157] Because it is a non-coercive order, non-compliance with a declaration does not expose the party to contempt. However, the court will not stand by and confess that it is powerless and has inherent power to grant an injunction to enforce the declaration.[158] Government respondents facing adverse decisions sometimes offer forensic invitations designed to secure the soft option of a humble declaration, rather than a prerogative remedy or injunction. Their counsel may offer a reassurance that the Minister will abide by a declaration, so that the court is persuaded that there is no need to make any further order, such as a mandatory injunction. Increasingly, they are greeted by the High Court with veiled rebukes. In *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*, the High Court declared that the possible exercise of the Minister's dispensing power was affected by an error of law in the assessment. In relation to the grant of the declaration, Hayne, J. noted that the Commonwealth had "accepted that, as would be expected, the Department and the Minister would give effect to any declaration the Court made."[159] If a controversy later emerged as to whether there was compliance with the declaration, the Court would consider it in the circumstances as they then existed and a mandamus may then be an available remedy.[160]

In *Hobart International*, the joint judgment rejected a "notion floated in argument" by the Commonwealth[161] that the efficacy of

---

[157] *Northern Territory v Skywest Airlines Pty Ltd* (1987) 90 FLR 270, 292.

[158] Webster v. Southwark Lond. Borough Council [1983] QB 698, 710 (Eng.); *Menzies v Paccar Fin Pty Ltd* [2010] FCA 748, ¶¶ [19]-[22]; *Dixon v Barton* [2011] NSWSC 1525, ¶ [184]; *Lei v Lei* [2020] VSC 840.

[159] *Plaintiff M76-2013 v Minister for Immigr, Multicultural Affs & Citizenship* (2013) 251 CLR 322, 362[112].

[160] *Id.* at 363[113] (Hayne, J., foreseeing mandamus against the assessor as potential further remedial relief).

[161] *Hobart Int'l Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519, 545[53].

the declaration would in some way depend on the Commonwealth as a "model litigant"[162] choosing to abide by it in dealings with the lessee. This notion "overlooked that final and preclusive legal effect" of the declaration as between the Commonwealth and the councils and the lessees.[163] The applicant councils were bound by the declaration vis-à-vis the Commonwealth and the lessees, even though the councils were not parties to the lease. The Commonwealth and the lessees, the contracting parties, were bound by the declaration even though they were not in dispute between themselves.

This reasoning in *Hobart International* as to why the declaration was binding on the parties to the litigation was orthodox. The declaration had a force that went beyond the rationale provided by res judicata and issue estoppel. The gateway to an extended ambit for a declaration's binding force was a liberal standing test, which allowed an entity that was not a party to the contract to obtain a declaration. Yet the analysis provided in the joint judgment in *Hobart International* of the binding force of the declaration in public law could have gone further. It could have addressed the public interest served by a declaration as to excess of power, particularly in light of relaxed standing tests enabling organisations that represent the public interest to seek judicial review.

B. Res Judicata and Precedent

A declaration that an administrator has acted in excess of power may be expressed in terms that confine it to the factual circumstances of the particular exercise of power. This is true of the declaration made in *Plaintiff M76/2013*.[164] It is not to be overlooked that a declaration as to the invalidity of the regulation, made in an earlier unrelated case, operated as a precedent, and on the evidence, the decision-maker had applied the criterion in the

---

[162] "[M]odel litigant" obligations, imposed under Legal Services Directions made under the Judiciary Act section 55ZF, apply to the Commonwealth's conduct of litigation, not to compliance with remedial orders. The Commonwealth has the same rights and obligations as any other litigant, whether suing or being sued. *See Austl Sec & Inv Comm'n v Hellicar*, (2012) 247 CLR 347, 435[240].

[163] *Hobart*, 276 CLR 519 at 545[53].

[164] (2013) 251 CLR 322.

invalid regulation. In other cases, a declaration may state in very general terms that delegated legislation, policy, or a type of decision-making procedure is ultra vires. In *Hobart International*, the proposed declaration as to the construction of the clause in the lease would be free-standing, rather than expressed to apply to the facts concerning the applicant, without transgressing the discretionary requirement that a declaration be neither abstract nor hypothetical.[165] A success in the High Court, often reflected in a declaration or answer to a case stated, has been shown, in particular in the migration area, to signify that a queue of other cases in the court below, or pending on appeal, will without further ado be resolved in the same way.

Many members of the public may be affected by a single excess of power, or multiple similar exercises of a power may be directed to a class of persons, as was acknowledged in *Dyson*.[166] While technically the administrator is bound only in relation to the particular applicant, the judgment should operate as a precedent. Other individuals affected by ultra vires action should not have to litigate, either individually or in a class action, to obtain the same declaration, this time binding the administrator separately in relation to each of them. For practical purposes, one declaration may benefit many members of the public.

This conventional expectation, supported by the doctrine of precedent, is not inconsistent with the view expressed in *Dyson* as to the convenience of the declaration as a remedy. A declaration that an administrative decision involves an excess of power in the narrow sense limits the power and therefore binds the administrator in relation to any member of the public affected by an identical excess of power, with the support of the doctrine of precedent. The position is different where the declaration is that the administrator denied procedural fairness, since this ground is established only with regard to the circumstances of the particular case.

---

[165] *Hobart*, 276 CLR 519.
[166] [1911] 1 KB 410.

CONCLUSIONS

Whether the declaration has its origins in equity or statute, or statute influenced by equitable discretionary considerations, it now has considerable force as a remedy in public law. The limitations of the discretionary principles have continued, without unreasonably constraining the declaration. Liberalisation of principles governing justiciability and standing has expanded the declaration's ambit. Unashamed suggestions by government, generously offered in a spirit of goodwill, that action in accordance with a declaration's statement of the executive's legal powers and obligations is optional, have rightly been rejected by the courts. Yet for all its humility, the declaration deserves more from the courts. It is time to recognise that for many declarations, a statement of the rights and obligations of the parties to the litigation binds the executive branch, in every worthwhile sense of that word, in potentially a multitude of other cases, to comply with the judicial outcome.