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Abstract
The majority's decision in *In re Judiciary and Navigation Acts* proceeded from the major premise that making an 'authoritative declaration of the law' is an exercise of judicial power, but that jurisdiction could not be conferred on the High Court to make such a declaration except in a 'matter'. Professor Leslie Zines' paper examines a number of issues relating to the conferral of jurisdiction to give advisory opinions, including whether they constitute an exercise of judicial power. Accepting the major premise of the majority's decision in *In re Judiciary and Navigation Acts*, he concludes that there are 'no good reasons based on principle, policy or textual provisions for the decision'.

My contention is that *In re Judiciary and Navigation Acts* was correctly decided, but for the wrong reason. It follows that, although there may be good reasons for conferring jurisdiction on the High Court to give advisory opinions, an advisory opinion jurisdiction cannot validly be conferred on the High Court.

Keywords
Access To Constitutional Justice, Advisory Opinions, In re Judiciary and Navigation Acts, Leslie Zines

A COMMENT ON PROFESSOR LESLIE ZINES' PAPER 'ADVISORY OPINIONS AND DECLARATORY JUDGMENTS AT THE SUIT OF GOVERNMENTS'

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The majority's decision in *In re Judiciary and Navigation Acts*[1] proceeded from the major premise that making an 'authoritative declaration of the law' is an exercise of judicial power, but that jurisdiction could not be conferred on the High Court to make such a declaration except in a 'matter'.[2] Because there can be 'no matter…unless there is some immediate, right, duty or liability to be established by the determination of the Court',[3] a provision conferring jurisdiction on the High Court to give 'advisory opinions' is invalid. Professor Leslie Zines' paper examines a number of issues relating to the conferral of jurisdiction to give advisory opinions, including whether they constitute an exercise of judicial power. Accepting the major premise of the majority's decision in *In re Judiciary and Navigation Acts*, he concludes that there are 'no good reasons based on principle, policy or textual provisions for the decision'.

Joseph Jaconelli, in an excellent paper on 'Hypothetical Disputes, Moot Points of Law, and Advisory Opinions' identified a number of characteristics of the 'common law method' of adjudication. He said (in part): 'the process of adjudication is fuelled by the presentation of competing arguments from advocates representing opposing perspectives on the legal issue at stake'.[4] In this paper, I present an opposing perspective.

My contention is that *In re Judiciary and Navigation Acts* was correctly decided, but for the wrong reason. It follows that, although there may be good reasons for conferring

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1 (1921) 29 CLR 257.

2 Ibid 264–7.

3 Ibid 265.

4 Joseph Jaconelli, 'Hypothetical Disputes, Moot Points of Law, and Advisory Opinions' (1985) 101 *Law Quarterly Review* 587, 587.

jurisdiction on the High Court to give advisory opinions,[5] an advisory opinion jurisdiction cannot validly be conferred on the High Court.

In my opinion, the view expressed by the majority in *In re Judiciary and Navigation Acts*, that making an 'authoritative declaration of the law' is a judicial function,[6] propounds an incomplete statement of judicial power. It is often said that there is no exhaustive definition of judicial power: 'no single combination of necessary or sufficient factors identifies what is judicial power'.[7] But an essential characteristic of judicial power is that it settles (that is, determines) 'a question as to the existence of a right or obligation'.[8]

Indeed, in *Fencott v Muller*,[9] the 'unique and essential function of the judicial power' was described as the quelling of controversies as to 'rights' – whether relating to 'life, liberty or property'[10] – 'by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion'.[11] And in *Bass v Permanent Trustee Company Limited*,[12] the majority said: 'Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions'.[13]

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5 See, eg, Stephen Crawshaw, 'The High Court of Australia and Advisory Opinions' (1977) 51 *Australian Law Journal* 112 and John M Williams, 'Re-thinking Advisory Opinions' (1996) 7 *Public Law Review* 205, 206–8; cf Helen Irving, 'Advisory Opinions, The Rule of Law, and The Separation of Powers (2004) 4 *Macquarie Law Journal* 105, especially at 120-2. As to arguments for and against the conferral of an advisory opinion jurisdiction on the High Court, see also Henry Burmester, 'Limitations on Federal Adjudication' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 227, 243-4.

6 Higgins J, though in dissent, concurred with this view at 271.

7 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 577 [93] (Hayne J).

8 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374, cited in *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 577 [94] (Hayne J). See also *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 358 [16], citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374–5.

9 (1983) 152 CLR 570.

10 Ibid 608, citing *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

11 Ibid 608, cited in *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372, 459 [242] (Hayne J).

12 (1999) 198 CLR 334.

13 Ibid 355–6 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 582 (Mason CJ, Dawson, Toohey and Gaudron JJ), 596 (Brennan J).

In *Bass*, the appellants appealed to the High Court from answers to four (of six) preliminary questions of law given by the Full Court of the Federal Court.[14] The majority concluded that two of those questions were 'inappropriate to answer' because a 'proper factual basis', necessary for their resolution, had not been established, and the answers given by the Federal Court to those questions were set aside.[15] The answers given by the Federal Court, 'not based on facts, found or agreed', were 'purely hypothetical'.[16] By answering those questions, the Federal Court did not 'finally resolve the dispute or quell the controversy' between the parties, nor did the answers 'constitute a step that [would] in the course of the proceedings necessarily dictate the result of those proceedings'.[17]

So it can be seen that one way of determining whether a power is 'judicial' is by asking: to what *end* is the power directed? The conferral of jurisdiction to make an 'authoritative declaration of the law' that is not directed to quelling a controversy as to the existence of a right, duty or liability does not exhibit that 'unique and essential function of judicial power' referred to in *Fencott* or achieve the 'object of the judicial process' – the final determination of the rights of the parties to an action – described in *Bass*.[18]

If the determination of a right, duty or liability is properly seen as an incident of 'judicial power' – the end to be served by invoking that power 'which every sovereign authority must of necessity have to *decide* controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property'[19] – then the 'matter' simply marks the boundaries within which that power is to be exercised. Judicial power is applied in aid of the resolution of the particular 'matter' in respect of which the jurisdiction of a court has been invoked, and the scope of which (subject to constitutional limits) is determined by the issues agitated by the parties (or a party in an ex parte proceeding).[20] The concepts of 'judicial power' and 'matter' are, thus, interrelated.

But the concept of 'matter', in my view, only confines the 'judicial power of the Commonwealth' by delimiting the field of legal dispute. The requirement for there to

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14 Ibid 343 [5].

15 Ibid 360 [59].

16 Ibid 357 [49].

17 Ibid.

18 As to the question of whether an advisory opinion is a judicial function, see also: Williams, above n 5, 207; *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334, 360 [59].

19 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ). (Emphasis added.)

20 See, eg, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [139] (Gummow and Hayne JJ).

be 'some immediate right, duty or liability to be established by the determination of [a] Court' does not, contrary to *In re Judiciary and Navigation Acts*, spring from the concept of 'matter', but rather 'judicial power'. An abstract question of law, about which there may be opposing points of view, is capable of giving rise to a 'controversy'. But, of course, there must be a '*justiciable* controversy'; the controversy must, having regard to the object of judicial power, be one that throws up for determination a right, duty or liability. Thus, the meaning of 'matter' and 'judicial power' cannot be disconnected in the way that the High Court 'largely disconnected'[21] those concepts in *In re Judiciary and Navigation Acts*.

In his book, *The Federal Judicature: Chapter III of the Constitution*, James Stellios says that the analysis of the majority in *In re Judiciary and Navigation Acts* – who accepted that giving an 'advisory opinion' is an exercise of 'judicial power' but not the 'judicial power of the Commonwealth' (because of the limiting effect of the concept of 'matter') – 'seemed to invert the relationship between the concepts of 'matter' and 'Commonwealth judicial power'.[22] He goes on to say: 'A "matter" was no longer seen as a dispute that required the exercise of judicial power. Instead, Commonwealth judicial power would be exercised when a "matter" was present.'[23] As I have attempted to show, it is from the animating concept of Ch III – judicial power – that the idea of 'matter' takes its colour:[24] because the function of judicial power is the determination of a right, duty or liability, the particular controversy to be quelled by the application of judicial power must raise for determination 'some immediate right, duty or liability'.

Advisory opinions, whether expressed to be 'authoritative' or 'final and conclusive' (as was the case in *In re Judiciary and Navigation Acts*), do not constitute an exercise of judicial power. It might be thought that whether or not giving an advisory opinion is an exercise of judicial power, the outcome is the same: jurisdiction to give advisory opinions cannot be conferred on the High Court. But if it is accepted that giving an advisory opinion is not an exercise of judicial power, those arguments against advisory opinions which seemed soluble – including the absence of adverseness and the problem of abstractness (both of which Professor Zines addresses in his paper) – cannot be surmounted in light of the strict doctrine of separation of powers entrenched by the Constitution.

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21 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 121 [4.24]; and see also at 124 [4.28]–[4.29].

22 Ibid 124 [4.29].

23 Ibid.

24 See also Burmester, above n 5, 231, citing *South Australia v Victoria* (1911) 12 CLR 667, 708 (O'Connor J).