THE DECLARATORY JUDGMENT IN AUSTRALIA AND THE UNITED STATES

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Section II

REQUIREMENTS OF JUSTICIABILITY & STANDING IN DECLARATORY ACTIONS

1. *Introduction*

Two aspects of the declaratory remedy where the differences between the High Court of Australia and the Supreme Court of the United States are particularly significant are the requirements of justiciability and of standing.

The purpose of the requirements of justiciability is to restrict the legal questions which can be presented to a court for adjudication to those considered suitable and in appropriate condition for determination by a court. To this end certain limiting principles have been devised by the courts. The court will not consider questions based on hypothetical situations or questions abstractly presented. The court will not entertain challenges to the validity of legislation where there is as yet no actual and concrete controversy. The court will not decide moot questions.

The purpose of the requirements of standing is to restrict persons permitted to present issues to the court for determination to those who have a sufficient personal interest in the subject matter of the litigation or who are appropriate representatives of other persons so interested. To this end, as in the case of justiciability, certain limiting principles have been devised by the courts. The court will not entertain a challenge to governmental action by a plaintiff who fails to show that such action has or will adversely affect legal interests of

his own or of persons of whose interests he is an appropriate representative. The court will permit even an interested plaintiff to challenge only such parts of a statute or regulation as actually and presently affect or threaten his interests.

The 'requirements of justiciability' and 'requirements of standing' are closely related, for one basic question underlies them both. Put in terms of the type of cases considered in this paper, that question is: how far must the governmental action have gone in interfering or threatening to interfere with interests of the plaintiff before he can bring suit to challenge its validity? The difference between justiciability and standing is largely a difference in focus of attention: in questions of standing, focus is on the position of the plaintiff in relation to the subject matter of the litigation, while in questions of justiciability, focus is directed to the challenged action itself and the condition of the legal issues tendered for decision.

Consider the High Court case, *Australian Boot Trade Employees' Federation v. Commonwealth.*[1] Suit there was brought by a trade union seeking a declaration of the unconstitutionality of a Commonwealth statute which prohibited various practices by union officers. No steps had been taken to enforce the statute against plaintiffs or against any other person and no threat of such enforcement had been made. The statute did not express clearly the limits of its applicability. Thus it in fact left for the executive department of government, when putting the legislation into effect, the determination (within a wide range) of its scope (that is how broadly or how narrowly it was to be construed).

The case presented a question of standing. Did the new statute, as yet unenforced, so injure, or threaten with injury, the plaintiff's interests as to give the plaintiff standing to challenge its constitutionality? But the case also presents a question of justiciability. Were the issues of the constitutionality of the statute as presented by the plaintiff's suit, coming as it did before any application and enforcement of the section (and therefore before it was apparent how broadly or narrowly the executive department would construe the scope of its applicability in particular situations) too abstract for judicial determination? (The High Court, three to two refused to entertain the suit, on what appear to be primarily grounds of non-justiciability rather than lack of standing. It is to be noted that the High Court tends to use such expressions as 'plaintiff has a sufficient material interest,' 'existence of a cause of action in the plaintiff,' and plaintiff's *'locus standi,'* both when dealing with issues of justiciability and when dealing with issues of standing. The Supreme Court is more apt to separate the two problems, using such expressions as 'ripeness of the issue' and

[1] (1954) 90 C.L.R. 24.

'abstractness of the question' when dealing with justiciability.)

Behind the restrictions on the sort and condition of legal questions which may be presented for judicial determination (the requirements of justiciability) and the restrictions on the persons at whose suit the court is required to give such a determination (the requirements of standing) lie the constitutional limitations on the federal judicial power. In both original and appellate jurisdiction, the Supreme Court is limited by the Constitution to the determination of 'cases' and 'controversies';[2] in its original jurisdiction at least, the High Court is limited to the determination of 'matters.'[3]

And, in interpreting these constitutional limitations, the two courts have been influenced by the traditional role of courts in Anglo-American jurisprudence as tribunals for the settlement of particular disputes between adversary parties who raise concrete issues for decision,[4] and seek to restrict suits which they will entertain to those which are presented in that form. For it is to such adversary proceedings that Anglo-American courts are accustomed and their judicial processes adapted.

Also influencing the two courts, especially in the case of challenges to the validity of governmental action (and most particularly where the challenge is to the constitutionality of the action), is the traditional conception of the limited role of the court as an organ of government and (within broad limits of legality and constitutionality) the deference therefore due by the court to the decisions of the legislature and of the executive. This concept is given particular weight by the Supreme Court.

Finally, the courts are made more reluctant to depart from the traditional criteria of justiciability and standing by the great number of cases already being pressed on the judicial system for decision. This again is a consideration given special attention by the Supreme Court. The requirements of justiciability and standing operate as a convenient sieve limiting the lawsuits which can come before the courts.

The requirements of justiciability and standing apply in all types of litigation, but declaratory actions tend in particular to bring them in issue. This is so because suits seeking declarations are often resorted to by litigants in situations which require the court to make determinations of the legal effect of events which have not yet taken place.

Consider again the situation in *Australian Boot Trade Employees'*

[2] *E.g., United Public Workers v. Mitchell,* (1947) 330 U.S. 75 (appellate jurisdiction); *e.g., Massachusetts v. Missouri,* (1939) 308 U.S. 1 (original jurisdiction).

[3] Commonwealth of Australia Constitution Act ss. 75-76.

[4] 'Developments in the Law—Declaratory Judgments 1941-1949', (1949) 62 *Harvard Law Review* 787, 792.

Federation v. Commonwealth.[5] Plaintiffs there, it will be recalled, sought to challenge by declaration the constitutionality of a statute. No steps had been taken to enforce the statute against the plaintiffs or any other person and no threat had been made of such enforcement. The statute left open, within a wide range, the scope of its applicability: it remained to be seen whether the executive department would construe and enforce it broadly or narrowly. Thus, plaintiffs' suit in effect asked the court to decide whether the act would be constitutional *if* at some future time the government interpreted the Act as applying so as to prohibit certain activities which plaintiff union officials proposed to engage in.

In terms of justiciability, the plaintiffs were asking the court to decide a hypothetical question, one based on a situation which might never come about. In terms of standing, the plaintiffs were seeking to challenge the constitutionality of a statute which they could not show was about to, or even was likely to, have an adverse effect on their constitutional rights. As we have seen, the High Court, by a majority, declined their request, refusing to entertain the case.

Such problems of justiciability and of standing, presented in a rather extreme form in the *Boot Trades* case, exist to some degree in the frequent declaratory judgment cases which look to events in the future. Consequently, in a study of declaratory judgments, these requirements assume a particular importance.

2. *Requirements of Justiciability*

(a) Supreme Court of the United States

The Supreme Court gives much attention to the requirements of justiciability in declaratory actions, and frequently discusses these requirements at length, in contrast with the High Court, where such discussion is infrequent. Because of the more extended treatment accorded justiciability by the Supreme Court, the American cases will be discussed first, an exception to the order followed elsewhere in this paper.

The Supreme Court often states, as its general principle of justiciability, the rule that the court will not entertain actions in which the legal issue tendered is 'hypothetical or abstract.'[6] The requirement is a constitutional one. 'The judicial power does not extend to the determination of abstract questions.'[7] Other cases state the requirement but not explicitly in constitutional terms.[8]

[5] (1954) 90 C.L.R. 24.

[6] This phrase is apparently a term of art used to designate both a legal question presented for decision against a background of hypothetical facts, (as in the *Boot Trades* case, *supra*, (1954) 90 C.L.R. 24), and a question presented without any factual background at all (as in *Public Service Commission v. Wycoff Co.* (1952) 344 U.S. 237).

[7] *Ashwander v. Tennessee Valley Authority* (1936) 297 U.S. 288, 324, *per* Hughes C.J. See also *International Longshoremen's Union v. Boyd* (1954) 347 U.S. 222; *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240 (*dictum*).

[8] *Electric Bond & Share Co. v. Securities and Exchange Commission* (1938) 303 U.S.

More specifically put, the rule requires that to be justiciable the legal issue must arise in a 'definite and concrete' controversy between adverse parties. This statement of the rule reflects the constitutional limitation of the federal judicial power to 'cases' and 'controversies.' Also, the Federal Declaratory Judgments Act restricts the grant of declaratory judgment to 'cases of actual controversy,' thus setting a similar requirement in statutory rather than constitutional terms.[9]

Furthermore, even within the limits of the constitutional power and the statutory grant, the court may refuse to entertain a declaratory action. The federal Act provides that the court '*may* declare the rights and other legal relations of any interested party seeking such declaration,'[10] thus making the power a discretionary one. We do not study in this paper, except incidentally, the varied factors which the court considers in deciding whether or not to exercise its discretion. It will suffice to note here that in some of the cases which the court has refused to entertain on grounds of non-justiciability, the refusal has been stated in terms of discretion rather than of lack of statutory or of constitutional power.[11]

From the doctrine requiring a definite and concrete controversy, there follows the rule that the court will not decide a legal issue other than as incident and necessary to the determination of specific rights of parties. An example of this rule is the holding of the court in *Public Service Commission v. Wycoff Co.* (1952).[12] There plaintiff was a firm engaged in transporting motion picture film into the state of Utah. The firm brought the film from out of state to Salt Lake City, where it stored and processed it, then transported it along routes within the state for delivery to Utah motion picture exhibitors. The inception of the dispute here litigated was the Utah Public Service Commission's refusal to grant plaintiff a renewal of a certificate authorizing it to carry the film over the Utah routes from Salt Lake City to other Utah points. Plaintiff brought suit in a federal district court against the Commission. By the time the case reached the Supreme Court the plaintiff's claim had been reduced to a prayer for the bare declaration that its intrastate carriage (*i.e.*, between Salt Lake City and other Utah points) was so integrated with the interstate part of the transport as to itself constitute interstate commerce. It appeared also that as yet the Utah Commission had not taken or

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419, 443. The rule against decision of 'hypothetical or abstract' questions applies equally to cases in which the legal issue has become moot. For instance, *California v. San Pablo & Tulare R.R.* (1893) 149 U.S. 308, (challenge to the constitutionality of provisions of a state constitution under which taxes against the defendant railroad had been assessed; suit dismissed by the Supreme Court as 'moot' upon an admission by plaintiff State that the defendant had tendered the amount of taxes claimed).

[9] 28 U.S.C. 2201.

[10] *Ibid.* My italics.

[11] *E.g., Alabama Federation of Labor v. McAdory* (1945) 325 U.S. 450; *Eccles v. People's Bank* (1948) 333 U.S. 426.

[12] 344 U.S. 237.

threatened any action to prevent the plaintiff from operating on the intrastate routes.[13] The Supreme Court, eight to one, refused to consider the merits of the case and directed that the action be dismissed, giving as its ground that the case was not an appropriate one for declaratory relief. Jackson J. for the majority said:

> The carrier's idea seems to be that it can now establish the major premise of an exemption, not as an incident of any present declaration of any specific right or immunity, but to hold in readiness for use should the Commission at any future time attempt to apply any part of a complicated regulatory statute to it. . . . [T]his . . . exceeds any permissible discretionary use of the Federal Declaratory Judgment Act.[14]

Coffman v. Breeze Corporations (1945)[15] is authority for the same point.

The above rules when applied to the type of case discussed in this paper lead to the proposition that the court will not pass on the validity of statutes, regulations, or other governmental action unless that action has already adversely affected, or is imminently threatening to so affect, definite rights of the plaintiff.

Let us now examine a number of the American cases to see what kind and degree of governmental interference is necessary to make challenge to its validity justiciable.

(1) Governmental action still in the stage of general plans to be carried out in the future rather than in the form of concrete acts definitely injuring or threatening to injure rights of the plaintiff is not yet ripe for challenge.

Such was a holding in the well-known case of *Ashwander v. Tennessee Valley Authority* (1936).[16] Plaintiffs in that case were minority shareholders in the Alabama Power Company, a private corporation. They brought suit against their company and against the T.V.A., with which the company had made a contract for the sale of certain electrical equipment, an interchange of hydroelectric power and the purchase from T.V.A. of 'surplus power.' Plaintiffs' suit asked that performance of this contract be enjoined on the ground that it was injurious to the company's corporate interests and that it was beyond the constitutional powers of the federal government. Plaintiffs also sought a declaration that the T.V.A. was unconstitutional in its entirety. (The Tennessee Valley Authority was established to accomplish social, economic and civic development and rehabilitation of the whole Tennessee valley area. Its purposes included an extensive rural electrification programme and the establishment of an independent power network for the permanent commercial pro-

[13] This represents the facts as viewed by the majority of the Supreme Court. A different view is taken by Douglas J. in dissent.

[14] 344 U.S. 237, 245. [15] 323 U.S. 316. [16] 297 U.S. 288.

duction of electric power in the area, the electricity to be dispensed at much lower rates than those then being charged by the competing private companies.)

The Supreme Court passed on the validity of the contract between T.V.A. and the Power company, upholding its constitutionality. It refused, however, to consider the constitutional objections to the Authority in its entirety. Hughes C.J. said:

> The pronouncements, policies and program of the Tennessee Valley Authority and its directors . . . did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining.[17]

(2) Where provisions in a statute are not definitely and presently applicable to the plaintiff, issues as to the validity of those provisions are not justiciable, even though they may at some time in the future turn out to be applicable to the plaintiff.

In *Electric Bond & Share Co. v. Securities and Exchange Commission* (1938),[18] the commission had brought a suit to enforce sections 4(a) and 5 of the Public Utility Holding Company Act of 1935 against the defendant holding companies. The sections in question required public utility holding companies which came within the definition of the Act to register with the commission and to supply specified information with respect to organization, financial structure, and details of operations.

Besides the 'registration' sections – sections 4(a) and 5 – the Act contained a number of 'control' provisions, designed to regulate such things as the issuance of securities by a public utilities holding company, acquisition by it of securities and utility assets, its service contracts and other intercompany transactions, and to provide for corporate simplification and reorganization of public utility holding companies. The Act provided that these 'control' sections would apply only after companies had registered under the earlier provisions of the Act. The Act also provided that the control sections were separable from the registration sections.

The defendant companies defended against the Commission's enforcement proceedings with a claim that the 'registration' sections were unconstitutional. They also brought a crossbill seeking a declaration that the whole of the Act was unconstitutional, claiming that notwithstanding the separability clause in the Act, sections 4(a) and 5 were purely auxiliary to the other or 'control' sections and that the object of the commission's suit was to compel submission to an integrated system of control.

The federal district court before which suit was brought upheld

[17] *Ibid.*, 324.

[18] 303 U.S. 419.

the validity of sections 4(a) and 5 on the merits and dismissed the crossbill without considering its claim on the merits, on the grounds that it presented no actual controversy within the meaning of the Federal Declaratory Judgments Act. The Supreme Court affirmed. Hughes C.J. said:

> By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation.[19]

Contrast, with the two cases discussed above, the Supreme Court's action in *Adler v. Board of Education* (1952)[20] where the court entertained a challenge to a New York statute and rules made under its authority before administrative implementation of the scheme was complete and before it had been put into operation. No member of the court even mentioned the existence of any question as to the justiciability of the suit except Frankfurter J. He dissented on the grounds that the suit was not justiciable and that plaintiffs did not have standing to sue, describing the act and rules as 'still an unfinished blueprint.'[21] Mr Justice Frankfurter's position represents the more usual attitude of the court.

(3) Where plaintiff alleges no specific instance of the application or threatened application to him of the statute he seeks to challenge, the court will not grant declaratory judgment.

It was so held in *Alabama Federation of Labor v. McAdory* (1945)[22] where the Supreme Court dismissed without reaching the merits a challenge by declaration to the constitutionality of an Alabama statute. The Act was a comprehensive measure, applying to all labour unions having members in Alabama. It sought to regulate various aspects of the internal affairs and activities of such unions, as well as picketing, boycotting, and striking. The Act imposed civil liability and criminal penalties for violation of its provisions. By section 7 of the Act, every labour organization 'functioning' or 'desiring to function' in the state was required to file, among other things, an annual report giving detailed information about its finances and its officers. The section provided that it should be unlawful for any union officer to collect dues or other monies from members while the union was in default with respect to the annual report.

This suit was brought in an Alabama state court by four labour

[19] *Ibid.*, 443.
[20] 342 U.S. 485. A fuller discussion of this case will be found *infra*, 362.
[21] *Ibid.*, 497.
[22] 325 U.S. 450.

unions. Plaintiffs sought to challenge the validity of the statute as a whole, and of certain sections in particular. *Inter alia* they claimed that the statutory requirements of compliance with section 7 as a prerequisite to 'functioning' in the state was an unconstitutional abridgment of their rights to freedom of speech and of assembly guaranteed by Amendment 1 of the Federal Constitution. No instance of enforcement, or threat of enforcement, of the statute was alleged.

The Alabama trial court upheld the constitutionality of the Act, and on appeal the Supreme Court of Alabama affirmed. The latter court discussed section 7, but did not give it any definite construction.

The case went up on certiorari to the United States Supreme Court. The court dismissed the suit without reaching the merits. Stone C.J., speaking for the court, said:

> We are thus invited to pass upon the constitutional validity of a state statute which has not yet been applied or threatened to be applied by the state courts to petitioners or to others in the manner anticipated. Lacking any authoritative construction of the statute by the state courts, without which no constitutional question arises, and lacking the authority to give such a controlling construction ourselves, and with a record which presents no concrete set of facts to which the statute is to be applied, the case is plainly not one to be disposed of by the declaratory judgment procedure.[23]

We are not here concerned with the second ground for the dismissal: the lack of an authoritative construction of the statute by the Alabama courts. It is sufficient to note that in Australia, where the High Court is the ultimate domestic tribunal for all matters of statutory interpretation, whether state or federal, this problem does not exist. As to the first ground – the lack of any application of the statute, threatened or actual, and the consequent lack of any concrete set of facts – the decision is similar to that of the High Court in the *Boot Trades* case.[24]

(4) Where preparation has been made to invoke against the plaintiff substantial penalties for violation of a statute, plaintiff's suit for a declaratory judgment challenging the statute's validity presents a justiciable 'case' or 'controversy.'

The Supreme Court so held in *Railway Mail Association v. Corsi* (1945).[25] In that case, challenge was made to the constitutionality of section 43 of the New York Civil Rights Law, which provides that no labour organization shall deny a person membership by reason of race, color or creed. For violation of the Act, penalties against the organization's officers and members were provided. The plaintiff, a labour union, had denied certain applications for membership on

[23] *Ibid.*, 460-461.
[24] *Australian Boot Trades Employees' Federation v. Commonwealth* (1954) 90 C.L.R. 24.
[25] 326 U.S. 88.

the grounds that the applicants did not satisfy the terms of article III of the union's constitution, which limited membership therein to persons of the Caucasian race.

Defendant here, the New York State Industrial Commissioner, who was charged with the enforcement of section 43, asserted to the plaintiff that section 43 was applicable to it, and that article III of the union constitution was invalid under the Act. Plaintiff denied his claim, and filed suit in a New York state court for a declaratory judgment that section 43 was unconstitutional.

The trial court upheld the validity of section 43 against plaintiff's constitutional challenges and its decision was affirmed by the Appellate Division and by the New York Court of Appeals. On appeal, the Supreme Court held that the case presented a justiciable 'case or controversy' and went on to uphold the decision of the New York courts on the merits. On the issue of justiciability the court said:

> The conflicting contentions of the parties in this case as to the validity of the state statute present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights asserted by appellant are threatened with imminent invasion by appellees . . .[26]

(5) The Supreme Court has held that where application of a federal statute is contingent upon the plaintiff's engaging, in the future, in the conduct prohibited by the Act and upon the responsible federal officials thereupon enforcing it against the plaintiff, the plaintiff's challenge to the validity of the statute presents no 'case or controversy,' even though it is fairly certain from the facts of the case (i) that plaintiff intends to engage in such conduct and will do so unless prevented by law, and (ii) that the defendant official or officials will enforce the sanctions for violation against plaintiff if he does engage in such conduct. This strict view has been taken in *United Public Workers v. Mitchell* (1947)[27] and in *International Longshoremen's Union v. Boyd* (1954).[28]

In the *Mitchell* case, the statutory provision challenged was a sentence in section 9(a) of a federal statute known as the Hatch Act. The challenged provision forbade any employee in the executive branch of the federal government, under penalty of mandatory dismissal, from taking 'any active part in political management or in political campaigns.' This general prohibition was spelled out in detail in rules of the Civil Service Commission. Thus, for instance, soliciting votes for a party or candidate, serving as an election officer, publicly expressing political views at a political gathering for or against any candidate, and writing for publication any letter or article

[26] *Ibid.*, 93. [27] 330 U.S. 75. [28] 347 U.S. 222.

in favour or against any political party, candidate, or faction were forbidden.

Plaintiffs here were a number of federal employees in the executive branch and a union of such employees. They brought suit before a statutory three judge federal district court against the members of the Civil Service Commission seeking a declaration of the invalidity of the statutory provision as violative of a number of their federal constitutional rights. They sought also an injunction against its enforcement. Plaintiffs alleged that they desired and intended to engage in various acts of political management and political campaigning. They enumerated them in the complaint and further specified what they had in mind in detailed affidavits. They wished among other things to write for publication letters and articles in support of candidates, to be connected editorially with publications identified with the legislative programme of their union, to solicit votes, and to aid in campaigns by such acts as posting banners and posters, distributing leaflets, and 'ringing doorbells'.

Eleven of the twelve individual plaintiffs alleged that, although they desired to engage in these activities, they feared to do so because of the penalty: dismissal from the federal service. No threats of dismissal if these activities were engaged in had been made specifically against these eleven plaintiffs, although the commission by means of public posters and other announcements addressed to federal employees generally had made clear the effect of the statutory provision and the commission's intention to enforce it.

The remaining individual plaintiff, one Poole, admitted that during his employment in a job in the federal executive branch (a roller at the United States mint in Philadelphia) he had been a ward executive committeeman for the Democratic party in Philadelphia and in that capacity had actively engaged in political activity. He alleged that he intended to continue such activity. Poole also alleged that the commission had started proceedings against him to remove him from his job for violation of the statutory provision and the rules.

The three judge district court considered the case on the merits and upheld the constitutionality of the challenged statutory provision. On appeal to the Supreme Court, a majority held that insofar as the eleven individual plaintiffs were concerned, no justiciable 'case or controversy' was presented. Reed J. for the majority said:

> The threats which menaced . . . [the eleven plaintiffs] . . . are closer to a general threat by officials to enforce those laws which they are charged to administer . . . than they are to the direct threat of punishment against a named organization for a completed act that made . . . [*Railway Mail Association v. Corsi*] . . . justiciable.[29]

[29] 330 U.S. 75, 88.

> A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication.[30]

Black and Douglas JJ. dissented on this question of justiciability, asserting that the eleven plaintiffs did present a 'case or controversy.' Douglas J. said:

> [Plaintiffs'] proposed conduct is sufficiently specific to show plainly that it will violate the Act. The policy of the Commission and the mandate of the Act leave no lingering doubt as to the consequences.[31]
>
> The threat against them is real, not fanciful, immediate not remote.[32]

As to Poole, the plaintiff who had violated the Hatch Act provision and against whom the commission had begun dismissal proceedings all the judges agreed that a justiciable controversy existed. The majority opinion, by Reed J., states that the court's determination must be limited to the issues raised by the controversy defined by the assertions of Poole's affidavit on one side and by the Civil Service Commission's charge against him on the other. As so limited, the court said, a controversy exists 'which meets the requirements of defined rights and a definite threat to interfere with a possessor of the . . . rights. . . .'[33] The majority then proceeds to consider the substantive issues raised by Poole and comes to the conclusion that the Hatch Act provision is, as applied to him, valid.

The second case is *International Longshoremen's Union v. Boyd* (1954).[34] That was a suit by a union, and by several of its members who were aliens resident in the United States, seeking a declaration of the inapplicability to the individual plaintiffs of a section of a federal statute, or in the alternative, if the statute were applicable, a declaration that it was unconstitutional. The facts were as follows: section 212 (d) (7) of the Immigration and Nationality Act of 1952 provides that certain provisions with respect to the exclusion of aliens from the United States shall be applicable 'to any alien who shall leave . . . Alaska, . . . and who seeks to enter the continental United States. . . .'[35]

Every summer some 3000 members of the plaintiff union who live in west coast states of the continental United States, among them a number of aliens, go up to Alaska to work in the salmon and herring canneries there, returning to their homes in the United States at the end of the season.

[30] *Ibid.*, 90. [31] *Ibid.*, 117. [32] *Ibid.*, 119. [33] *Ibid.*, 92. [34] 347 U.S. 222.

[35] The provisions excluding aliens who seek to enter the United States are more stringent than the provisions which resident aliens must satisfy in order lawfully to remain in the country. Consequently, a resident alien who left the United States and subsequently sought re-entry might be excluded under the Act.

After the passage of the 1952 Act and before the beginning of the 1953 canning season, defendant, the district director of the Immigration and Naturalization Service in Seattle (the normal port of exit from the United States for Alaska and of entry from Alaska to the United States), announced that as he interpreted section 212 (d) (7) it would apply to aliens returning home to the United States after a summer job in Alaska and that he intended so to administer it. Plaintiff union claimed that his interpretation was in error and it subsequently brought this suit before a statutory three judge federal district court seeking the declarations above mentioned, and an injunction.

Pursuant to pre-trial order, the parties agreed on a stipulated set of facts, including a detailed statement of the course of conduct the defendant immigration officer proposed to pursue, pursuant to his interpretation of section 212 (d) (7), a few months later when workers sought re-entry from Alaska after the completion of their summer jobs.

The district court held the controversy a justiciable one, and went on to hold section 212 (d) (7) applicable to plaintiffs and constitutional.

On appeal to the Supreme Court, the majority held that no 'case or controversy' existed and refused to consider the merits of the case. Frankfurter J. wrote for the majority:

> Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. . . . Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function. *United Public Workers v. Mitchell . . .; Alabama Federation of Labor v. McAdory. . . .*[36]

Black and Douglas JJ. again dissented, holding that the case presented a 'case' or 'controversy.'[37]

We come now to a number of cases in which the Supreme Court has shown a different and broader attitude on the issue of justiciability in declaratory actions, which exists alongside, and is quite unreconciled with, the much narrower (and dominant) position, represented in its most extreme form in the *Mitchell* and *Boyd* cases.

The court has given effect to this more liberal attitude in a group of cases challenging the validity of federal regulations. *Columbia Broadcasting System, Inc. v. United States* (1942)[38] is one of this group of cases. There the Supreme Court held reviewable some regulations

[36] 347 U.S. 222, 223-224.
[37] (1954) *Cf. Public Utilities Commission v. United Air Lines,* (1953) 346 U.S. 402.
[38] 316 U.S. 407. Plaintiff here sought injunctive, not declaratory relief, but the principles of justiciability involved are similar.

newly promulgated by the Federal Communications Commission relating to radio chain broadcasting.

The regulations were not then in effect, and even if they had been in effect the commission could not have enforced them against any radio station until after a proceeding in which that station's licence had been revoked or its application for a licence denied. Furthermore, the plaintiff in the action was a 'network,' which itself did no broadcasting, and so could not have been proceeded against by the commission at all. The court nevertheless held that the fact that the regulations, although in terms applying only to broadcast stations, had serious adverse effects on plaintiff network's business, was sufficient to make the regulations reviewable at plaintiff's instance.

Rochester Telephone Corp. v. United States (1939)[39] is a similar case, though not so striking on its facts as the *Columbia Broadcasting System* case. There the Supreme Court held reviewable an order of the Federal Communications Commission which did no more than classify the plaintiff Telephone Company as subject to its jurisdiction. The order itself did not command plaintiff to do or refrain from doing anything (although the effect of classification was to subject the company to a number of existing regulations which applied generally to companies similarly classified).

Two recent cases of challenges to administrative regulations exemplify the same liberal point of view. They are *Ramspeck v. Federal Trial Examiners Conference* (1953)[40] and *Nukk v. Shaughnessy* (1955).[41] In the *Ramspeck* case, a number of trial examiners and an incorporated association of such examiners brought suit in federal district court against the members of the Civil Service Commission, seeking a declaration that certain rules promulgated by the commission relating to the promotion, compensation and tenure of trial examiners and the assignment of cases to them were not authorized by statute. The rules were alleged to have gone into effect and one of the individual plaintiffs had apparently been discharged under the rules, but no specific application of the rules was before the court. The defendants asserted, *inter alia,* that the challenge was not justiciable, citing *United Public Workers v. Mitchell*[42] and *Ashwander v. Tennessee Valley Authority.*[43]

The district court held the controversy justiciable and found for plaintiffs on the merits; the Supreme Court took jurisdiction without any discussion whatsoever of the issue of justiciability and reversed the district court on the merits, upholding the validity of the rules.

Nukk v. Shaughnessy involved a challenge to, among other things, the validity of certain 'orders of supervision' made against the plain-

[39] 307 U.S. 125. The suit here also is not one seeking declaratory relief.
[40] 345 U.S. 128. [41] 350 U.S. 869. [42] (1947) 330 U.S. 75. [43] (1936) 297 U.S. 288.

tiffs by the defendant, a district director of immigration. The plaintiffs were aliens living in the United States who had been ordered to be deported on the grounds of Communist Party membership but were still in the country because no foreign nation had been found which would receive them. A federal statute provided that, in the case of such an alien, he should, pending deportation, be subject to supervision under regulations prescribed by the attorney-general. Pursuant to the statute, the Attorney-General had made regulations, and purportedly acting under their authority, defendant immigration officer had made orders of supervision for each plaintiff. These orders required, *inter alia,* that the alien report once a week at a given immigration office, that he terminate membership in the Communist Party and any activity in support thereof, that he refrain from 'associating' with any person he knows to be a member thereof, and that he not travel outside a radius of fifty miles from Times Square in New York City.

Plaintiffs brought suit before a statutory three judge federal district court for a declaration *inter alia* as to the invalidity of the orders on constitutional and other grounds. Plaintiffs claimed a right to have the orders reviewed under the review provisions of the federal Administrative Procedure Act and also under ordinary declaratory judgment principles. The operation of the orders had been stayed pending determination of the suit. Plaintiffs did not allege that they had violated the orders, that any proceedings to enforce sanctions for violation of the orders had been commenced or even threatened against them, nor that they had violated the orders in any way or that they desired or intended to do so. In fact it did not appear that the orders had ever come into operation against them.

The district court dismissed the case without reaching the merits on the grounds that there was no actual controversy between the parties, citing the Supreme Court's decision in *United Public Workers v. Mitchell.*[44]

On appeal, the Supreme Court in a *per curiam* decision, reversed and remanded the case for decision on the merits. The opinion said only, 'The court is of opinion that the complaints do present a case and controversy,' and cited *Rochester Telephone Corp. v. United States.*[45]

These four cases manifest a quite different position on the question of the kind and degree of governmental interference with a plaintiff's rights required to make a case justiciable from that expressed in the cases previously considered.

Each of these four cases involved a challenge to administrative regulations, but the more liberal view of the Supreme Court is not

[44] (1947) 330 U.S. 75. [45] (1939) 307 U.S. 125.

restricted to cases involving challenges to federal regulations. For instance in *Pierce v. Society of Sisters* (1925)[46] the Supreme Court permitted two private schools to challenge the validity of a state statute requiring parents and guardians to send their children to public schools, although the statute by its terms would not have gone into effect until over two years after the date suit was commenced. (The plaintiffs alleged that the defendants, public officials of the state, had publicly announced that the Act was valid and that they intended to enforce it, and that as a result some parents and guardians had withdrawn their children from plaintiffs' schools and others had refused to enter their children, to the plaintiffs' injury; furthermore that the direct consequence of the Act would be the closing of plaintiffs' schools.)

Also, there are the two companion cases of *Pennsylvania v. West Virginia* and *Ohio v. West Virginia* (1923)[47] in which the Supreme Court permitted the plaintiff states to challenge the validity of a West Virginia statute in suits commenced only eight days after the statute went into effect and before any action had or could have been taken under its authority.

So far most of the cases considered have been brought in the federal courts under the Federal Declaratory Judgments Act. As we have seen in the *McAdory* case,[48] other cases reach the Supreme Court which have been commenced in state courts under state declaratory judgment procedures. In at least two such cases the Supreme Court has shown very liberal standards of justiciability. One is *Adler v. Board of Education* (1952).[49]

In that case, challenge was made to the constitutionality of a New York statute and of regulations made under its authority. The purpose of the statute, passed in 1949, was 'the elimination of subversive persons from the [New York] public school system.' The statute provided that the New York Board of Regents, the governing body of the New York school system, should adopt and enforce a set of regulations for the disqualification or removal of school personnel who violate either of two existing statutes, one declaring ineligible for employment in the New York schools any person advocating the doctrine of the unlawful overthrow of the government or becoming a member of any organization so advocating, and the other providing for the removal of any employee in the public schools who utters any treasonable or seditious words or does any such acts. The Act also

[46] 268 U.S. 510.

[47] 262 U.S. 553. Both these cases, as well as the *Pierce* case above, were decided long before the creation of the federal declaratory judgment remedy in 1934. The relief sought was injunctive. The issues of justiciability involved, however, are similar to those which an action for a declaration would raise.

[48] *Alabama Federation of Labor v. McAdory* (1945) 325 U.S. 450. [49] 342 U.S. 485.

required the Board of Regents to make a list of organizations which it finds to be subversive in that they advocate the doctrine of forcible overthrow of the government and to provide in its regulations that membership in any organization so listed shall constitute *prima facie* evidence of disqualification for any school position.

The Board of Regents had, pursuant to the statute, adopted a set of 'rules' providing elaborate machinery for annual reports on each employee. It had provided in its rules that membership in a listed organization should be *prima facie* evidence of disqualification and had announced its intention of preparing the required list of organizations, but at the time suit was commenced none had been listed.

Up to the time of suit there had been no action taken against any teacher or employee under the statute and rules. (All eight of the plaintiffs alleged that they were municipal taxpayers in New York City; two in addition alleged that they were parents of children in New York City schools, four others that they were teachers in New York City schools.) The plaintiff teachers did not allege that they had engaged in any of the conduct prohibited under the Act or that they intended to do so, nor did they allege that they were threatened with any action under the law.

Suit was brought in a New York state court under New York declaratory judgment procedure. The case was decided wholly on the pleadings: a complaint identifying the plaintiffs and their interests, setting out the challenged statutes and rules and stating plaintiffs' constitutional objections to them, and the defendants' answer denying the assertions of unconstitutionality and contesting plaintiffs' standing.

The New York courts had no hesitation about entertaining the case and deciding it on the merits. The trial court held in favour of plaintiffs on the merits but this holding was reversed in the appellate courts.

The case went up on appeal to the Supreme Court of the United States from the New York Court of Appeals. In spite of what by the standards of cases like *United Public Workers v. Mitchell*[50] was the extreme prematurity of the challenge, eight of the nine Supreme Court justices accepted jurisdiction of the case without discussion, directing their attention immediately to the decision of the merits. Frankfurter J. alone objected, dissenting from the court's assumption of jurisdiction in the case on the grounds that the case was not justiciable and that the plaintiffs lacked standing.[51]

[50] (1947) 330 U.S. 75.

[51] It may be that the *Adler* case is simply an aberration by the court, in which the judges' interest in the important constitutional questions raised by the merits of the case drew them into entertaining the suit without paying any attention to the problems of justiciability which it involved.

A comparable case, also arising from the New York state courts under the New York declaratory judgment procedure is *Connecticut Mutual Life Insurance Co. v. Moore* (1948).[52] The Supreme Court there, with three dissents, held that it had jurisdiction to entertain a constitutional challenge brought by nine insurance companies to a New York statute purporting to escheat to the state unclaimed insurance proceeds, although no claim to any specific proceeds was in issue and although, so far as appeared, the state had not yet made any claims under the statute.

Cases coming up from the state courts, however, are not always treated by the Supreme Court in such a liberal way. Note for instance the strict view taken in *Alabama Federation of Labor v. McAdory*.[53]

The question arises whether there are any special characteristics, either of the group of cases involving challenges to administrative regulations, or of the cases coming up from the state courts, which justify the Supreme Court's more liberal treatment of them.

As for the cases involving challenges to regulations, Professors Hart and Wechsler, discussing these cases,[54] suggest that the doctrine of sovereign immunity, which in many circumstances bars suits directly against the government or against government agencies, is a factor. In challenging government action, it is necessary, in order to avoid the operation of sovereign immunity, to establish a controversy with a government official over a wrong that he has individually done to you. It may be easier, Hart and Wechsler suggest, to satisfy the court of the existence of such a controversy in the case of administrative regulations (where one can claim a quarrel with the officials who promulgated the regulations) than in the case of a statute, for the legislature cannot be sued and plaintiff must therefore find some administrative official who individually threatens to enforce the statute against him.

This suggestion may go part way in explaining the apparent greater willingness of the Supreme Court to entertain challenges to regulations. Note, however, that in the case of the challenges to statutes in the *Mitchell* and *Boyd* cases, the existence of a controversy with the officials concerned was clear, yet the Supreme Court refused to entertain the case.

In a recent article,[55] Professor Davis points out, as a possible point of distinction as regards justiciability between challenges to statutes and challenges to regulations that where the administrator who issues

[52] 333 U.S. 541.
[53] 325 U.S. 450.
[54] *The Federal Courts and the Federal System* (1953) 155-156.
[55] 'Ripeness of Governmental Action for Judicial Review', (1955) 68 *Harvard Law Review* 1122, 1326.

the regulations is the officer for their enforcement, the mere issuance of the regulations may be deemed a threat of enforcement, in contradistinction to a statute, the passage of which by the legislature is not of itself a threat of enforcement. This point has some plausibility, but we must note that in two of the cases in which the Supreme Court permitted early challenge to the validity of administrative action, the defendant official who promulgated the challenged order had no power to initiate proceedings to enforce it (*Rochester Telephone Corp. v. United States*;[56] *Nukk v. Shaughnessy*[57]).

These suggestions, then, do not provide a complete and satisfactory justification or explanation of the adoption of more liberal standards of justiciability in cases of challenges to federal regulations than in other cases. Nor are there doctrinal grounds to justify the Supreme Court's adopting less strict requirements of justiciability in cases coming up from the State courts. The limitation of the jurisdiction of the Supreme Court to 'cases or controversies' is the same for all cases regardless of their origin. Compare the statement of Frankfurter J. in his dissent in the *Adler* case, made with reference to the requirements of standing: 'New York is free to determine how the views of its courts on matters of constitutionality are to be invoked. But its action cannot of course confer jurisdiction on this Court, limited as that is by the settled construction of Article III of the Constitution.'[58]

To sum up, it appears that, although some cases in which the Supreme Court has permitted considerable latitude in requirements of justiciability can be partially explained on other grounds, there do exist in the reports, coexistent with and unreconciled with the cases expressing the stricter (and dominant) view, various groups of cases manifesting a more liberal position on justiciability. This more liberal position is comparable to the position of the High Court in the ordinary public law declaratory actions brought by private plaintiffs. Only in the exceptional cases of *Pennsylvania v. West Virginia* and *Ohio v. West Virginia*,[59] however, has the Supreme Court approached the liberality of the most extreme Australian cases.

Before ending this section on the Supreme Court's requirements of justiciability, another factor should be noted which contributes to the strictness of the court's requirements. This is the extreme reluctance of the Supreme Court to decide a question of constitutionality. The

[56] (1939) 307 U.S. 125. [57] (1955) 350 U.S. 869.

[58] (1952) 342 U.S. 485, 501. There are, however, practical considerations which may influence the Supreme Court to show greater latitude in cases arising from state courts where the state court has passed on questions of federal law. In such cases, a refusal by the Supreme Court to review the state court's decision on the grounds that the case is non-justiciable would leave the state decision as *res judicata* on the federal issue until the plaintiff, or someone else, could again bring the question before the Supreme Court.

[59] *Supra*, 362.

most famous statements of the court in this regard are the *dicta* of Mr Justice Brandeis in his concurring opinion in *Ashwander v. Tennessee Valley Authority*.[60]

Brandeis J. said, among other things:

> The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress, and has restricted exercise of this function by rigid insistence that the jurisdiction of the federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions. (Citations omitted.)

He went on to note that:

> The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed on it for decision.[61]

Although a similar attitude has occasionally been voiced by individual members of the High Court, the Australian tribunal does not share the Supreme Court's reluctance with regard to making constitutional decisions.

A final point to be noted about the Supreme Court's requirements of justiciability is the insistence of the court that it have a concrete and detailed set of facts before it on which to base its decision.[62] (The High Court makes no such strict requirement.) This insistence by the Supreme Court is the natural result of the court's requirements that governmental action to be challengeable must be in the form of concrete acts definitely injuring or threatening rights of the plaintiff and definitely and presently applicable to the plaintiff.

(b) High Court of Australia

The requirements of justiciability in the High Court of Australia have their basis in the constitutional limitation of its original jurisdiction to 'matters.'[63] If a case falls within the constitutional limits, the question then arises whether the court has power under Order IV rule 1 to grant declaratory relief.[64]

Then, even if the court holds that it does have power in the given case to make a declaration, it must further consider whether the case is a proper one for the exercise of that power. (The declaratory remedy is discretionary with the court,[65] as with the Supreme Court under the federal Act in the United States.)[66]

[60] (1936) 297 U.S. 288.

[61] *Ibid.*, 288, 345-346.

[62] *Alabama Federation of Labor v. McAdory*, (1945) 325 U.S. 450, 460; *United Public Workers v. Mitchell*, (1947) 330 U.S. 75; *International Longshoremen's Union v. Boyd*, (1954) 347 U.S. 222.

[63] Commonwealth of Australia Constitution Act, ss. 75, 76.

[64] *Supra*, 213-214.

[65] *Australian Boot Trade Employees' Federation v. Commonwealth* (1954) 90 C.L.R. 24; *Colonial Sugar Refining Co. v. Attorney-General for the Commonwealth* (1912) 15 C.L.R. 182, 202-203 *per* Barton J.

[66] *Supra*, page 351.

The High Court does not always indicate whether its decision refusing to decide a declaratory case on the merits is based on constitutional grounds, on the ground of lack of power under Order IV rule 1, or on purely discretionary grounds.

Although the High Court of Australia shows less concern over the requirements of justiciability in declaratory judgment actions than the Supreme Court, and only infrequently discusses them, its pronouncements when it does discuss them are similar to those of the Supreme Court.[67]

(1) For instance, there are a number of statements in the judgments to the effect that the court does not decide 'abstract questions.' At the extreme, this proposition is stated as a constitutional limitation on the jurisdiction of the court: '. . . Parliament can[not] confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.' *In re Judiciary and Navigation Acts* (1921).[68] See also the *dicta* of Dixon J. in the first *Pharmaceutical Benefits Case.*[69]

In other cases, the proposition that the court will not decide abstract questions is stated, but not in terms of lack of constitutional power of the court.[70]

(2) In several cases, there are statements to the effect that the court does not decide a legal issue other than as incident to the determination of specific rights of parties.

Here also the requirement is, at the extreme, a constitutional limit on the jurisdiction of the High Court.

> . . . [T]here can be no matter within the meaning of [section 76 of the Constitution] unless there is some immediate right, duty or liability to be established by the determination of the Court.[71]

There are cases holding the same principle, but not in terms of constitutional limits.[72] *James v. South Australia.*

(3) The court has made a number of statements to the effect that to be challengeable, governmental action must cause present injury or probable future injury to the litigant's rights. Thus Taylor J. in

[67] This paper is concerned only with declaratory cases brought in the original jurisdiction of the High Court. No attention is here given to pronouncements of the court in cases seeking declaratory relief which come to it on appeal from the State courts.

[68] 29 C.L.R. 257, 267.

[69] (1945) 71 C.L.R. 237, 272.

[70] *The Union Label Case* (1908) 6 C.L.R. 469, 491, *per* Griffith C.J. (*dictum*); *Luna Park v. Commonwealth* (1923) 32 C.L.R. 596, 600, *per* Knox C.J. For a recent case in which the High Court appears to have viewed the question of whether to decide the abstract issues in the case as one of discretion, see *Australian Boot Trade Employees' Federation v. Commonwealth* (1954) 90 C.L.R. 24.

[71] *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 265; see also *per* Dixon J. in the first *Pharmaceutical Benefits Case;* [1945] Argus L. R. 435, 451 *(dictum).*

[72] *Bruce v. Commonwealth Trade Marks Label Association* (1907) 4 C.L.R. 1569. *James v. South Australia* (1927) 40 C.L.R. 1, 38. Compare the Supreme Court's decision in *Public Service Commission v. Wycoff Co.* (1952) 344 U.S. 237.

Australian Boot Trade Employees' Federation v. Commonwealth (1954)[73] said:

> . . . I am unaware of any case where the mere possibility or risk of future interference with a plaintiff's rights has been recognized as an appropriate basis for the exercise of the jurisdiction to make a declaratory decree.

Compare with that statement the following *dictum* of Latham C.J. in *Toowoomba Foundry Ltd. v. Commonwealth* (1945):[74]

> It is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid.

Chief Justice Latham's *dictum* appears to indicate somewhat more liberal standards of justiciability than those of the Supreme Court. But in general the pronouncements of the High Court on this matter do not seem very different from those of the Supreme Court.

The attitude of the High Court towards the requirements of justiciability is, however, different from that of the Supreme Court. Striking examples of this difference are the judgments in *Australian Boot Trade Employees' Federation v. Commonwealth.* As will be recalled, challenge had there been brought to a Commonwealth statute prohibiting certain practices by union officers. The statute did not express clearly the limits of its applicability, and as it had not yet been enforced or threatened to be enforced, the court could only speculate as to whether the government would construe the Act broadly or narrowly when the time for application came. The questions as to its constitutionality were consequently to a degree hypothetical and abstract.

The High Court held, three to two, that as a matter of discretion it ought not to entertain the suit. In stating their reasons for and against deciding the issues presented, the judges show a pragmatic attitude towards justiciability: they look to the consequences of a decision in the abstract in the particular case, rather than as would the Supreme Court, applying a fixed rule that no abstract questions will be decided.

Of the majority, Kitto J. said:

> Undoubtedly cases can arise, and in the past they have arisen from time to time, in which the course of resolving questions of validity in anticipation of events, prima-facie unsatisfactory though it is, appears to be desirable because the circumstances provide reasons in its favour which outweigh the objections to it. But I do not find it possible to take that view in this case.[75]

[73] 90 C.L.R. 24, 53. [74] [1945] Argus L. R. 282, 289. [75] 90 C.L.R. 24, 50.

In the minority, Dixon C.J. said:

> Section 78 penalizes a considerable number of different acts described in language which is not always very definite or exact. It is therefore neither safe nor wise to attempt to cover, in any pronouncement upon its validity, every part of the field of its intended application. . . .
> But in its main features I think that it is a valid law of the Commonwealth. . . .[76]

Dixon C.J. declares himself as 'feeling very little embarrassed in forming . . . [this opinion] by the abstract nature of the question presented by the suit.' He concludes, after expressly reserving judgment on certain points, that '. . . in no substantial respect entitling the plaintiffs to relief is s. 78 . . . beyond the powers of the Parliament . . .'[77] Also in the minority, Fullagar J. said:

> . . . I entertain . . . a clear opinion that s. 78 . . . is a valid exercise of constitutional power, and I cannot see any very strong reason for declining at this stage to reveal this opinion.[78]

Having considered some of the High Court's general statements on the matter of justiciability, we will now examine a few of the more important cases to see what degree of interference or threat of interference with the plaintiff's rights the governmental action must entail in order that the plaintiff may challenge by declaration the validity of the action.

(1) If the governmental action substantially interferes with plaintiff's conduct of his business, plaintiff can seek a declaration of the invalidity of the action. In *Crouch v. Commonwealth*[79] the government had made an order requiring anyone acquiring a new automobile to have a prior permit. The permits were issued at the discretion of prescribed transport authorities. The plaintiff, a dealer in new cars, brought suit for a declaration that the order was *ultra vires*. He alleged, *inter alia*, that he had bought and sold a new car in violation of the order and that prosecution for the offenses was pending against him. There was division of opinion on the court as to whether the allegation of a pending prosecution stated a ground for making a declaratory judgment,[80] but all five justices agreed in sustaining plaintiff's right to maintain the action, holding that the requirement that permits be obtained was a real impediment to plaintiff's conduct of his business and was a sufficient allegation of interference to show that plaintiff had an interest which would support his action.

Morgan v. Commonwealth[81] is a similar case.

(2) A summons to attend and give evidence, and to produce specified documents, at a hearing before a Royal Commission is a sufficient threat of interference with plaintiff's affairs to make justici-

[76] *Ibid.*, 36. [77] *Ibid.*, 45. [78] *Ibid.*, 46. [79] (1948) 77 C.L.R. 339.
[80] See discussion *infra*, 272-273. [81] (1947) 74 C.L.R. 421.

able a declaratory suit against the members of the commission and against the Attorney-General to challenge the validity of the Acts under which the commission is purporting to act, but it is improper for the court to make a declaration specifying in advance that questions relating to certain matters may not be asked. In *Colonial Sugar Refining Co. v. Attorney-General For The Commonwealth*,[82] a Royal Commission had been appointed, purportedly pursuant to the Royal Commission Act 1902, to enquire into the Australian sugar industry. The commission had sent to plaintiff a list of questions which the commission proposed to ask. Later, plaintiff's directors and general manager had been summoned to testify and to produce specified documents. They had refused, informations had been laid against them, and one of the informations had been heard and a director fined.

Later in the year, after the passage of the Royal Commissions Act 1912, a new commission with somewhat enlarged authority was issued to the same persons. The commission served a summons to attend and give evidence, and to produce specified documents, on plaintiff's general manager. Before the date specified in the summons, the company brought this action in the original jurisdiction of the High Court against the members of the Royal Commission and against the Attorney-General, seeking, *inter alia*, a declaration that the Royal Commission Acts were *ultra vires* the Commonwealth Parliament and that the general manager was consequently not bound to attend meetings of the commission or to give evidence or produce documents. The plaintiffs sought in the alternative, if the legislation was held valid, a declaration that they were not bound to answer any questions or produce any documents (1) relating to any subject as to which the Commonwealth Parliament had no power to legislate, or (2) which were not relevant to any inquiry the commission was empowered to make.

The High Court unanimously upheld the constitutionality of the Royal Commission Acts (although Isaacs and Higgins JJ. disagreed as to the scope of the inquiries authorized by the Acts). The court split, however, over whether it had jurisdiction to make a declaration in favour of plaintiff as to what questions it could not be compelled to answer. Griffith C.J. and Barton J. (the majority by virtue only of the Chief Justice's casting vote) held that the court did have such jurisdiction and that the case was a proper one for the discretionary exercise of the declaratory power, citing the then recently decided case of *Dyson v. Attorney-General*.[83] They made a declaration to the effect that the commission could not lawfully ask questions, or demand

[82] (1912) 15 C.L.R. 182 (H.C. of A.); (1913) 17 C.L.R. 644 (J.C.).
[83] [1911] 1 K.B. 410 (C.A.); [1912] 1 Ch. 158 (C.A.).

the production of documents which were relevant only to certain designated subjects, including

> (a) the internal management of the affairs of the plaintiff company. . . .
> (b) matters relating to the value of particular parts of the property of the plaintiff company except such parts as are actually and directly employed in the production and manufacture of sugar within the Commonwealth.[84]

Isaacs and Higgins JJ. dissented on this point. Higgins J. stated that the High Court had no jurisdiction under Order IV rule 1 to make a declaration in such a case, and that, even if it had jurisdiction, it should in its discretion refuse to exercise it in the situation before it.

> Questions which may seem to us, if they are taken singly and on first appearance, irrelevant to the exercise of any power of the Commonwealth, or irrelevant to the inquiry directed by the Commission, may turn out, as the inquiry develops, to be eminently relevant. . . . It would be much better to wait until some definite question is actually asked and objected to, or some definite document is called for and refused, rather than attempt to define the limits of the inquiry by anticipation. . . .[85]

The case went on appeal to the Privy Council.[86] The issue of the High Court's jurisdiction to grant a declaration in the case was evidently assumed, for it was not discussed, and the Privy Council's decree, reversing the High Court, was itself in the form of a declaration. The declaration was to the effect that the Royal Commission Acts were *ultra vires* of the Australian Parliament 'so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition.'[87]

The Privy Council did discuss in a *dictum* the propriety of the declaration which the High Court had issued, and their Lordships expressed themselves as being in agreement with the dissenters Higgins and Isaacs JJ. that it would be impossible to say in advance what questions might not turn out, by the end of the commission's inquiry, to be relevant.[88]

(3) In one case the High Court refused to entertain a suit challenging Commonwealth action though its threatened interference with plaintiff's business was only two weeks away. In *Luna Park Ltd. v. Commonwealth*,[89] plaintiff company operated an amusement park, which was open only during the summer. For a number of years the company had used a certain system of charging admission to the various entertainments in the park, and it had not been subjected

[84] 15 C.L.R. 182, 199. [85] *Ibid.*, 227. [86] (1913) 17 C.L.R. 644. [87] *Ibid.*, 656.
[88] *Ibid.*, 649-651. [89] (1923) 32 C.L.R. 596.

to entertainment tax on its receipts. Then in 1923, shortly before the park was to re-open for the summer season, the Commonwealth Commissioner of Taxation informed plaintiff that if, when it re-opened, it used the system for charging admissions as before, it would be liable for tax under the regulations.

Plaintiff promptly brought suit (this was two weeks before the park was due to re-open) seeking a declaration that the regulations were invalid. It alleged that it intended to use the same system for admission as before (the system was described in detail) and that the Commonwealth was threatening to prosecute if it did not comply and pay the tax. Plaintiff argued that an action for a declaration lay under Order IV rule 1, citing, *inter alia, Dyson v. Attorney-General*,[90] and *Guaranty Trust Co. v. Hannay & Co.*[91]

The High Court, however, dismissed the suit. Knox C.J. said:

> The state of facts on which the claim is based is purely hypothetical – 'if the company elects to carry on its business in a certain way, will it be liable to pay a certain tax?' It has always been the rule that the Court does not answer questions based on a hypothetical state of facts . . . If this declaration were made, it would have no binding effect in the true sense at all. It would be no more than an abstract opinion in the nature of advice that, if the company did certain things, it would or would not become liable to pay a certain tax.[92]

Luna Park Ltd. v. Commonwealth has been cited occasionally in later cases, but the strict requirements of justiciability which it sets up have not been adhered to. The fact that the legal point involved was not an important one and that the threat to plaintiff's business was evidently not so drastic as to require anticipatory judicial intervention to save it great loss are probably factors in explaining the court's attitude.

Compare with this case the American cases of *United Public Workers v. Mitchell* (1947)[93] and *International Longshoremen's Union v. Boyd* (1954).[94]

(4) The court will not entertain a challenge to governmental action where, because of revocation of the regulations or otherwise, the legal issue has become moot.[95] Where, however, there was a threat to reimpose orders which had been revoked after plaintiff brought suit to challenge their validity, the High Court entertained the suit.[96]

(5) The fact that a criminal prosecution is pending against the plaintiff does not necessarily bar him from bringing a separate declaratory action to challenge the validity of the statute or regulation under

[90] [1911] 1 K.B. 410 (C.A.); [1912] 1 Ch. 158 (C.A.). [91] [1915] 2 K.B. 536 (C.A.).
[92] 32 C.L.R. 596, 600. [93] 330 U.S. 75. [94] 347 U.S. 222.
[95] *Bruce v. Commonwealth Trade Marks Label Association* (1907) 4 C.L.R. 1569; *Dairy Farmers' Cooperative Milk Co. v. Commonwealth* (1946) 73 C.L.R. 381.
[96] *Wragg v. N.S.W.* (1953) 88 C.L.R. 353.

which he is being prosecuted. The High Court has entertained such actions in *Cann's Pty. Ltd. v. Commonwealth;*[97] *Morgan v. Commonwealth;*[98] *Crouch v. Commonwealth.*[99] An allegation of pending prosecution itself is no ground on which to sustain plaintiff's suit; plaintiff must by other allegations demonstrate a sufficient interest.[1]

The High Court appears to be somewhat more liberal than the Supreme Court in its requirements of justiciability in the ordinary declaratory judgment case, but not extremely so. The cases we have so far been dealing with have been ones in which one or more members of the court discussed the question of the justiciability of the action. Such cases are, however, a minority in the reports. In the majority of the Australian declaratory judgment cases brought to challenge governmental action, justiciability has been assumed without any discussion, and the court has gone directly to a consideration of the merits.

This lack of concern with justiciability has not, however, resulted in the entertainment of frequent premature challenges. In fact, in many of the cases in which the High Court made no mention of justiciability the controversy was sufficiently mature so that, so far at least as the requirements of justiciability were concerned, the plaintiff could have raised his challenge by way of one of the traditional (that is coercive) forms of relief.

There is, however, a small group of cases, a number of them landmarks in Australian economic or political history, which are important exceptions to the ordinary practice. In these cases, actions challenging governmental action of various kinds have been entertained by the court, in circumstances where the prematurity and breadth of the challenge, and the abstract manner in which the legal issues were presented, made the suit resemble a proceeding for an advisory opinion.

The progenitor of these cases was *The Union Label Case* (1908).[2] The facts in that case were as follows: the Commonwealth Parliament, purportedly acting pursuant to the power given it by section 51 (xviii) of the Constitution 'to make laws . . . with respect to . . . trade marks,' enacted a section of the Trade Marks Act entitled 'Workers' Trade Marks.' Under it, trade unions could obtain registration for such marks with the Commonwealth Registrar of Trade Marks. The marks were to signify that the goods to which they were affixed were manufactured exclusively by members of the trade union in question.

[97] (1946) 71 C.L.R. 210. [98] (1947) 74 C.L.R. 339. [99] (1948) 77 C.L.R. 339.

[1] For a review of the Supreme Court's decisions on the effect of a pending or threatened criminal prosecution on a plaintiff's right to challenge governmental action, see Davis, 'Ripeness of Governmental Action for Judicial Review', (1955) 68 *Harvard Law Review* 1122, 1145-1153.

[2] 6 C.L.R. 469.

The section provided a fifty pounds penalty for any false use of such registered trade mark by any manufacturer.

Defendant union had designed a workers' trade mark and obtained registration for it with the registrar. As yet, however, no manufacturer employing members of the union had agreed to use the trade mark and none had attempted unauthorized use of it.

This suit was brought by four brewery companies suing as individual plaintiffs, and by the Attorney-General for New South Wales suing at their relation against the union and against the registrar. The relief sought was, *inter alia,* a declaration that the enactment providing for the registration of workers' trade marks and regulations which had been made thereunder were *ultra vires* of the Commonwealth Parliament under section 51 (xviii) of the Constitution. The Attorney-General for New South Wales alleged that this unconstitutional Commonwealth action constituted an infringement of the rights of the state of New South Wales to control and regulate its own internal trade and commerce and that as such it was injurious to the people of the state. The brewery companies alleged in general terms that the registration of the mark would compel them to allow use of the mark on their goods or lose business with members of the union and people in sympathy with the union, that use of the mark would alienate other customers who were unsympathetic to the union and that plaintiffs would lose their trade, and that registration of the mark would tend to force the plaintiffs to employ exclusively members of the defendant union. The companies, however, made no specific allegations of present or presently threatened injury.

The High Court by a three to two majority, nevertheless held that the suit was maintainable, both as to the four private plaintiffs and as to the Attorney-General for New South Wales. The judgments of the court defined the rights which an Attorney-General was empowered to vindicate in very broad terms. For instance, O'Connor J. said:

> . . . when a . . . public authority clothed with statutory powers exceeds them by some act *which tends in its nature to interfere* with public rights and so to injure the public, the Attorney-General for the community in which the cause of complaint arises may institute proceedings . . . to protect the public interests, *although there may be no evidence of actual injury to the public.*[3]

This broad definition of the rights which an Attorney-General is entitled to sue to protect has been accepted and applied in a number of later cases.

Although this exceptional group of cases got its start early, the cases have appeared in numbers only in the last fifteen years. Probably the most striking of all of them is the first *Pharmaceutical Benefits*

[3] 6 C.L.R. 469, 550-551. My italics.

Case (1945),[4] in which the High Court entertained a challenge to a statute which was not yet even in effect. The statute challenged was the Commonwealth Pharmaceutical Benefits Act 1944. It provided for the supply of medicines and various medical appliances to all persons ordinarily resident in Australia free of charge. Payment for items thus supplied was to be made at prescribed rates by the Commonwealth government to the chemists who supplied them. The Act made an appropriation of money from an existing National Welfare Fund to cover the cost to the Commonwealth of such payments.

The Act directed that a Commonwealth formulary be drawn up listing the medicines and appliances to be supplied under the Act and provided that the Commonwealth Director-General of Health, who was given general administration of the Act, should 'approve' any chemist who met the requirements of the Act. An 'approved' chemist was required to supply medicines or appliances free of charge to any person entitled to the benefits of the Act who presented a prescription for such medicine or appliance made out on a prescribed form and signed by a medical practitioner. It was made an offence for a chemist to make any charge for such items. Doctors were not required to use the Commonwealth form, but, if they did use it, they were required to use it only as authorized.

The Act also purported to give the Commonwealth power to enter the premises of 'approved' chemists, powers to take samples of drugs, and powers to make regulations for carrying out the Act, including regulation of the standards of composition or purity of pharmaceutical benefits to be supplied under the Act.

By its terms, the Act provided that it should not go into effect until 'proclaimed' by the Commonwealth government. At the time the case was argued the Act had not yet been proclaimed, but it was stated in argument that it was the intention of the government to proclaim it some three months later and in the meantime preliminary steps were being taken. Thus challenge to the Act was made long before any of its provisions had been put into operation.

Suit was brought in the case by the Attorney-General for Victoria, at the relation of three individuals (all were doctors) against the Commonwealth, the Commonwealth Minister for Health, and the Commonwealth Director-General of Health (who had charge of the general administration of the Act). The action sought a declaration that the Act was unconstitutional as being beyond the powers of the Commonwealth Parliament to enact.

Defendants demurred to the plaintiff's statement of claim. They contended that the challenged Act was supported by section 81 of the Constitution as an appropriations Act, and that insofar as any of its

[4] 71 C.L.R. 237.

provisions went beyond mere appropriation, they were merely incidental to the main purpose of the Act and as such were supported by section 51 (xxxix) of the Constitution, the 'incidental' power.

Defendants also denied that the Attorney-General for Victoria had a right to bring suit. They argued that the Act was primarily an appropriations Act and involved for the most part administrative action and but little exertion of coercive power. Therefore, they contended, it infringed no right of individual or state and challenge to it should be denied, following the American case of *Massachusetts v. Mellon* (1923).[5]

Plaintiffs contended that the Act was much more than a mere appropriations Act and that its provisions other than the appropriation section could not be supported under the 'incidental' power in the Constitution. They argued further that many matters which the Act sought to regulate, such as the contractual relation of chemist and customer, the manner of prescribing medicines by doctors, the fixing of prices to be paid chemists, for medicines, and the setting of standards for medicines and appliances, were matters within the exclusive control of the state. (Defendants countered with the argument that even if it were true that the Act had entered a potential legislative field of the state, there was no conflict, for Victoria has not as yet passed any legislation in these areas.)

The suit was brought in the original jurisdiction of the High Court. Trial of the action consisted of argument of counsel on the demurrer before the High Court. The judges had before them only the pleadings of the parties and copies of the challenged statute.

In spite of the earliness of the challenge and the absence of any concrete fact situation, the High Court entertained the suits and struck down the entire Act on the merits.[6]

The decision would be analogous to the decision by the U.S. Supreme Court in *Ashwander v. Tennessee Valley Authority* (1936)[7] if the Supreme Court had there made a declaration invalidating the entire T.V.A. project (instead of refusing, as it did, to consider the constitutionality of any part of the T.V.A. scheme which had not taken the form of concrete action affecting the plaintiff's rights).

In both *The Union Label Case*,[8] and the first *Pharmaceutical Benefits Case*, an Attorney-General was among the plaintiffs who brought the action. In the second case, he was the sole plaintiff. It is undoubtedly true that the High Court's broad definition of the rights which an Attorney-General is entitled to vindicate is a factor behind

[5] 262 U.S. 447.

[6] Considerable discussion was devoted to the question of whether the suit was maintainable, centring mostly on the question of the standing of the Attorney-General for Victoria to bring suit. Consideration of this point will be deferred until s. II (3) (b) *infra*, 384.

[7] 297 U.S. 288.

[8] (1908) 6 C.L.R. 469.

the High Court's extremely liberal standards of justiciability in several of the cases in the group we are now discussing. In three of these cases, *Commonwealth v. Queensland*;[9] *South Australia v. Commonwealth*;[10] and the first *Pharmaceutical Benefits Case*, an Attorney-General (or Attorneys-General) was the sole plaintiff; in the two others either a co-plaintiff (*The Union Label Case*), or plaintiffs in companion suits (*Bank of New South Wales v. Commonwealth*).[11]

The High Court's extraordinarily liberal standards of justiciability, however, are not confined to suits where an Attorney-General is a plaintiff. In two cases in the group under discussion, *Australian National Airways Ltd. v. Commonwealth*;[12] *Australian Communist Party v. Commonwealth*,[13] the plaintiffs were all private persons and in *The Union Label Case* the right of the private plaintiffs to maintain the action was separately considered and sustained. We will consider the most extreme of the cases brought solely by private plaintiffs: *Australian Communist Party v. Commonwealth*.[13] These suits, brought by the Australian Communist Party, by two individuals, members thereof, and by six labour unions, sought a declaration that the Commonwealth Communist Party Dissolution Act 1950 was unconstitutional. The challenged Act contained the following provisions:

Section 4 declared the Australian Communist Party to be an unlawful association and dissolved the party, vesting its property in a receiver. Section 5 empowered the government to declare unlawful other organizations in certain circumstances, for instance, if the organization was at any time after 10 May 1948 affiliated with the Australian Communist Party, or if its policy was directed or controlled wholly or substantially by persons who were at any time after 10 May 1948 members of the Australian Communist Party and made use of that body as a means of advocating communism. The government could not act against such an organization unless satisfied that the body's continued existence was prejudicial to the security and defence of the Commonwealth, and then only after the material on which the decision was made had been considered by a committee of three top government officials and two other persons. An organization 'declared' had twenty-eight days to apply to a court to have the declaration set aside; after that it was dissolved and knowing participation in its activities made illegal.

Section 9 applied to individuals, empowering the government to 'declare' a person if satisfied that such person was then or at any time after 10 May 1948 a member of the Australian Communist Party or a communist and that he was engaging, or was likely to engage, in

[9] (1920) 29 C.L.R. 1. [10] (1942) 65 C.L.R. 373. [11] (1948) 76 C.L.R. 1.
[12] (1945) 71 C.L.R. 29. [13] (1951) 83 C.L.R. 1.

activities prejudicial to the security and defence of the Commonwealth.

Provisions for consideration of the adverse material by a high level committee, and for appeal of the 'declaration,' were included, similar to those provided for 'declared organizations' under section 5.

The effect of the 'declaration' of an individual was to render him incapable of holding Commonwealth office or employment, and of holding office in any union which the government had 'declared' to be in a 'vital' industry (as defined). By section 12 of the Act, when any union is thus 'declared' to be in a 'vital' industry, any office therein occupied by a person who had been 'declared' under section 9 becomes vacant.

The Act went into effect on 20 October 1950. These suits were commenced the same day. As of that time the only present effect of the Act was the dissolution of the Australian Communist Party and the vesting of its property in a receiver. So far as appears from the report of the case no organizations had been 'declared' under section 5, no individuals had been 'declared' under section 9, and no unions had been 'declared' to be in 'vital' industries.

Nevertheless, the High Court entertained the suit and considered the validity of the Act on the merits without any discussion of the justiciability of the suit. (The court held by a five to one majority that the Act was unconstitutional.) Furthermore, the court assumed the *locus standi* as plaintiffs not only of the Australian Communist Party (which was as we have seen immediately affected by one section of the Act), but also of the many other plaintiffs in the other suits. These included five labour unions whose allegations indicated they would be liable to be declared to be in 'vital industries,' various individuals who were presently members of the Australian Communist Party and might therefore be liable to be declared under section 9, and certain other individuals suing on behalf of a labour union which might be liable for declaration under section 5.

The situation in this case is similar to that in *Electric Bond & Share Co. v. Securities and Exchange Commission* (1938).[14] There, as here, part of the Act only was presently applicable; the question whether or not the other parts of the Act would come into operation against the plaintiffs depended on a number of contingencies. But there the Supreme Court permitted the plaintiffs to challenge only the provisions of the Act which were presently being applied to them.

The first *Pharmaceutical Benefits Case,* and *Australian Communist Party v. Commonwealth* are the most striking examples of the group of cases now under discussion. Besides *The Union Label Case,* I would class the following other cases in this group:

[14] 303 U.S. 419.

Commonwealth v. Queensland[15] (action by the Commonwealth and its Attorney-General for a declaration of the invalidity of a subsection of a Queensland income tax Act on the grounds that its effect is to render interest from Commonwealth securities liable to income tax in contravention of a Commonwealth statute).

South Australia v. Commonwealth[16] (actions by the states of South Australia, Victoria, Queensland, Western Australia and their respective Attorneys-General against the Commonwealth and the Commonwealth Treasurer for a declaration of the unconstitutionality of four Commonwealth Acts whose combined effect was to exclude the states entirely from the field of income taxation).

Australian National Airways Ltd. v. Commonwealth[17] (actions by three private airlines against the Commonwealth and various Commonwealth officials for a declaration *inter alia* of the unconstitutionality of a Commonwealth statute which contemplated the nationalization of interstate and territorial air transport in Australia).

Bank of New South Wales v. Commonwealth,[18] (actions by a number of private banks and by the states of Victoria, South Australia and Western Australia by their respective Attorneys-General for a declaration of the unconstitutionality of the Banking Act 1947, which sought to nationalize banking in Australia).

It is somewhat paradoxical to note that, although the High Court in *In re Judiciary and Navigation Acts*[19] held that Parliament could not confer on it the power to give advisory opinions on the validity of Commonwealth legislation, the cases we are now considering, in terms of the prematurity of the challenge and the abstract manner in which the legal questions are presented, resemble proceedings for advisory opinions. In seeking explanations of the latitude permitted by the High Court in this group of cases, it should be noted that in all of them the suits challenged significant legislation. Furthermore, in all of the five most recent cases, the Acts challenged were of the highest importance, and an early answer to the question of their validity was important, not only for the plaintiff, but for the public and the government as well. For instance, the decision of the High Court invalidating the bank nationalization scheme challenged in *Bank of New South Wales v. Commonwealth* was of enormous political and economic significance in Australia, and the political significance of the court's decision in *Australian Communist Party v. Commonwealth* was hardly less.

Besides this, in several of the cases, the challenged legislation contemplated many steps to be taken and significant changes in the *status quo* to be made by the time the statute came into full operation.

[15] (1920) 29 C.L.R. 1. [16] (1942) 65 C.L.R. 373. [17] (1945) 71 C.L.R. 31.
[18] (1948) 76 C.L.R. 1. [19] (1921) 29 C.L.R. 257.

Thus, if consideration and invalidation of the statute had been postponed until after the statute had come into full operation, the court would in effect have sat by until important things were done which its judgment when rendered would have ordered forthwith undone. This difficulty was particularly true of the bank nationalization scheme challenged in *Bank of New South Wales v. Commonwealth.*

It is probable that all these factors – the importance of the questions the suits raised, the importance of having these questions quickly determined, and the inconvenience which would have been caused by delaying decision – influenced the High Court in this group of cases. We have already noted in our examination of the judgments in *Australian Boot Trade Employees' Federation v. Commonwealth*[20] that the High Court there takes a pragmatic attitude towards the requirements of justiciability, weighing the factors for and against decision of abstractly presented questions in the particular case rather than applying, as the Supreme Court ordinarily does, a rigid general rule. The group of cases now under discussion illustrates the same pragmatic attitude. In contrast, the Supreme Court gives little weight to the importance of the legislation challenged, to the desirability of speedy determinations of its validity, or to the inconvenience occasioned by invalidation of a statute long after it has been put into operation.

One final point should be mentioned in this section. The High Court does not insist as the Supreme Court does upon having a concrete set of facts on which to base its decision, and the procedures most frequently resorted to in declaratory suits tend to bring legal issues before the High Court for decision without any detailed set of facts. The most important of these procedures is an action upon a statement of claim countered by a demurrer under Order XXIV rule 1 and rule 2 of the Rules of the High Court.[21] Of the approximately eighty-five declaratory cases challenging governmental action which have been brought in the original jurisdiction of the High Court in the last twenty-five years, forty-five have been of this type.[22]

In such cases, the proceeding goes typically as follows: the plaintiff in its statement of claim states its interest in the subject matter and its contentions as to the invalidity of the governmental action it seeks to challenge. (In the case of statute or regulation the statement of claim sets out part or all of the text.) The defendant demurs, asserting the validity of the challenged action and stating the constitutional or statutory provision which it claims supports its validity. The

[20] (1954) 90 C.L.R. 24.

[21] Discussed *supra*, 214.

[22] Examples of cases in which the demurrer procedure has been used: The first *Pharmaceutical Benefits Case* (1945) 71 C.L.R. 237; *Crouch v. Commonwealth* (1948) 77 C.L.R. 339; *Australian National Airways Ltd. v. Commonwealth* (1945) 71 C.L.R. 31; *British Medical Association v. Commonwealth* (1949) 79 C.L.R. 201.

demurrer then comes on for hearing before the Full Court, and the court's decision on the demurrer is accepted by the parties as the final determination of the matter.

It is obvious that the factual background for the decision in cases brought under this procedure is different from the detailed one ordinarily insisted upon by the Supreme Court. In the hearing on the demurrer in the High Court no witnesses are heard. There are no facts before the court other than those set forth in the statement of claim, which is usually brief.

The bareness of the factual background thus provided has been criticized by Australian observers. A recent discussion of procedure and pleading in the High Court praises the demurrer procedure as a way of raising constitutional issues 'with speed and clarity' but notes that it does not always provide the court with the necessary facts.[23] Dixon J. criticizes the lack of facts resulting from the use of demurrer in the type of challenge made in *Cann's Ltd. v. Commonwealth*.[24]

Two other procedures used before the High Court have, like the demurrer procedure, the effect of bringing issues before the High Court in an abstract form. One is an action heard by a single judge of the High Court, where the judge after hearing states a case for the decision of the Full Court.[25] The other is a motion by the plaintiff for an interlocutory injunction, with the motion being heard by the Full Court and treated as the trial of the action.[26]

(3) *Requirements of Standing*

(a) Private Plaintiffs

Requirements of standing are rules whose purpose is to insure that only litigants who have a sufficient personal interest in the subject matter of the litigation, or who are appropriate representatives of other persons so interested, are allowed to present issues to the court for determination.

We have seen that the requirements of standing are closely related to those of justiciability and that the two sets of requirements often overlap. Consequently much that we might have taken up in this section has already been discussed above under the head of the requirements of justiciability. We need merely recall that in considering questions of standing, the focus is on the position of the

[23] F. C. Hutley in *The Commonwealth of Australia* (G. W. Paton ed. 1952), 194.

[24] (1946) 71 C.L.R. 210.

[25] Authority to do so is derived from Order XXXII r. 2 and Order XVII r. 26 *High Court Rules* 1903-1953, and of the Judiciary Act 1903-1953 s. 18. Examples of cases in which this procedure was used are: *Morgan v. Commonwealth* (1947) 74 C.L.R. 421; *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1; *Australian Boot Trade Employees' Federation v. Commonwealth* (1954) 90 C.L.R. 24.

[26] Examples of cases in which this procedure was used are: *South Australia v. Commonwealth* (1942) 65 C.L.R. 373; *Bank of New South Wales v. Commonwealth* (1948) 76 C.L.R. 1.

litigant who tenders the issues to the court for decision rather than on the issues themselves and their condition.

We will first consider the requirements of standing for private plaintiffs seeking to challenge governmental action. Our consideration will be brief, so the Australian and American cases can be considered together.

In cases involving challenges to governmental action, the main rule of standing in both Australia and the United States can be stated thus: the plaintiff must show either that the challenged action adversely affects (or threatens so to affect) legal interests of his own or of others whose interests he may appropriately represent.

The principle that a plaintiff must show injury to legal interests of his own is illustrated by the High Court case of *Anderson v. Commonwealth*.[27] The governmental action there under challenge was an agreement which had been concluded between the Commonwealth and the State of Queensland relating to the production and importation of sugar. Plaintiff, who alleged in support of his *locus standi* only that he was a member of the public, contended that the effect of the agreement was substantially to increase the cost of sugar to himself and to other consumers in Australia. He sought a declaration that the agreement was beyond the constitutional powers of the Commonwealth government.

The High Court dismissed the action on the grounds that plaintiff had not sufficient interest to maintain it. The court said, *per* Gavan Duffy C.J., Starke & Evatt JJ.:

> . . . the plaintiff has no interest in the subject matter beyond that of any other member of the public. . . . [T]he right of an individual to bring such an action does not exist unless he establishes that he is 'more particularly affected than other people'. . . .[28]

One of the cases cited in support of the holding was *Frothingham v. Mellon* (1928),[29] a case which is illustrative of the Supreme Court's position in a similar situation. There the Supreme Court refused to review the constitutionality of a federal statute on suit by a private plaintiff who alleged in support of her standing only that she paid federal taxes. The court said that a federal taxpayer's interest in the moneys of the federal treasury was 'shared with millions of others' and that it was 'comparatively minute and indeterminable.'[30] To invoke the court's power to declare an Act of Congress unconstitutional, the court said, a litigant 'must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not

[27] (1932) 47 C.L.R. 50.
[28] *Ibid.*, 50, 51-52.
[29] 262 U.S. 447. No federal declaratory remedy existed at that time; the suit sought injunctive relief.
[30] 262 U.S. 447, 487.

merely that he suffers in some indefinite way in common with people generally.'[31]

In *Real Estate Institute v. Blair,*[32] the plaintiff Real Estate Institute attacked the validity of certain Commonwealth regulations providing for the temporary appropriation of unoccupied dwelling houses for the use of returning servicemen in need of housing. The defendants in the action were the Commonwealth, the Commonwealth Attorney-General, and Blair, a serviceman who had made application under the regulations for possession of an unoccupied house. Plaintiff institute alleged that it was a company composed of auctioneers and agents of real estate, and that the businesses of a large number of its members had been adversely affected by the challenged regulations.

The High Court, although permitting challenge to part of the regulations at the suit of the individual co-plaintiff, who was owner of the unoccupied house in question, held that the Real Estate Institute did not itself have standing to maintain the action. Starke J. said:

> The Real Estate Institute is not a competent party. . . . [O]nly those whose rights are infringed and not strangers are entitled to challenge the validity of legislation or regulations or orders made thereunder. The pleadings disclose no right of the Real Estate Institute that is infringed or even affected by the regulations. . . .[33]

With that holding, compare the Supreme Court's decision in *Tileston v. Ullman* (1943).[34] Plaintiff in that case was a physician who sought invalidation of two Connecticut statutes prohibiting both the use of contraceptives and the giving of assistance or counsel in their use. Plaintiff alleged that the existence of the statutes prevented him from giving professional advice concerning the use of contraceptives to three patients whose lives would be endangered by child-bearing and that consequently the statutes tended to the deprivation of life without due process of law in contravention of the Fourteenth Amendment of the Federal Constitution. The Supreme Court dismissed the case without reaching the merits on the grounds that the plaintiff alleged no infringement of any constitutional rights of his own and showed no standing to secure an adjudication of the alleged infringement of his patients' rights.[35]

Another principle following from the main rule of standing is that a complainant, even though he has standing to challenge a statute (or regulation), can challenge only such part as actually affects his interests (and such other parts as are inseparable from the offending part). In *Real Estate Institute v. Blair, supra,* in discussing the breadth

[31] *Ibid.*, 488. The Supreme Court, however, does recognize the standing of municipal taxpayers to challenge expenditures of municipal funds; Hart & Wechsler, *The Federal Courts and The Federal System* (1953) 160. [32] (1946) 73 C.L.R. 213.
[33] *Ibid.*, 226. [34] 318 U.S. 44.
[35] But see *Pierce v. Society of Sisters* (1925) 268 U.S. 510.

of the challenge which the individual plaintiff could make to the regulations, Starke, Dixon and Williams JJ. all follow this rule. Starke J. said, '. . .[Plaintiff] cannot roam at large over the regulations and attack them generally. He must be confined to those which affect his rights to the possession of his dwelling house and are inseverably tied up with them.'[36] There are statements of similar tenor by Dixon J. and Williams J. in *British Medical Association v. Commonwealth*.[37]

Analogous holdings by the Supreme Court appear in *Ashwander v. Tennessee Valley Authority*[38] and *Electric Bond & Share Co. v. Securities and Exchange Commission*[39] considered *supra*.

(b) Australia: Suits by Attorneys-General

The High Court has recognized standing under certain circumstances in the Attorneys-General of State or Commonwealth to bring suits to challenge the validity of Commonwealth or State legislative or other governmental action.[40]

The first such action to be recognized and the one which has been most frequently used is a suit by a state Attorney-General for the declaration of the invalidity of a Commonwealth statute, regulation, or other action.[41] We have already seen examples of the broad definitions of the interests which a state Attorney-General could sue to vindicate in *The Union Label Case*[42] and the first *Pharmaceutical Benefits Case*.[43]

In the first *Pharmaceutical Benefits Case,* Dixon J. stated the rule thus: the Attorney-General for a state has standing to sue 'wherever his public is or may be affected by what he says is an *ultra vires* Act on the part of the Commonwealth or of another State.'[44]

From examination of the cases, it appears that 'the public' affected by the challenged Commonwealth action may be the whole population of the state (as in the case of the Pharmaceutical Benefits Act) or it may be merely a small group in the population (as in the case of the Commonwealth Clothing Factory,[45] whose challenged action affected only manufacturers of similar types of clothing). It is sufficient that the Commonwealth action is 'an invasion of a purely State field of legislative power,' for such invasion is an interference with 'the public rights of citizens of the State, who are properly represented

[36] (1946) 73 C.L.R. 213, 227.
[37] (1949) 79 C.L.R. 201, 257-258 *per* Dixon J., 291 *per* Williams J.
[38] (1936) 297 U.S. 288. [39] (1938) 303 U.S. 419. [40] *Supra*, 214-215.
[41] *The Union Label Case* (1908) 6 C.L.R. 469. [42] *Ibid.*
[43] (1945) 71 C.L.R. 237.
[44] *Ibid.*, 272. Another definition of the Attorney-General's standing is given in *Attorney-General for Victoria v. Commonwealth (The Commonwealth Clothing Factory Case)* (1935) 52 C.L.R. 533, 556 *per* Gavan Duffy C.J., Evatt and McTiernan JJ.: 'In our opinion, it must now be taken as established that the Attorney-General of a State . . . has a sufficient title to invoke the provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents. . . .'
[45] *Attorney-General for Victoria v. Commonwealth* (1935) 52 C.L.R. 533.

in litigation with respect to those rights by the Attorney-General of the State.'[46]

The effect of the challenged action upon 'the public' may be present and actual (as was the case of the competition presented by the challenged operations of the Commonwealth Clothing Factory) or it may be prospective and contingent (as in the case of the Commonwealth Registrar's registration of the brewery employees' workers' trade mark in *The Union Label Case*). It is apparently not necessary that injury (or threat of injury) to members of the public be alleged or proved.[47]

One possible qualification on the *locus standi* of a state's Attorney-General to challenge Commonwealth action was suggested in *dicta* of Latham C.J. and McTiernan J. in the first *Pharmaceutical Benefits Case*. Latham C.J. said:

> . . . I do not express any opinion upon the question whether a State or a person has *locus standi* to complain of a Federal Appropriation Act which is simply an Appropriation Act, that is to say, which merely authorizes the expenditure of money – see *Massachusetts v. Mellon* . . .[48]

The converse of the suits just discussed where the Attorney-General of a State challenges action by the Commonwealth are suits by the Attorney-General of the Commonwealth challenging action by a State. This type of suit has only been used in three cases: *New South Wales v. Commonwealth*,[49] *Commonwealth v. Queensland*[50] and *Commonwealth v. South Australia*.[51] In *Commonwealth v. Queensland*, the Commonwealth Attorney-General sought a declaration of the invalidity of a section of a Queensland income tax Act. The challenged section purported to include in a taxpayer's gross income the revenue derived from Commonwealth-issued securities. The Attorney-General contended that such a provision conflicted with a Commonwealth statute exempting from income tax income from such securities. The court upheld this contention on the merits, overruling the defendants' preliminary objection that the Commonwealth Attorney-General had no standing to bring the suit. Isaacs and Rich JJ. said:

> The principle establishing the status of the Attorney-General of New South Wales to sue the Commonwealth in the *Workers' Trade Mark Case* [*The Union Label Case*] . . . applies *e converso* to the present case and is sufficient for the purpose. . . . [The Attorney-General for the Commonwealth] is not bound to wait until the coercion has actually commenced, nor is he bound to leave the vindication of the Commonwealth authority to individuals.[52]

[46] Latham C.J. in the first *Pharmaceutical Benefits Case*, (1945) C.L.R. 237, 247.
[47] *The Union Label Case* (1908) 6 C.L.R. 469, 553, *per* O'Connor J. (*dictum*); *Commonwealth v. Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1, 8.
[48] (1945) 71 C.L.R. 237, 248. [49] (1915) 20 C.L.R. 54. [50] (1920) 29 C.L.R. 1.
[51] (1926) 38 C.L.R. 408. [52] 29 C.L.R. 1, 12-13.

The court apparently makes no distinction between such suits by the Commonwealth Attorney-General challenging State action and suits by the Attorney-General of a State challenging Commonwealth action so far as requirements of standing are concerned.

A third class of suit is that by an Attorney-General of a State challenging action by another State. There has been only one case of the type, *Tasmania v. Victoria*.[53] In that case, the State of Victoria had passed an Act, one section of which empowered the government to '. . . prohibit the importation . . . into Victoria . . . of any tree plant or vegetable which is in the opinion of the Governor in Council likely to introduce any disease or insect into Victoria.' Purportedly in pursuance of its power under this section, the Victorian government made a proclamation prohibiting the importation of Tasmanian potatoes into Victoria. This suit, brought by the Attorney-General for Tasmania, claimed a declaration that the statutory section was unconstitutional as contravening section 92 of the Commonwealth Constitution, which provides that '. . . trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.' The suit also claimed a declaration on the non-constitutional ground that the proclamation was not authorized by the Act.

The High Court decided the case on the merits in favour of the plaintiff, upholding his right to maintain the suit. Dixon J. said, 'Section 92 . . . guarantees to the members of the Tasmanian community as such considered collectively a freedom to carry on trade with the communities of other States. This is a public advantage enjoyed by them as of common right which the Attorney-General may suitably protect by proceedings in his name.'[54]

The court made no distinction between this action and the two prior types so far as the requirements for standing were concerned. Note, however, that Rich and Starke JJ. in their judgments both assert that the Attorney-General has standing to challenge the other State's action only on constitutional grounds. A claim that the action is unauthorized under state law (plaintiff's alternative contention in this case) is not maintainable by the Attorney-General, they assert.[55]

A fourth and final type of suit is one by the Commonwealth Attorney-General challenging action by a body created by the Commonwealth Parliament. In *Commonwealth v. Australian Commonwealth Shipping Board*,[56] the High Court entertained an action by the Attorney-General for a declaration that a contract which the defendant Board, created by Act of the Commonwealth Parliament, had made was *ultra vires* of its powers. This action presents no

[53] (1935) 52 C.L.R. 157.
[54] *Ibid.*, 188.
[55] *Ibid.*, 171 (Rich J.), 178 (Starke J.).
[56] (1926) 39 C.L.R. 1.

novelty, for the power of the Attorney-General to prevent public bodies from exceeding their statutory powers has been long recognized in British law.[57]

In all four actions, an Attorney-General may bring the suit as the sole plaintiff (with the state or the Commonwealth, as the case may be, named as a nominal co-plaintiff).[58] Or he may sue at the relation of private citizens.[59] In some cases, private citizens, either relators or not, are joined as co-plaintiffs.[60]

In cases where an Attorney-General sues at the relation of private citizens, it is not necessary that the relators have *locus standi* in their own right, and only that the Attorney-General himself has standing.[61]

The definition of the interests which an Attorney-General may bring suit to protect is very broad by comparison with the requirements for standing set for individual plaintiffs. See *Anderson v. Commonwealth*[62] and *Real Estate Institute v. Blair.*[63] It is evident that the court sees in the actions by Attorneys-General a means for challenging government action under circumstances in which no private plaintiff would or could sue.

For instance, in *Anderson v. Commonwealth,* in the course of refusing to entertain a challenge brought by a private plaintiff, Gavan Duffy C.J., Starke and Evatt JJ. said:

> The public is not or should not be without remedy, for the Attorney-General of the Commonwealth or of any of the States sufficiently interested, might take proceedings necessary to protect their rights and interests.[64]

(c) United States: Suits by States and Federal Government

No type of suit for challenging the validity of state or federal action comparable to the Australian actions by the Attorney-General has been developed in the American courts. Suits have been maintained by the federal government and by States challenging governmental action of various kinds, but such suits have not, like the Attorney-Generals' suits in Australia, become a major means for the determination of the validity of important legislation.

There are three reasons for this. In the first place, the Supreme Court has not allowed suits by a state on behalf of its citizens with

[57] *The Union Label Case* (1908) 6 C.L.R. 469, 550-551, *per* O'Connor J. (*dictum*).
[58] *E.g., Commonwealth v. Queensland* (1920) 29 C.L.R. 1; *Tasmania v. Victoria* (1935) 52 C.L.R. 157.
[59] *E.g., The Union Label Case* (1908) 6 C.L.R. 469; *Commonwealth v. Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1; *Attorney-General for Victoria v. Commonwealth* (1935) 52 C.L.R. 533.
[60] *E.g., The Union Label Case, supra.*
[61] *Attorney-General for Victoria v. Commonwealth* (1935) *supra,* n. 59, *per* Rich J.
[62] (1932) 47 C.L.R. 50.
[63] (1946) 73 C.L.R. 213.
[64] (1932) 47 C.L.R. 50, 52.

anything like the liberality with which the High Court has allowed corresponding suits by an Attorney-General in Australia.[65]

In the second place, the Supreme Court appears to apply the same strict requirements of standing (as well as of justiciability) in suits brought by a State or by the federal government to challenge governmental action as those it applies in suits by private plaintiffs. This is in contrast to the High Court's more liberal requirements in suits brought by an Attorney-General.

In the third place, the immunity from suits of state and federal governments under the sovereign immunity doctrine in America presents an obstacle to suits to test the validity of governmental action except where consent to suit has been given. The doctrine protects not only the government itself but also government agencies and government officials if suit against them is considered to be in substance a suit against the government. Only where the suit names an individual official as the defendant and alleges that he personally has acted under an unconstitutional statute or in excess of his statutory authority can the suit be maintained.[66]

A few important cases should be mentioned here. The first is *Massachusetts v. Mellon* (1923)[67] companion case to *Frothingham v. Mellon*[68] discussed *supra*. The subject of challenge in both cases was the Maternity Act, a federal appropriations statute providing money for the promotion of the health of mothers and infants, the appropriations to be appointed among as many of the States as accepted and complied with the requirements of the Act. Participation was made voluntary for the States. A federal bureau was established to administer the provisions of the Act.

The State of Massachusetts, which had not participated in the Act, brought this action in the original jurisdiction of the Supreme Court to enjoin the Secretary of the Treasury from paying out any funds under the Act.

Massachusetts sued on two grounds, first, on its own behalf, contending that the Act amounted to a usurpation of powers reserved exclusively to the States by the federal Constitution; second, as the representative of its citizens, alleging that their rights had been invaded by the Act.

The Supreme Court dismissed the suit without reaching the merits. As to the plaintiff's contentions on its own behalf, the court said,

[65] *Massachusetts v. Mellon*, (1923) 262 U.S. 447, *infra*.

[66] See 'Developments in the Law—Declaratory Judgments 1941-1949', (1949) 62 *Harvard Law Review* 787, 821-825. For material on federal government immunity only, see Hart and Wechsler, *The Federal Courts and the Federal System* (1953) 236-238.

[67] 262 U.S. 447. Injunctive, not declaratory, relief was sought in this case, which was brought before the creation of the federal declaratory remedy.

[68] *Ibid.*

> . . . the complaint of the plaintiff State is . . . the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent;[69]
>
> . . . [W]e are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded and threatened, but abstract questions of political power, of sovereignty, of government.[70]

As to Massachusetts' attempt to maintain the suit as the representative of its citizens, the court said,

> We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. . . . [T]he citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a State, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens . . . it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.[71]

The attitude manifested in this case as to the *locus standi* of a state to challenge the validity of federal action is in strong contrast to the High Court's position as expressed, for instance, in *The Union Label Case*[72] and the first *Pharmaceutical Benefits Case,*[73] (although it is to be remembered that Latham C.J. and McTiernan J. in the *Pharmaceutical Benefits Case* reserved judgment on the question whether, in the exact circumstances of *Massachusetts v. Mellon, i.e.* a challenge to an Act which was purely an appropriation Act, the Attorney-General would have standing to sue).

As for suits by States challenging the validity of action by other States, mention should be made here of the exceptional cases of *Ohio v. West Virginia* and *Pennsylvania v. West Virginia,*[74] which alone among U.S. Supreme Court cases resemble in latitude the Australian Attorney-General actions. These companion suits were brought by Pennsylvania and Ohio to enjoin on grounds of unconstitutionality the enforcement of a West Virginia statute which sought to limit the export of natural gas from that state to such amounts as remained after domestic needs had been satisfied. They were brought only a few days after the challenged Act went into effect and before any action had been taken under it. The Supreme Court, nevertheless, entertained the actions on the merits.

[69] *Ibid.*, 483. [70] *Ibid.*, 484-485. [71] *Ibid.*, 485-486.
[72] (1908) 6 C.L.R. 469. [73] (1945) 71 C.L.R. 237. [74] (1923) 262 U.S. 553.

Section III

CONCLUSION

There are certain similarities between the declaratory judgment remedy in the two courts. The remedy in both courts is a discretionary one. In both countries, a constitutional limitation on the jurisdiction of the court fixes the outside limits of the declaratory power, and both courts have held that this limitation prevents them from giving advisory opinions. On questions, however, of the sort and condition of legal issues which may be presented to the court for determination (requirements of justiciability) and of the persons at whose suit the court is required to give such determinations (requirements of standing), the courts are in many respects far apart.

As to the requirements of justiciability in declaratory actions, the Supreme Court gives them much attention and frequently discusses them at length, in contrast with the High Court, where such discussion is infrequent. The dominant view of the Supreme Court sets strict requirements of justiciability and consequently confines the power to grant declaratory relief within narrow limits. In a number of other declaratory cases, however, the Supreme Court has shown a different and broader attitude, and this more liberal view exists alongside, and unreconciled with, the court's stricter and dominant position.

Although the High Court shows less concern over the requirements of justiciability in declaratory actions than does the Supreme Court, and only infrequently discusses them, its pronouncements when it does discuss them are similar to those of the Supreme Court. But the High Court tends to take a pragmatic attitude towards the requirements of justiciability: for instance, the court looks to the consequences in the particular case of deciding a question in the abstract or of postponing decision until a concrete case has arisen, rather than applying, as the Supreme Court does, a fixed rule that there will be no decision of abstract questions.

In the majority of Australian declaratory judgment cases brought to challenge governmental action, justiciability has been assumed without any discussion, the High Court going directly to a consideration of the merits. This lack of concern with justiciability, however, has not resulted in the court entertaining large numbers of premature challenges. In the ordinary declaratory judgment case, the High Court appears to be only somewhat more liberal in its requirements of justiciability than the Supreme Court.

There is, however, a small group of cases which are important exceptions to the High Court's usual standards of justiciability. In these cases, the court has entertained suits challenging governmental

action of various kinds in circumstances where the prematurity and breadth of the challenge, and the abstract manner in which the legal issues were presented, make the suit resemble a proceeding for an advisory opinion. The High Court probably has been influenced in these exceptional cases by the importance of the legislation challenged, the desirability of a speedy determination of its validity, and in certain cases by the inconvenience which would have been occasioned by delaying invalidation of the enactment until after it had been put into full operation. (The Supreme Court gives little weight to such considerations in deciding whether or not to entertain a declaratory action.)

Furthermore, in a number of these exceptional cases before the High Court, the Attorney-General of a state or of the Commonwealth was a plaintiff. Undoubtedly the court's broad definition of the rights which an Attorney-General is entitled to sue to vindicate has been influential in inducing the court to entertain these suits.

There is a significant difference between the practice of the two courts. While the Supreme Court ordinarily insists on having a concrete and detailed set of facts before it on which to base its decision, the High Court does not make this requirement. In fact the procedures by which declaratory cases ordinarily come before the High Court tend to present the legal issues for decision without a concrete set of facts.

The requirements of standing established for private plaintiffs are similar in the two courts. The High Court has, however, taken a step to which there is no analogy in the United States. It has recognized standing in the Attorney-General of a state to bring suit 'whenever his public is or may be affected by what he says is an *ultra vires* Act on the part of the Commonwealth or of another State.'[75] (The Attorney-General can attack regulations or other governmental action as well as statutes.) A corresponding standing is recognized in the Attorney-General for the Commonwealth, with a similar broad definition of the rights which he is entitled to protect. Although actions somewhat similar have occasionally been brought by a state or by the federal government in the United States, no real equivalent to the Australian suits has been developed, and such suits in the United States have never become, as they have in Australia, a major means for determining the validity of important legislation.

The High Court of Australia has entertained suits for declaratory judgments in large numbers, and among them have been many of Australia's most important cases on public law issues. The United States Supreme Court has not given the declaratory judgment remedy the scope in public law litigation given it by the High Court. The

[75] Dixon J. in the first *Pharmaceutical Benefits Case* (1945) 71 C.L.R. 237, 272.

Supreme Court has been influenced by its traditionally strict requirements of justiciability and standing and by its extreme reluctance to decide a question of constitutionality.[76]

(Concluded)

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