

STATE TRIBUNALS AND CHAPTER III OF THE AUSTRALIAN CONSTITUTION – FOUR CASES CONSIDERED

*The Hon Duncan Kerr SC MP**

Radio 2UE Sydney Pty Ltd v Burns (EOD)¹

*Commonwealth v Wood*²

Trust Co of Australia Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd
*(t/as Café Tiffany's)*³

*Attorney-General (NSW) v 2UE Sydney Pty Ltd*⁴

This paper discusses a quartet of recent cases involving State tribunals and Chapter III of the Australian Constitution. Each of these cases addresses previously uncontroversial aspects of the distribution of judicial power between the Commonwealth and the States. *Wood* and *Stockland*, decisions of the Federal Court of Australia and the New South Wales Court of Appeal respectively, apply distinctly different tests to answer the question of whether, and if so in what circumstances, a State tribunal is to be regarded as a 'court of a State' for the purposes of Chapter III of the Australian Constitution and the *Judiciary Act 1903* (Cth).

Radio 2UE (reversing *2UE v Burns*) deals with the related but subsequent question of whether a State tribunal that is not a 'court of a State' is limited in, or excluded from, exercising its 'power' or 'jurisdiction' over federal questions in consequence of implications arising from Chapter III. This paper suggests that the conclusions reached by the NSW Court of Appeal in both *Stockland* and *Radio 2UE* are difficult to reconcile with recent decisions of the High Court and may prove to be aberrations rather than portents.

I Introduction

Australia's integrated judicial system is a product of Chapter III of the Australian Constitution. The drafters of the Australian Constitution provided for 'a Federal Supreme Court' — the High Court of Australia — to be the prime repository of the judicial power of the Commonwealth⁵. The new Commonwealth was otherwise thought neither to require, nor have the resources to justify, the establishment of a comprehensive parallel system of federal courts. To avoid the need to establish further federal judicial institutions, an autochthonous Australian constitutional device, s 77 of the Australian Constitution, empowered the Commonwealth Parliament to invest federal judicial power not only upon such other courts as it might later create, but also upon existing and future (then colonial, but soon to become) State courts.

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To ensure Commonwealth supremacy, s 77(ii) of the Australian Constitution empowered the Commonwealth Parliament to define the extent to which the jurisdiction of any federal court would be exclusive of that belonging to or invested in the states. Section 38 of the Judiciary Act was enacted pursuant to that authority.

Only in respect of a limited range of matters — the most important of which, for practical purposes, are those involving suits between states or between States and the Commonwealth — was the jurisdiction of the High Court made exclusive of the jurisdiction of the courts of the States⁶. In respect of the far larger residuum, s 39 of the Judiciary Act allowed, and continues to allow, State courts to also exercise federal judicial power⁷.

Moreover, this important statutory device also withdrew from State courts all formerly existing State judicial power that overlapped with the judicial power of the Commonwealth⁸ including, for illustrative purposes, jurisdiction over litigation ‘between residents of different States’⁹ where prior to the passage of the Judiciary Act, State courts routinely exercised State judicial power subject to the rules of private international law.¹⁰ Section 39 then reinvested the ‘several Courts of the States ... within the limits of their several jurisdictions’ with most of the substance of that withdrawn State jurisdiction as part of a wider grant of federal jurisdiction¹¹. To the extent that there would otherwise have been an overlap between state and federal judicial power, that possibility was removed. Henceforth, State courts could only exercise judicial power over a federal matter if their jurisdiction could be sourced to the Commonwealth Parliament’s legislative investiture in them of the judicial power of the Commonwealth.

Since 1903, the Judiciary Act scheme has permitted State courts to exercise concurrent federal and state judicial power. As such, they form part of the integrated Australian judicial system. But what of the many other State bodies that now exercise judicial power? At the State level there has been an explosion in the use of what Neil Rees has described as “court substitute” tribunals¹². What is their fit within the Australian constitutional structure?

Had this question been asked even a few years ago, the answer would have seemed not only obvious but also uncontentious. Such a State body, albeit named a ‘tribunal’, might be shown on proper legal analysis to actually be a Chapter III ‘court of a State’¹³. If so, the Judiciary Act would operate to invest that tribunal with federal judicial power, just as it would any other State court¹⁴. On the other hand, a State tribunal capable of exercising aspects of State judicial power, but not on proper legal analysis a ‘court of a State’, would not be at all affected by Chapter III considerations. By contrast with the Commonwealth¹⁵, State tribunals and other administrative bodies can, without objection, exercise admixed State executive, judicial and quasi-legislative powers¹⁶. Neither the Australian Constitution nor the Judiciary Act refer to the powers or jurisdiction of a non-court State tribunal. A State tribunal’s capacity therefore would not be affected in respect of the exercise of any aspect of State judicial power it might possess over subject matter and parties which, had the tribunal been a court, would have been removed by s 39(1) of the Judiciary Act and reinvested as federal jurisdiction by s 39(2).

That these answers are now in doubt as a result of the divergent judicial approaches revealed by the decisions discussed in this case note well demonstrates the protean nature, and the seemingly endless possibilities of, Chapter III jurisprudence notwithstanding increasing overt resistance within the High Court to its continued development¹⁷. It also highlights the potential for an ongoing overflow of that jurisprudence from the federal to the State sphere¹⁸.

Wood and *Stockland* illustrate contrasting judicial approaches to the methodology required to answer the question whether a particular state tribunal may be regarded as a ‘court of a State’ for the purposes of the Australian Constitution and the Judiciary Act.

*Wood*¹⁹, a decision of the Federal Court applied the hitherto orthodox ‘balance sheet’ approach²⁰. That approach compares the similarities and differences between the tribunal in question and a traditional court. In undertaking this comparison, *Wood* emphasised substance over form²¹. By contrast, in *Stockland*, the NSW Court of Appeal applied a novel test based on implications said to arise from Chapter III — concluding that to be a court for constitutional purposes a tribunal must be an institution exclusively, or at least predominantly, composed of judges²².

*2UE v Burns*²³ and *Radio 2UE*²⁴ illustrate contrasting judicial approaches to the consequential question of whether a State tribunal that is not a ‘court of a State’ is limited in its jurisdiction over federal questions in consequence of implications arising from Chapter III. *Radio 2UE*, a decision of the NSW Court of Appeal reversing *2UE v Burns*, held that while ordinarily, a State tribunal could consider submissions regarding the constitutional validity of State legislation in the course of the exercise of its statutory powers, it lacked jurisdiction to do so if its decisions, made in consequence of those constitutional considerations, could be registered in and enforced as orders of a court²⁵.

The differences of judicial opinion highlighted in this quartet of cases will have significant and ongoing ramifications. Of equal importance to the development of Australian constitutional law is the recognition that the reasoning in *Radio 2UE* appears to require even more sweeping conclusions than those ultimately reached²⁶. These cases are not only of theoretical interest; they also have direct and immediate practical implications. This is especially so given that ‘[o]ne of the most significant recent developments in the Australian legal system has been the creation of many new statutory decision-making bodies.’²⁷ Highlighting this point, Rees quotes the President of the Victorian Civil and Administrative Tribunal (‘VCAT’), who identifies that Tribunal as having already become ‘the principal jurisdiction for the resolution of mainstream civil disputes in Victoria.’²⁸

Lawyers who represent clients involved unwillingly in State administrative proceedings will, without doubt, explore the possibilities of a Chapter III challenge seeking to oust such tribunal jurisdiction. The current uncertainties will encourage further litigation. It seems inevitable that some of the questions raised by these cases will be finally resolved only by the High Court²⁹. Until that day, State tribunals exercising admixed administrative and judicial functions are likely to face continual challenges to their powers and jurisdiction arising from these complexities, which until recently, were not evident.

II The facts and the decisions in outline

A *2UE v Burns*

In *2UE v Burns*, O’Connor DCJ, sitting as President of the Appeal Panel of the New South Wales Administrative Decisions Tribunal (‘NSWADT’), decided that that Tribunal was a court both in the ‘general sense’ and the ‘Judiciary Act sense’ of the word³⁰. The issue arose in the following way: a member of the public, Gary Burns, had made a complaint about homosexual vilification to the Equal Opportunity Division of the NSWADT³¹. He complained about comments made by radio presenters John Laws and Steve Price, which had been broadcast by the radio station Radio 2UE Sydney Pty Ltd (‘2UE’)³². The Tribunal upheld Burns’ complaint under s 49ZT of the *Anti-Discrimination Act 1977* (NSW) (‘ADA’)³³ and ordered 2UE to broadcast an apology that was to be read by Laws and Price³⁴. Laws, Price and 2UE then appealed to the Appeal Panel of the NSWADT. Their submissions challenged the constitutional validity of s 49ZT of the ADA³⁵.

Their counsel argued that the New South Wales law placed an unlawful burden on their freedom of political communication³⁶, an implied right under the Australian Constitution³⁷. The NSW Attorney-General intervened³⁸. On the NSW Attorney-General’s behalf, counsel

objected to the Tribunal considering this question on the ground that the Tribunal was not a 'court' within the meaning of s 39(2) of the Judiciary Act³⁹. The NSW Attorney-General asserted that because the Tribunal was not a court, 'it [was] not invested with the authority to hear matters arising under the Constitution or involving its interpretation'⁴⁰.

The NSW Attorney-General argued that as an administrative body constituted under State law, the Tribunal was bound to accept the constitutional validity of the laws of NSW, including s 49ZT of the ADA⁴¹. Hence, it was contended that if an argument of inconsistency with the Australian Constitution was advanced before it, the Tribunal was obliged to refer any such question to the NSW Supreme Court pursuant to s 118(1) of the *Administrative Decisions Tribunal Act 1997* (NSW)⁴².

O'Connor P rejected the argument that the NSWADT (both as constituted generally and, more particularly, as the Appeal Panel) was not a court⁴³. His Honour also rejected the NSW Attorney-General's related proposition that, assuming the Tribunal was not a court, it would lack authority to form a view regarding the validity of a State statute on the ground that it was inconsistent with Commonwealth law⁴⁴. His Honour held that the Tribunal, even if it were not a 'court of a State', had a duty to ensure that its conduct was lawful and within power — it was both competent and indeed obliged to consider any question of law relating to its jurisdiction.

B Wood

The litigation in *Wood*⁴⁵ involved a challenge by the Commonwealth to the Anti-Discrimination Tribunal of Tasmania ('TASADT') exercising its authority in respect of a matter in which the Commonwealth was itself a party.

The issue arose as follows: in late 2000, Eleanore Tibble, a 15-year-old member of the Tasmanian Squadron of the organisation then known as the Air Training Corps (since renamed the Australian Air Force Cadets), hanged herself in a shed on her mother's property⁴⁶. A military investigation conducted after Tibble's death revealed that earlier disciplinary allegations against her had been badly mismanaged by her superiors in the Air Training Corps ('Cadets')⁴⁷. A psychiatrist engaged by the Military Compensation and Rehabilitation Service found that the way the Cadets had mishandled the disciplinary matter had contributed more than 50 per cent to Tibble's decision to commit suicide.

Soon after Tibble's death, her mother, Susan Campbell, found her daughter's body. Campbell was deeply traumatised. She wanted to ensure that similar mishandlings of disciplinary allegations against young cadets would never happen again. One of the steps Campbell took was to complain to the Tasmanian Anti-Discrimination Commissioner, on her own and on her deceased daughter's behalf⁴⁸. Her complaint included allegations against the Cadets of discrimination on the basis of 'age and gender/sex in education/training and membership and activities of clubs.'⁴⁹ Campbell sought orders directed to the prevention of further discriminatory conduct. Her complaint was accepted by the Commissioner and referred to the TASADT, constituted by Magistrate Helen Wood sitting as Chairperson, for determination⁵⁰.

Campbell's complaints identified two Cadet officers and the Cadets itself, as the parties against whom she sought remedies. However, after hearing preliminary submissions by counsel for the Commonwealth, Chairperson Wood ruled that the Commonwealth should be substituted for the Cadets as the proper party against whom the complaint would proceed.

The Commonwealth then applied to the Federal Court seeking orders to prevent the TASADT from further hearing and determining the complaints. The Commonwealth's submissions to the Federal Court were summarised by Heerey J as follows: 'it is a

necessary implication from Ch III that a State tribunal (ie a body which is not a “court of a State”) cannot exercise any part of the judicial power of the Commonwealth.⁵¹

The prohibition contended for by the Commonwealth extended, not only to matters in which the Commonwealth itself was a party, but also, for example, to all matters that involved residents of other States⁵² and all matters arising under any law made by the federal Parliament.⁵³

Conceived in this way, the Commonwealth’s contended limitation bore little resemblance to that which had been proposed by the NSW Attorney-General in *2UE v Burns*⁵⁴. In that case, the NSW Attorney-General had submitted that because a tribunal was disqualified from exercising the judicial power of the Commonwealth, it was obliged to accept the validity of any State legislation under which it operated⁵⁵. By contrast, as articulated by the Commonwealth in *Wood*, the prohibition contended for had a very different consequence — it removed the entire jurisdiction of a tribunal whenever a case required any exercise by it of judicial power touching upon a federal question.

However, Heerey J decided the threshold question against the Commonwealth. His Honour held that the TASADT was in fact a court of the State of Tasmania for the purposes of the receipt of federal jurisdiction⁵⁶. As such, it had undoubted jurisdiction over the Commonwealth. Heerey J did not find it necessary to adjudicate upon the wider propositions advanced by the Commonwealth.⁵⁷

C Stockland

The Chapter III issue in *Stockland* arose as a matter of statutory interpretation. Skiwing Pty Ltd (‘Skiwing’) conducted a cafe in a shopping arcade owned by Stockland Property Management Ltd (‘Stockland Ltd’)⁵⁸. Skiwing brought various claims before the Retail Leases Division of the NSWADT⁵⁹. Skiwing’s claims included alleged breaches of s 52 of the TPA. At one level, the issue was a routine question of statutory interpretation. Federal legislation governed whether or not the Retail Leases Division of the NSWADT had the power to deal with these federal claims⁶⁰. Section 86(2) of the TPA provides:

The several courts of the States are invested with federal jurisdiction within the limits of their several jurisdictions, whether those limits are as to locality, subject-matter or otherwise ... with respect to any matter arising under ... Part V in respect of which a civil proceeding is instituted by a person other than the Minister or the Commission.

The circumstance that took the matter into constitutional law territory was that the language of s 86(2) mirrored s 39(2) of the Judiciary Act and was clearly intended to confer jurisdiction on every court and tribunal that answered the description of a ‘court of a State’ under s 77(iii) of the Australian Constitution.

Approaching the matter in the same manner as O’Connor P did in *2UE v Burns*⁶¹, the Appeal Panel of the NSWADT held that the Retail Leases Division was a ‘court of the State’ and, as such, had jurisdiction to entertain Skiwing’s TPA s 52 claim⁶².

Stockland Ltd then appealed to the NSW Court of Appeal. The Court of Appeal, constituted by Spigelman CJ, Hodgson and Bryson JJA, held that it was impermissible to treat the Retail Leases Division of the NSWADT as distinct from its other constituent parts⁶³. It concluded that, taken as a whole, the NSWADT was not a ‘court of a State’ in the context of federal constitutional law⁶⁴.

Furthermore, the Court of Appeal disapproved of the reasoning of O’Connor P in *2UE v Burns*. It held that an essential feature of a ‘court of a State’, as that term is used in Chapter

III of the Australian Constitution, is that it be an institution exclusively, or at least predominantly, composed of judges⁶⁵.

Spigelman CJ acknowledged that the Court's conclusion in that regard was inconsistent with the approach taken by Heerey J in *Wood*⁶⁶.

D Radio 2UE

In the aftermath of *Stockland*, a slightly differently constituted NSW Court of Appeal, consisting of Spigelman CJ, Hodgson and Ipp JJA, formally overruled *2UE v Burns* in *Radio 2UE*⁶⁷.

The Court of Appeal's conclusion that the NSWADT was not a 'court of a State' for the purposes of the Australian Constitution and the Judiciary Act, then required the Court to address the consequential question of how the NSWADT should have dealt with the asserted inconsistency of state law with the Australian Constitution — the issue that had been the subject of submissions on behalf of Laws, Price and 2UE.

In *2UE v Burns*, O'Connor P had held that the NSWADT, even if it were not 'a court of a State', was both competent and obliged to consider any question of law relating to its jurisdiction⁶⁸.

Setting that conclusion aside, the Court of Appeal in *Radio 2UE* granted a declaration that the Appeal Panel of the NSWADT lacked jurisdiction to determine whether s 49ZT of the ADA should be read down so as not to infringe the constitutional implication of freedom of communication about government matters⁶⁹. However, the Court of Appeal reached this conclusion for reasons other than those that had been submitted on behalf of the NSW Attorney-General⁷⁰. Spigelman CJ held that ordinarily, a state tribunal could consider submissions regarding the federal constitutional validity of State legislation in the course of the exercise of its statutory powers⁷¹. Hodgson JA rejected the NSW Attorney-General's contention that a state tribunal was required to make its decisions heedless of whether or not the State law might be invalid under the Australian Constitution⁷².

The NSWADT (and its Appeal Panel) was held to lack jurisdiction 'solely on the basis' that its decisions could be registered in, and enforced as orders of, the NSW Supreme Court⁷³. The underlying premise for this conclusion, articulated by Spigelman CJ, was that it is impermissible for '[a] State Parliament [to] confer on a court, let alone on a tribunal, judicial power with respect to any matter referred to in s 75 or s 76 of the Constitution.'⁷⁴ As decisions of the NSWADT could be enforced by registration in the NSW Supreme Court, that circumstance gave them judicial force and converted what would otherwise have been an inherent and legitimate consideration in the administrative decision-making process into a binding decision and, as such, an impermissible exercise of federal judicial power⁷⁵. The NSW Court of Appeal held that *Brandy v Human Rights and Equal Opportunity Commission* ('*Brandy*')⁷⁶ compelled that conclusion and could not be relevantly distinguished⁷⁷.

III Discussion

A When is a Tribunal a 'Court of a State'?

On the subject of judicial power, the High Court has observed that '[t]he acknowledged difficulty, if not impossibility, of framing a definition ... that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential ... are not by themselves conclusive of it'⁷⁸.

The same is equally true of all attempts to frame a definition of a ‘court’. Various negative and positive indicia have emerged, but there appears to be broad agreement that there is ‘no unmistakable hall-mark by which a “court” ... may unerringly be identified. It is largely a matter of impression.’⁷⁹ If no test can be definitive, it should not be surprising that differences arise between judges as to whether or not a particular body is a court.

In *Stockland*, the NSW Court of Appeal accepted that the NSWADT had many of the indicia of a court. It accepted that, Chapter III considerations aside, the question of whether or not that body was a court was finely balanced⁸⁰ and that for many statutory purposes, the NSWADT would have sufficient characteristics of a court to allow a finding that it met that description⁸¹.

As if to emphasise this point, a later and differently constituted NSW Court of Appeal, consisting of Handley and Basten JJA and McDougall J, in *Trust Co of Australia Ltd v Skiwing Pty Ltd* held that the Appeal Panel of the NSWADT⁸² possessed the ‘relevant characteristics to be a “court” for the purposes of the *Suitors’ Fund Act 1951* (NSW)’⁸³.

What therefore makes the disagreement between the judges in *Stockland* and those who decided the earlier cases of *2UE v Burns* and *Wood* significant, rather than merely interesting, is that the NSW Court of Appeal in *Stockland* concluded that the expression ‘court of a State’ was ‘a constitutional expression’ that⁸⁴, in the context of Chapter III, demanded that a more stringent meaning be given to the word ‘court’ than would ordinarily be required⁸⁵.

I will first set out the two contending positions.

1 The position of the Federal Court of Australia

In *Wood*, Heerey J commenced his analysis of the status of the TASADT by noting that the question was not how the *Anti-Discrimination Act 1998* (Tas) characterised the Tribunal, but rather whether the Tribunal answered the description of a ‘court’ in ss 71 and 77(iii) of the Australian Constitution and s 39(2) of the Judiciary Act⁸⁶. The terms ‘court’ and ‘court of a State’ were to be construed in a context where a general separation of powers doctrine, strictly applied in relation to the federal judiciary, did not apply at a State level⁸⁷. Heerey J accepted that there was no comprehensive test by which it was possible to define the characteristics of a ‘court of a State’⁸⁸. Accordingly, his Honour undertook that task by contrasting and weighing the cumulative effect of the various usual positive and negative indicia that had been advanced on behalf of the parties as lending weight to their submissions that the TASADT was, or was not, such a court⁸⁹. That was in accordance with the submissions of counsel and followed conventional methodology.

Heerey J relied on *North Australian Aboriginal Legal Aid Service Inc v Bradley*⁹⁰ (‘Bradley’) as having settled the law as to whether or not the judicial power of the Commonwealth could be exercised by a particular tribunal — however named — otherwise appearing to possess the attributes of a State court⁹¹. Critically, to meet the *Bradley* test, the tribunal must be, and appear to be, independent and impartial⁹². His Honour reasoned as follows:

In *Bradley* at [35]–[38] McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ pointed out that, until quite recent times in Australia, State and Territory summary courts have been constituted by members of the public service and subject to the regulation and discipline inherent in that position. One might add that this circumstance is explicitly recognised in s 39(2)(d) of the Judiciary Act.

The federal jurisdiction of a court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate or ‘some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction’. At the time the Judiciary Act was passed, such magistrates would have been salaried officials, as distinct from honorary justices of the peace, and members of their State public service, with nothing like Act of Settlement

tenure. (And, as late as the 1970s Stipendiary and Police Magistrates in some States were not required to be lawyers.) Moreover, the fact that Parliament thought it necessary to impose such a condition suggests that at the time of the drafting of the Constitution a few years earlier it was contemplated that even honorary justices, who had no security of tenure at all, would, in the absence of such a condition, constitute a court of a State⁹³.

Heerey J concluded that the TASADT was both capable of being characterised as a court⁹⁴ and in possession of the requisite impartiality and independence:

To my mind, reasonable and informed members of the public would think that the Tribunal was free from influence of the other branches of the Tasmanian government, and particularly the Executive. On reading the *Anti-Discrimination Act*, such persons would observe that it specifically applied to the conduct of the Tasmanian government, and other governments. They would also note that the Tribunal was empowered to do most of the things courts do, to conduct hearings in public of disputes between parties, to summon witnesses, to find disputed facts and apply legal rules to facts as found, to give reasons for its decisions, and to make orders which can be immediately enforced.⁹⁵

Noting that specialist tribunals have come to play an important role in the legal institutional framework of the States, Heerey J endorsed O'Connor P's remarks in *2UE v Burns* that '[t]he Parliament could have, but did not, choose to vest the jurisdiction in the traditional courts. It established a specialist jurisdiction, with special procedures and a special bench⁹⁶.' His Honour also adopted⁹⁷ O'Connor P's conclusion that it would 'be a strange result if modern adjudicative institutions ... were not seen to be "courts" within the meaning of the Judiciary Act.'⁹⁸

2 The position of the NSW Court of Appeal

By contrast, in *Stockland*, Spigelman CJ concluded that '[i]n order to be part of the constitutionally required integrated judicial system, a tribunal must be able to be characterised not only as a court, but as a court of law.'⁹⁹ This proposition was stated as self-evident. But, save as referred to immediately below, it is not clear what, if anything, the distinction between a 'court' and a 'court of law' might require¹⁰⁰. His Honour continued: 'One aspect of a court of law is that it is comprised, probably exclusively although it is sufficient to say predominantly, of judges.'¹⁰¹

Spigelman CJ identified s 79 of the Australian Constitution as a source of textual support for his conclusion that an essential feature of a court, as that word is used in Chapter III, is that it is an institution composed of judges¹⁰². Section 79 of the Australian Constitution provides: 'The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.' Accordingly, his Honour noted that s 79 assumes that 'a "court of a State", like any other court exercising the judicial power of the Commonwealth, will be composed of "judges".'¹⁰³

In addition, Spigelman CJ, with Hodgson and Bryson JJA in agreement, dismissed Heerey J's argument that the now repealed s 39(2)(d)¹⁰⁴ of the Judiciary Act served as a clear indication that the constitutional understanding at the time of Federation had been otherwise, observing that 'the meaning of a constitutional expression is not fixed as at 1900, save with respect to essential features.'¹⁰⁵

3 Which approach is to be preferred?

The rival approaches of the Federal Court and the NSW Court of Appeal, whilst overlapping, are legally inconsistent. As *Wood* illustrates, a tribunal can meet the *Bradley* test of integrity and independence, yet fail to satisfy the additional *Stockland* proposition that a Chapter III 'court of a State' must be composed exclusively, or at least predominantly, of judges¹⁰⁶.

The subsequent decision of the High Court in *Forge v Australian Securities and Investments Commission* ('*Forge*')¹⁰⁷ may shed some light on which approach is to be preferred. *Forge* decided that the appointment of acting State Supreme Court judges did not offend Chapter III¹⁰⁸. The reasoning in *Forge* appears to be more consistent with the conclusions reached by the Federal Court in *Wood*, than those reached by the NSW Court of Appeal in *Stockland*.

Gleeson CJ's analysis of the factors bearing upon the question of whether a body should be regarded as a 'court of a State' includes a passage with a striking similarity to the analysis of Heerey J in *Wood*:

No one ever suggested that, in that respect, Ch III of the Constitution 1901 (Cth) provided a template that had to be followed to ensure the independence of State Supreme Courts, much less of all courts on which federal jurisdiction might be conferred. Indeed, for most of the twentieth century, many of the judicial officers who exercised federal judicial power, that is to say, State magistrates, were part of the State public service. If Ch III of the Constitution were said to establish the Australian standard for judicial independence then two embarrassing considerations would arise: first, the standard altered in 1977; secondly, the state Supreme Courts and other State courts upon which federal jurisdiction has been conferred did not comply with the standard at the time of federation, and have never done so since.^{109, 109}

What was crucial, in Gleeson CJ's view, was a guarantee of impartiality and independence. The Australian Constitution did not otherwise specify minimum requirements. His Honour continued:

It follows from the terms of Ch III that state Supreme Courts must continue to answer the description of 'courts'. For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the Constitution. It is the principle that governs the outcome of the present case. ... For the reasons given above, however, Ch III of the Constitution, and in particular s 72, did not before 1977, and does not now, specify those minimum requirements, either for State Supreme Courts or for other State courts that may be invested with federal jurisdiction.¹¹⁰

Gummow, Hayne and Crennan JJ, to the same effect, stated:

Both before and long after Federation, courts of summary jurisdiction have been constituted by justices of the peace or by stipendiary magistrates who formed part of the colonial or state public services. As public servants, each was generally subject to disciplinary and like procedures applying to all public servants. Thus, neither before nor after federation have all state courts been constituted by judicial officers having the protections of judicial independence afforded by provisions rooted in the Act of Settlement and having as their chief characteristics appointment during good behaviour and protection from diminution in remuneration. That being so, if the courts of the States that were, at Federation, considered fit receptacles for the investing of federal jurisdiction included courts constituted by public servants, why may not the Supreme Court of a State be constituted by an acting judge?

The question just posed assumes that all courts in a hierarchy of courts must be constituted alike. In particular, it assumes that inferior State courts, particularly the courts of summary jurisdiction, subject to the general supervision of the Supreme Court of the state, through the grant of relief in the nature of prerogative writs and, at least to some extent, the process of appeal, must be constituted in the same way as the Supreme Court of that State. Yet it is only in relatively recent times that the terms of appointment of judicial officers in inferior courts have come to resemble those governing the appointment of judges of Supreme Courts.

History reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court. The development of different rules for courts of record from those applying to inferior courts in respect of judicial immunity and in respect of collateral attack upon judicial decisions shows this to be so. The independence and impartiality of inferior courts, particularly the courts of summary jurisdiction, was for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases.¹¹¹

The passages cited above appear to strongly reinforce the often stated principle that, subject to compliance with the 'stable principle' of institutional independence and impartiality¹¹², 'the Commonwealth must take [the States' judicial systems] as it finds them.'¹¹³ Nothing in *Forge* suggests that the High Court discerned any Chapter III requirement that a 'court of a State' can only exercise federal judicial power if it is exclusively or predominantly composed of judges¹¹⁴.

Heydon J noted:

The arguments of the applicants turn on the meaning of the expression 'such other courts' in s 71 and 'any court of a State' in s 77(iii) of the Constitution. Those words now bear the meaning 'they bore in the circumstances of their enactment by the Imperial Parliament in 1900.'¹¹⁵

This, however, is directly contrary to the proposition advanced by the NSW Court of Appeal that the expression 'court of a State' is to be given a different meaning to the conception of a court existing at the time of Federation¹¹⁶.

As the Court of Appeal did not identify any other issues of principle which would justify the imposition of a higher threshold, *Forge* appears likely to compel a reassessment of the correctness and authority of *Stockland*.¹¹⁷

4 A circular argument?

There is a further reason to doubt the conclusions reached in *Stockland*. The shift of the analytical focus from 'what is a "court"' to 'who is a "judge"' relies on an illusory distinction.

The NSW Court of Appeal in *Stockland* did not intend its conclusion, that in order to exercise the judicial power of the Commonwealth, a 'court' must be exclusively or predominantly composed of judges, to encompass only judges appointed under Chapter III of the Australian Constitution.¹¹⁸

Yet as Leslie Zines has noted, once that bright line threshold is crossed, as it must be for State appointees, the question of 'who is a "judge"' can only be answered by a functional test¹¹⁹ — a 'judge' is a person who lawfully exercises the judicial authority of a 'court'.

Deeper examination of the question of 'who is a "judge"' inevitably leads back to the original question it was meant to help answer: 'what is a "court"'? It is impossible to avoid this inherent circularity. The two questions are one and the same. Zines' conundrum leads to the conclusion that the *Stockland* test, turning as it does on the requirement that a 'court of a State' be exclusively or predominantly composed of judges, can offer only illusory clarity.

Restating the way a question is posed does not, and cannot, simplify the task of legal analysis or reduce the complexity inherent in answering it. The underlying first order question will still remain: 'what is a "court"'? Because that question cannot be answered by any exclusive and exhaustive definition, it can only be approached obliquely by the kind of balance sheet approach that the common law has evolved to determine, case by case, whether or not a particular body is a court. And, to echo both O'Connor P and Heerey J, it would be a 'strange result' if independent and impartial state tribunals created to carry out modern, often specialist adjudicative tasks, and upon which no repugnant non-judicial functions have been conferred, are not seen to be 'courts' within the meaning of s 39(2) of the Judiciary Act¹²⁰.

5 A caveat

Some minor cautions are in order.

As *Stockland* was argued contemporaneously with *Forge*, the conclusion and reasoning of the NSW Court of Appeal in *Stockland* was not available to the High Court. Perhaps, should this issue come before the High Court again, the decision of a very strong bench of the NSW Court of Appeal in *Stockland*¹²¹ might prompt some justices of the High Court to reconsider aspects of what was said in *Forge*.

Moreover, *Stockland* will continue to have practical consequences in NSW, at least until it is reconsidered within the hierarchy of the NSW court system or overturned by a later decision of the High Court.

B Does Chapter III limit the jurisdiction of non-court administrative tribunals?

In *Radio 2UE*, the NSW Court of Appeal concluded that the NSWADT lacked jurisdiction to consider the constitutional validity of s 49ZT of the ADA because the decisions of the Tribunal could be registered in, and enforced as orders of, the NSW Supreme Court¹²².

The Court of Appeal concluded that where the subject matter before it involved a federal question, a state tribunal was in no different a position to that of a Commonwealth tribunal in this respect¹²³. *Brandy* was held to be binding High Court authority that could not be distinguished. It precluded both federal and State non-court tribunals alike from exercising any power over federal questions in instances in which their determinations could be given effect by registration in a court.

1 Was Radio 2UE decided per incuriam?

Although the NSW Court of Appeal in *Radio 2UE* relied on *Brandy* for its conclusions, that case assumed prominence only during the course of oral argument¹²⁴. It had not been among the arguments advanced on behalf of the NSW Attorney-General or the subject of detailed submissions. *Brandy*'s potential significance thus emerged late and as a side wind. This may explain why the Court of Appeal did not consider or even advert to a later decision of the High Court: *Re Residential Tenancies Tribunal (NSW); Ex parte the Defence Housing Authority ('Henderson's case')*¹²⁵.

Henderson's Case involved a challenge to the power of the NSW Residential Tenancies Tribunal ('RTT') to make orders binding the Commonwealth¹²⁶. The jurisdiction of the RTT was invoked by Dr Arvin Henderson who owned certain premises leased by the Commonwealth as manifested by the Defence Housing Authority ('DFA')¹²⁷. The RTT was constituted under the *Residential Tenancies Act 1987* (NSW)¹²⁸.

The dispute before the RTT involved the Commonwealth as a party. The resolution of the dispute required the RTT to consider whether or not there were any constitutional or federal statutory impediments to the application of State law. Orders of the RTT for payment of money, including any amount awarded by way of costs, could be enforced by registration as an order of a court in a manner similar to the orders of the NSWADT considered in *Radio 2UE*.¹²⁹

The DFA applied for a writ of prohibition. The Commonwealth argued that the RTT lacked power to exercise any authority over it.

The High Court rejected the Commonwealth's challenge to the jurisdiction of the RTT and upheld the Tribunal's power to make orders binding the Commonwealth. Two of the six majority justices, McHugh J¹³⁰ and Gummow J¹³¹ arrived at that conclusion despite finding that the RTT was not a court of the State of NSW. Dawson, Toohey and Gaudron JJ found it unnecessary to decide whether or not the RTT was a court. Observing that the answer to that question would make no difference, their Honours stated:

We very much doubt whether proceedings before the tribunal are judicial proceedings rather than proceedings of an administrative tribunal ... but in the end it does not matter because in either event the DFA is bound generally by the Residential Tenancies Act and the tribunal has jurisdiction over it.¹³²

The order nisi for a writ of prohibition was discharged¹³³.

The ratio of *Henderson's case* must therefore include the proposition that a State administrative tribunal which is not a 'court of a State' can nonetheless lawfully make decisions affecting, and exercise authority over¹³⁴, parties and subject matters that, if the tribunal had been a court, would have been transformed into an exercise of federal judicial power¹³⁵.

Although *Brandy* had been decided by the High Court only months before *Henderson's Case*, none of the justices who took part in both of these cases identified the fact that decisions of the RTT could be given effect by registration as an order of a court as being a relevant consideration. Accordingly, *Henderson's case* may suggest that *Brandy* can and should be distinguished, and its application confined to Commonwealth entities.¹³⁶

2 Broader issues

However, criticism of *Radio 2UE* on the narrow ground that it was reached without sufficient regard to *Henderson's case* would not address the wider issues of principle that are common to the group of four cases examined by this article.

If court registration of their orders is the only problem that Chapter III creates for State tribunals, State Parliaments could readily devise other ways to enforce tribunal decisions to avoid disruption of their effective functioning. Moreover, it is not at all clear how Spigelman CJ's reasoning in *Radio 2UE*¹³⁷ can be reconciled with his Honour's conclusion that it is only when the decision of a State tribunal can be registered and enforced as a judgment of a court that a tribunal impermissibly exercises federal judicial power.

3 The outcome in *Radio 2UE* is inherently unstable

In respect of Chapter III issues, the Commonwealth's argument advanced in *Wood* had four steps¹³⁸:

- 1 in hearing and determining a complaint under the *Anti-Discrimination Act 1998* (Tas), the TASADT is exercising judicial power;
- 2 where the Commonwealth is a party to a complaint under the Act, the power to determine that complaint is part of the judicial power of the Commonwealth;
- 3 the TASADT can only exercise any part of the judicial power of the Commonwealth if it is a 'court of a State' within the meaning of ss 71 and 77(iii) of the Australian Constitution; and
- 4 the TASADT is not a 'court of a State' for that purpose.

If, as Spigelman CJ stated in *Radio 2UE*,¹³⁹ the underlying principle is that a State cannot confer state judicial power with respect to any matter referred to in ss 75 or 76 of the Australian Constitution on a non-court tribunal, what objection can be offered to any of the logical steps argued for by the Commonwealth in *Wood*? That reasoning, carried to its logical conclusion, inevitably leads to the same end point as that submitted for on behalf of

the Commonwealth in *Wood* — that it is a necessary implication from Chapter III that a State tribunal which is not a ‘court of a State’ cannot exercise any part of the judicial power of the Commonwealth, and therefore, cannot exercise any judicial power at all in relation to matters referred to in ss 75 or 76 of the Australian Constitution. The underlying proposition advanced by Spigelman CJ cannot be reconciled with the narrow conclusion reached by his Honour and the NSW Court of Appeal in *Radio 2UE*. The outcome in *Radio 2UE* is therefore inherently unstable.

If the underlying principle articulated by Spigelman CJ is correct, its logical application requires the broader conclusion that a State quasi-judicial tribunal lacks jurisdiction to deal with cases involving the Commonwealth¹⁴⁰ or residents of different States¹⁴¹. No non-court tribunal exercising State judicial power can consider any issue arising under the Australian Constitution¹⁴² or any laws made by the federal Parliament¹⁴³. There are, however, objections that can properly be made to Spigelman CJ’s statement of the underlying principle.

4 Objections of principle

The separation of judicial and executive power is not a constitutional requirement at the State level¹⁴⁴. That a State administrative tribunal may also lawfully exercise judicial power is now too well-established a proposition to be doubted.

Sections 75 and 76 of the Australian Constitution did not withdraw any aspect of the pre-existing state judicial power of the former colonies¹⁴⁵. State judicial power was, and remains, capable of being exercised by State administrative tribunals as well as courts¹⁴⁶. The right of State tribunals other than courts to exercise State judicial power was not affected by s 77 of the Australian Constitution, nor was it diminished by the Judiciary Act. As Spigelman CJ correctly observed in *Radio 2UE*, the Judiciary Act does not speak in any way to the exercise of powers by tribunals that do not fall within the description of a ‘court of a State’.¹⁴⁷

Any restriction on the jurisdiction of a State tribunal to exercise the judicial power of its State must therefore rest not on the text of the Australian Constitution (because no basis for that exists) or on the effect of the Judiciary Act, but instead on an implication arising from the nature of the Chapter III scheme. However, there is nothing in the existing case law to suggest any High Court support for the existence of any such implication.

The right of State Parliaments to confer admixed judicial and administrative powers on their courts is subject to one Chapter III qualification. According to *Kable*, State Parliaments cannot confer repugnant non-judicial functions on state courts and, as potential repositories of federal judicial power, there must be institutional guarantees of their independence and impartiality¹⁴⁸. Yet *Kable* appears to have no relevance in respect of the jurisdiction of bodies that do not meet the description of a ‘court of a State’. *Kable* has consistently been held to neither require nor impose a de facto separation of powers doctrine on the States. McHugh J, for example, has observed that *Kable* would not prevent a State Parliament legislating so as to employ non-judicial tribunals even to determine issues of criminal guilt and to sentence offenders for breaches of the law¹⁴⁹.

The indisputable constitutional entitlement of the states to intermingle judicial and administrative functions, and to confer that admixed power on administrative tribunals — an entitlement not available to the Commonwealth¹⁵⁰ — is consistent with the right of State administrative bodies to lawfully exercise State judicial power notwithstanding that the subject matter of, or a party to, the dispute might be of a kind that, were it a ‘matter’, could also come within the original jurisdiction of the High Court pursuant to ss 75 or 76 of the Australian Constitution¹⁵¹.

Although the recent jurisprudence of the High Court has been dominated by Chapter III questions, no decision of that Court can be referred to as authority for a contrary implication. Nor can any dicta of a Justice of that Court be advanced as a basis for its derivation — the only faintly arguable exception being a Delphic comment from Kirby J, in dissent, in *Henderson's case*¹⁵².

5 Does Chapter III require a separation of powers doctrine for the States?

In *APLA Ltd v Legal Services Commissioner (NSW)*, Gummow J¹⁵³ and Callinan J¹⁵⁴ each set out compendiously what they understood to be the principles that should guide the High Court's approach to Chapter III of the Australian Constitution. Neither judgment provides any support for the proposed implication of a separation of powers doctrine for the States. Gummow J carefully listed each of the implications that his Honour accepted as arising from Chapter III and discussed them in detail — in terms that suggested that his Honour intended thereby to define their entire content in exclusive and exhaustive terms such that beyond those matters there was no room to develop any further implications derived from the nature and distribution of federal judicial power. Callinan J expressed even deeper scepticism¹⁵⁵.

Yet the decision and the reasoning in *Radio 2UE* can be sustained only if such a further implication exists¹⁵⁶. In the context of the Australian Constitution, given that the High Court is able to reconsider its earlier decisions¹⁵⁷ the existence of hostile previous dicta and an absence of case law in support of a proposition need not be fatal. But, when these factors are coupled with an absence of any principled reasons for its necessity, there must be good reason to doubt that any such supposed implication exists.

As Kirby J recently noted, '[i]t is always valid to test a legal proposition by reference to the consequences that would flow from its acceptance.'¹⁵⁸ Adopting the supposed implication would give rise to capricious outcomes. Unless *Henderson's case* was also overruled, the Commonwealth¹⁵⁹ and residents of different States¹⁶⁰ would be subject to the authority of State officials and State tribunals exercising exclusively executive and quasi-legislative powers, yet immune to the jurisdiction of the most impartial and independent State non-court tribunals that exercised any authority capable of being characterised as a manifestation of State judicial power¹⁶¹.

Moreover, the implication that flows logically from the reasoning in *Radio 2UE* would impose a separation of powers doctrine on the States. The resultant need to characterise what is done by State tribunals as belonging to executive, legislative or judicial power, in a State context in which no separation has hitherto been required, will give rise to endless complexity. The considerations left unresolved by Hodgson JA in *Radio 2UE*,¹⁶² including his Honour's speculation (left unresolved in the absence of a further notice for the purposes of Judiciary Act s 78B) that a State tribunal might not be able to proceed to any decision at all unless and until all federal questions arising incidentally were addressed by a court having a federal jurisdiction, illustrate just some of the many difficult subsidiary issues the application of a separation of powers doctrine on State tribunals would open up.

The coherence of the integrated national scheme created by Chapter III and the Judiciary Act would be damaged, rather than enhanced, by such an outcome. The seamless capacity of both State courts and tribunals to each individually resolve disputes including intermingled federal and state law and parties would be lost. State administrative proceedings would be at risk of becoming a labyrinth trapping those subject to them in a maze of complexity. Such destructive outcomes are not required to render effective the ultimate supremacy of the Commonwealth in respect of the exercise of federal judicial¹⁶³ or executive¹⁶⁴ power.

For the above reasons, it may reasonably be doubted that any relevant supposed Chapter III State separation of powers implication exists.

IV Conclusion

The quartet of cases discussed in this case note give different and conflicting answers to two important questions: (1) which test should be applied to discriminate between a non-court State tribunal and a 'court of a State'; and (2) whether a State tribunal that is not a 'court of a State' is limited in, or excluded from, exercising its 'power' or 'jurisdiction' over federal questions in consequence of implications arising from Chapter III of the Australian Constitution.

The decisions in *Stockland* and *Radio 2UE* will require considerable rethinking by Australian courts and tribunals of prior assumptions that Chapter III jurisprudence can have no practical relevance to State administrative law.

However, the conclusions reached by the NSW Court of Appeal in those cases remain difficult to reconcile with some of the more recent decisions of the High Court. For that reason, both *Stockland* and *Radio 2UE* may prove, in the long run, to be aberrations rather than portents.

Endnotes

- 1 2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) ('2UE v Burns').
- 2 (2006) 148 FCR 276 ('Wood').
- 3 2006] 66 NSWLR 77 ('Stockland').
- 4 (2006) 236 ALR 385 ('Radio 2UE').
- 5 Australian Constitution s 71.
- 6 Judiciary Act 1903 (Cth) s 38 ('Judiciary Act').
- 7 It does this by first sweeping away every aspect of jurisdiction that state courts would otherwise have been able to exercise concurrently with the High Court: *Judiciary Act* s 39(1) acknowledges the jurisdiction made exclusive 'by virtue of section 38'. Section 39(1) further removes the remaining jurisdiction of state courts over all federal matters. Section 39(2) then fills the vacuum s 39(1) creates by investing 'the several Courts of the States' with the right to exercise federal jurisdiction with respect to 'all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38'. This conferral is subject to a number of conditions, one of the most important of which has recently been repealed. The now repealed s 39(2)(d) originally provided that the federal jurisdiction of a State court of summary jurisdiction could only be exercised by a stipendiary or police or special magistrate, or some magistrate of the State who is specially authorised by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred. This thereby excluded courts composed of lay justices from the right to any exercise of federal jurisdiction. Section 39(2)(d) was repealed by *Judiciary Legislation Amendment Act 2006* (Cth) Sch 1 item 1, but seemingly on the mistaken assumption that no such courts remained in use.
- 8 See above n 7.
- 9 Australian Constitution s 75(iv).
- 10 See, eg, *Re Richards; Ex parte Maloney* (1902) 2 SR (NSW) B & P 3; *Ex parte Penglase* (1903) 3 SR (NSW) 680; *Fincham v Spencer* (1901) 26 VLR 665; *Ramsay v Eager* (1902) 27 VLR 603. All Australian colonial Supreme Courts could exercise jurisdiction in respect of inter-colonial disputes. In the period leading up to Federation the Australasian Judgments Act 1886, 49 Vict 4 (Federal Council of Australasia) and the *Australasian Testamentary Process Act 1897*, 60 Vict 2 (Federal Council of Australasia) operated alongside the various 19th century colonial rules of court to facilitate inter-colonial service and execution of process. After the Commonwealth was formed in 1901 and the Australian Parliament enacted the *Service and Execution of Process Act 1901* (Cth) these Acts of the Federal Council were repealed. However, s 27(2) of the *Service and Execution of Process Act 1901* (Cth) provided for the continued transitional operation of pre-existing colonial rules of court until each State Supreme Court made rules of court relating to the new legislation. In due course, each State Supreme Court did so: see, eg, *Service and Execution of Process Act 1901: Rules of Court (NSW)*, made 23 December 1902, published in *NSW Government Gazette*, 30 December 1902, 9229.
- 11 Judiciary Act s 39(2).
- 12 Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41, 43–4.
- 13 Australian Constitution s 77(iii). In some cases this will be simple to establish. Thus the New South Wales Dust Diseases Tribunal, although called a tribunal, is expressly established as a court of record: *Dust Diseases Tribunal Act 1989* (NSW) s 4(2). But it has also always been possible for a state body to be a

- court even if its empowering statute does not include such a clear statement: see, eg, *State Rail Authority (NSW) v Consumer Claims Tribunal* (1988) 14NSWLR 473, 477–9 (Hope JA).
- 14 Judiciary Act s 39.
 - 15 *R v Kirby*; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254.
 - 16 See generally *Kable v DPP (NSW)* (1996) 189 CLR 51 ('Kable'). See also Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (1986) 7 NSWLR 372, 381 (Street CJ), 398–401 (Kirby P), 407 (Glass JA), 407 (Mahoney JA); *Clyne v East* [1967] 2 NSWLR 483, 487–8 (Herron CJ), 495 (Sugerman JA); *City of Collingwood v Victoria* [No 2] [1994] 1 VR 652, 663–4 (Brooking J); *Nicholas v Western Australia* [1972] WAR 168, 175 (Burt J).
 - 17 See below Part III(B)(5).
 - 18 This trend is observed initially in *Kable* (1996) 189 CLR 51.
 - 19 (2006) 148 FCR 276.
 - 20 This is an expression I have borrowed from Graeme Hill, 'State Administrative Tribunals and the Constitutional Definition of "Court"' (2006) 13 Australian Journal of Administrative Law 103, 105–6. For a good example of the balance sheet approach: see *A-G (UK) v British Broadcasting Corporation* [1981] AC 303.
 - 21 (2006) 148 FCR 276, 292 (Heerey J), citing *Australian Postal Commission v Dao* [No 2] (1986) 6 NSWLR 497, 515 (McHugh JA).
 - 22 (2006) 66 NSWLR 77, 84, 87–9 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).
 - 23 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005).
 - 24 (2006) 236 ALR 385.
 - 25 *Ibid* 397–9 (Spigelman CJ), 404–5 (Hodgson JA), 405 (Ipp JA).
 - 26 See below Part III(B)(3).
 - 27 Rees, above n 8, 41.
 - 28 *Ibid* 46, citing Morris J, 'Civil Litigation: VCAT and the Courts' (Paper presented at the Advanced Civil Litigation Seminar Series 2004, Law Institute of Victoria, 15 April 2004).
 - 29 Special leave to appeal was sought in *Stockland* (2006) 66 NSWLR 77, but the grounds raised did not involve the constitutional issues discussed in this case note. From the point of view of the appellant seeking special leave to appeal, the constitutional issues in *Stockland* became moot following remedial amendments to NSW statute law that created a parallel substantive right in State law to that contained in the *Trade Practices Act 1974* (Cth) ('TPA') in relation to misleading and deceptive conduct: see *Retail Leases Act 1994* (NSW) s 62D, inserted by *Retail Leases Amendment Act 2005* (NSW).
 - 30 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [39], [49].
 - 31 *Burns v Radio 2UE Sydney Pty Ltd* [2004] NSWADT 267 (Unreported, Rice JM, Alt and Bolt)
 - 32 *Ibid*.
 - 33 *Ibid* [103] (Rice JM, Alt and Bolt NJMM).
 - 34 *Burns v Radio 2UE Sydney Pty Ltd* [No 2] [2005] NSWADT 24 (Unreported, Rice JM, Alt and Bolt NJMM, 16 February 2005) [47] (Rice JM, Alt and Bolt NJMM, 22 November 2004) [1]–[4]
 - 35 *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [4].
 - 36 *Ibid*.
 - 37 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
 - 38 *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [6].
 - 39 *Ibid*.
 - 40 *Ibid*.
 - 41 *Ibid* [7].
 - 42 For a discussion of the facts: see *ibid* [1]–[7] (O'Connor P). While the Appeal Panel of the NSWADT had power to refer such a question to the NSW Supreme Court pursuant to Administrative Decisions Tribunal Act 1997 (NSW) s 118(1), at first instance, the NSWADT had no such power. This created the practical dilemma later noted in *Radio 2UE* (2006) 236 ALR 385, 402 (Hodgson JA).
 - 43 *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [39]–[76].
 - 44 *Ibid* [77]–[96].
 - 45 *Wood* (2006) 148 FCR 276, 276 (Heerey J); *Campbell on Behalf of Tibble v FLG OFF Smith* [2004] TASADT 16 (Unreported, Chairperson Wood, 12 March 2004) [4].
 - 46 Coroner Peter Dixon, Record of Investigation into Death: Eleanore Tibble (Coronial Division, Magistrates Court of Tasmania, 15 February 2002) 3.
 - 47 *Ibid*.
 - 48 *ibid*.
 - 49 *Campbell on behalf of Tibble v FLG OFF Smith* [2004] TASADT 16 (Unreported, Chairperson Wood, 12 March 2004) [4], quoting counsel for the respondent's written submission.
 - 50 *Wood* (2006) 148 FCR 276, 281 (Heerey J).
 - 51 *Ibid* 288.
 - 52 Australian Constitution s 75(iv).
 - 53 Australian Constitution s 76(ii).
 - 54 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005).
 - 55 See above n 37 and accompanying text.
 - 56 (2006) 148 FCR 276, 289–96.
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- 57 Ibid 288–9.
 - 58 (2006) 66 NSWLR 77, 79 (Spigelman CJ).
 - 59 Ibid.
 - 60 TPA s 82(2).
 - 61 See above n 39 and accompanying text.
 - 62 *Trust Co of Australia Pty Ltd (Stockland Property Management Ltd) v Skiwing Pty Ltd* trading as Café Tiffany's (2005) ATPR (Digest) ¶46-264, 52 531–6 (Chesterman ADCJ, Molloy JM and Weule NJM).
 - 63 *Stockland* (2006) 66 NSWLR 77, 84–6 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).
 - 64 Ibid 86–9 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).
 - 65 Ibid 84, 88–9 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA). However, Spigelman CJ did suggest that the application of a balance sheet approach to the NSWADT would have resulted in the same outcome: at 89.
 - 66 Ibid 89.
 - 67 This occurred as a result of the application of the NSW Attorney-General seeking a declaration from the NSW Court of Appeal that the NSWADT 'has no jurisdiction to, and cannot hear and determine, a question arising under the Commonwealth Constitution or involving its interpretation': *Radio 2UE* (2006) 236 ALR 385, 386 (Spigelman CJ). None of the other parties to the proceedings contended that *Stockland* (2006) 66 NSWLR 77 should be reopened: at 387, 400 (Spigelman CJ).
 - 68 [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [95].
 - 69 *Radio 2UE* (2006) 236 ALR 385, 401 (Spigelman CJ). While in agreement as to the outcome, Hodgson JA expressed some reservations, leaving some questions open and only joining in the final outcome on the basis of his 'understanding' of the effect of the declaration: at 405. Unhelpfully, Ipp JA agreed with both Spigelman CJ and Hodgson JA: at 405.
 - 70 Ibid 398 (Spigelman CJ), 403–4 (Hodgson JA), 405 (Ipp JA).
 - 71 Ibid 399.
 - 72 Ibid 402–4.
 - 73 Ibid 398 (Spigelman CJ).
 - 74 Ibid 395–6. Ipp JA concurred: at 405.
 - 75 Ibid 398–9 (Spigelman CJ), 403–4 (Hodgson JA), 405 (Ipp JA).
 - 76 (1995) 183 CLR 245
 - 77 Note that Hodgson JA considered, but ultimately rejected, the view that *Brandy* was distinguishable: *Radio 2UE* (2006) 236 ALR 385, 404.
 - 78 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–9 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
 - 79 *A-G (UK) v British Broadcasting Corporation* [1981] AC 303, 351 (Lord Edmund-Davies).
 - 80 (2006) 66 NSWLR 77, 83–4 (Spigelman CJ).
 - 81 Ibid 84 (Spigelman CJ).
 - 82 Their Honours did not advert to the proposition in *Stockland* (2006) 66 NSWLR 77, 84–6 (Spigelman CJ) that it is not permissible to treat one component of the NSWADT as separate from its other constituent parts.
 - 83 [2006] NSWCA 387 (Unreported, Handley and Basten JJA and McDougall J, 21 December
 - 84 (2006) 66 NSWLR 77, 86 (Spigelman CJ), [74] (Basten JA).
 - 85 Ibid 86–9 (Spigelman CJ).
 - 86 (2006) 148 FCR 276, 289.
 - 87 Ibid.
 - 88 Ibid.
 - 89 Ibid 291–4.
 - 90 (2004) 218 CLR 146.
 - 91 *Wood* (2006) 148 FCR 276, 292–4.
 - 92 Ibid 292 (Heerey J), citing *Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
 - 93 *Wood* (2006) 148 FCR 276, 293.
 - 94 Ibid 289–96. Given the very different role that this consideration played in the NSW Court of Appeal's decision in *Radio 2UE* (2006) 236 ALR 385: see below Part III(A)(2); it is ironic that Heerey J concluded that the fact that the TASADT's orders could be enforced by means effectively identical to the mechanism considered in *Brandy* (1995) 183 CLR 245 tended to support the conclusion that the TASADT was a court of the State of Tasmania: *ibid* 292.
 - 95 *Wood* (2006) 148 FCR 276, 293.
 - 96 Ibid 295, quoting *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [50].
 - 97 *Wood* (2006) 148 FCR 276, 295 (Heerey J).
 - 98 *2UE v Burns* [2005] NSWADTAP 69 (Unreported, O'Connor P, 6 December 2005) [53].
 - 99 (2006) 66 NSWLR 77, 87.
 - 100 Plainly Spigelman CJ did not mean by this expression that whenever a state tribunal has the power to determine existing rights and liabilities between parties it must ipso facto be a 'court of law' — this suggested criterion was criticised in *Hill*, above n 16, 105.
 - 101 *Stockland* (2006) 66 NSWLR 77, 87 (Spigelman CJ).
 - 102 Ibid 88.
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- 103 Ibid. Note that Spigelman CJ accepted, in an earlier but related passage, that it was not necessary that state judges be termed such, rather than say magistrates, the issue being one of substance not form: at 87.
- 104 Repealed by Judiciary Legislation Amendment Act 2006 (Cth) sch 1 item 1.
- 105 *Stockland* (2006) 66 NSWLR 77, 89 (Spigelman CJ), 92 (Hodgson JA), 92 (Bryson JA).
- 106 This inconsistency has been assumed for the purpose of immediate discussion, but it holds true only if the legal conception of a 'judge' can logically be divorced from the legal conception of a 'court'. That such a divorce is possible was a necessary, if silent, premise of the decision of the NSW Court of Appeal in *Stockland*. However, the validity of that premise is doubtful for the reasons set out below in Part III(A)(4). If the premise is unsound, debate about a court having to be comprised of 'judges' becomes a red herring — a discussion of a distinction without a difference.
- 107 (2006) 229 ALR 223.
- 108 Ibid 234–5 (Gleeson CJ), 249–50 (Gummow, Hayne and Crennan JJ), 290 (Callinan J), 302 (Heydon J).
- 109 Ibid 232 (citations omitted). Cf *Wood* (2006) 148 FCR 276, 293 (Heerey J), extracted above in Part III(A)(1).
- 110 *Forge* (2006) 229 ALR 223, 234.
- 111 Ibid 245–6.
- 112 Ibid 234 (Gleeson CJ).
- 113 *Leeth v Commonwealth* (1992) 174 CLR 455, 498 (Gaudron J) (citations omitted). See also *Bagshaw v Carter* [2006] NSWCA 113 (Unreported, Giles, Ipp and McColl JJA, 12 May 2006) [32]–[37] (Ipp JA).
- 114 The precise meaning of this requirement is difficult to discern: see below Part III(A)(4).
- 115 *Forge* (2006) 229 ALR 223, 295, citing *R v Jones* (1972) 128 CLR 221, 229 (Barwick CJ).
- 116 See above n 105. English local courts to this day are still presided over by lay magistrates and rely on legally qualified clerks to give them guidance on the law, yet they are undoubtedly courts in the fullest sense: see, eg, *Boddington v British Transport Police* [1999] 2 AC 143, 162 (Lord Irvine).
- 117 Note also that in *Dao v Australian Postal Commission* (1987) 162 CLR 317, the High Court assumed, although without an express finding, that the then Equal Opportunity Tribunal of NSW, a body closely analogous to the present-day NSWADT, was a court.
- 118 Spigelman CJ's reference in *Stockland* (2006) 66 NSWLR 77 to 'judges' explicitly extended to State magistrates: at 87. But his Honour identified no method of distinguishing between those 'judges' and those who, although appointed to exercise the judicial power of the State of NSW as members of the NSWADT Appeal Panel, his Honour held were not 'judges'. *Forge* (2006) 229 ALR 223, 243–4, 246 (Gummow, Hayne and Crennan JJ) removes any remaining doubt that the *Act of Settlement 1701* (Imp), 12 & 13 Wm 3, c 2 terms of appointment are essential for a State 'judge'.
- 119 This comment was made verbally in response to the author's delivery of the paper on which this case note is based at the Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales: see Duncan Kerr, 'The Federal and State Courts on Constitutional Law: The 2006 Term' (Paper presented at the 2007 Constitutional Law Conference, Sydney, 16 February 2007).
- 120 See above n 98.
- 121 Individually, each of the justices would command the respect of the High Court. However, the weight to be accorded to their decision in *Stockland* (2006) 66 NSWLR 77 may be thought to be slightly lessened because of the reservations expressed, and the questions left open, by Hodgson JA: *Radio 2UE* (2006) 236 ALR 385, 402, 404–5; see also above n 68. Further, exactly what Ipp JA decided, beyond his bare assent to the actual declaration granted by the Court, is difficult to discern. His Honour expressed agreement with both Spigelman CJ and Hodgson JA: at 405.
- 122 Ibid 398–9 (Spigelman CJ).
- 123 Ibid 398–400 (Spigelman CJ).
- 124 Ibid 399 (Spigelman CJ).
- 125 125 (1997) 190 CLR 410.
- 126 Ibid 428–9 (Dawson, Toohey and Gaudron JJ), 449–51 (McHugh J), 461–2 (Gummow J), 476–7 (Kirby J).
- 127 A majority of the High Court was content to proceed on the assumption that the DFA was the Commonwealth: ibid 428 (Brennan CJ), 448 (Dawson, Toohey and Gaudron JJ), 510 (Kirby J). McHugh J made an express finding that it was the Commonwealth: at 460. Gummow J made an implicit finding to the same effect: at 474.
- 128 Residential Tenancies Act 1987 (NSW) pt 6 div 1, repealed by Residential Tribunal Act 1998 (NSW) ss 79–80.
- 129 Residential Tenancies Act 1987 (NSW) s 112(1), repealed by Residential Tribunal Act 1998 (NSW) s 80.
- 130 Ibid 461.
- 131 Ibid 474.
- 132 Ibid 448.
- 133 Ibid 428 (Brennan CJ), 448 (Dawson, Toohey and Gaudron JJ), 461 (McHugh J), 475 (Gummow J). Kirby J dissented: at 512.
- 134 It is not apparent from the judgments whether the power being exercised by the RTT was executive, judicial or a quasi-judicial mixture of both. It is arguable that the correct inference is that the Court took the view that nothing turned on these distinctions as they applied to the jurisdiction of a state tribunal.
- 135 This arises as a consequence of the withdrawal of all relevant State judicial power by Judiciary Act s 39(1) and its immediate reinvestment as federal jurisdiction by s 39(2): see above n 3 and accompanying text.

- 136 The alternative argument would be that *Henderson's Case* (1997) 190 CLR 410 can be distinguished on its facts because, with the exception of a possible costs order, the actual remedies sought in that case could not have been enforced by registration. Section 112(1) (repealed) of the *Residential Tenancies Act* 1987 (NSW) provided for the registration of orders 'of the[RTT] for payment of an amount of money (including any amount awarded as costs)'. Dr Henderson had commenced proceedings in the RTT 'seeking an order that the [DFA] permit [him] to inspect premises at Epping in New South Wales' that he had leased to the Authority: at 449 (McHugh J).
- 137 Spigelman CJ argues that the text and structure of the Australian Constitution, particularly the strong doctrine of separation of powers arising from Ch III, means that a state cannot confer judicial power with respect to any matter referred to in ss 75 or 76 of the Australian Constitution on a non-court tribunal: *Radio 2UE* (2006) 236 ALR 385, 395–6.
- 138 (2006) 148 FCR 276, 288 (Heerey J).
- 139 See above n 73.
- 140 Australian Constitution s 75(iii).
- 141 Australian Constitution s 75(iv).
- 142 Australian Constitution s 76(i).
- 143 Australian Constitution s 76(ii).
- 144 See above n 16.
- 145 See above Pt I for a more detailed explanation of the relationship between these non-self-executing jurisdictional provisions of Ch III of the Australian Constitution and the provisions of the Judiciary Act Pt VI.
- 146 However, in the case of State courts, State judicial power is subject to the provisions of the Judiciary Act Pt VI.
- 147 (2006) 236 ALR 385, 395.
- 148 (1996) 189 CLR 51, 116–19 (McHugh J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 591 (Gleeson CJ), 598–9 (McHugh J), 626–7 (Kirby J).
- 149 *Fardon v A-G (Qld)* (2004) 223 CLR 575, 598–9, 601. See also *Powercoal Pty Ltd v Industrial Relations Commission (NSW)* (2005) 64 NSWLR 406; *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151.
- 150 See above n 15.
- 151 *Henderson's case* (1997) 190 CLR 410, if it does not itself compel that conclusion, is strongly supportive of it: see the discussion of this case above in Part III(B)(1).
- 152 *Ibid* 512.
- 153 (2005) 224 CLR 322, 405–7.
- 154 *Ibid* 483–6.
- 155 See especially *ibid* 484–5.
- 156 See above Part III(B)(4).
- 157 See *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311, 316 (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).
- 158 *New South Wales v Commonwealth* (2006) 231 ALR 1, 147.
- 159 Australian Constitution s 75(iii).
- 160 Australian Constitution s 75(iv).
- 161 At the very least, the ratio of *Henderson's case* (1997) 190 CLR 410 must extend this far, if not further: see above n 136 and accompanying text.
- 162 (2006) 236 ALR 385, 402, 404.
- 163 The Commonwealth Parliament can remove the jurisdiction of any State court over the Commonwealth by a law made under s 77(ii) of the Australian Constitution. That it has not chosen to do so reflects the practical convenience thereby achieved.
- 164 Commonwealth supremacy in respect of the executive can be guaranteed by s 109 of the Australian Constitution. As Gummow J observed in *Henderson's case* (1997) 190 CLR 410,469, '[s]ection 109 ... protects those rights and liabilities against such destruction, modification or qualification by State law as amounts to inconsistency in the constitutional sense.' Further, insofar as it falls within a matter of federal legislative power, the Commonwealth can remove the jurisdiction of any State tribunal over federal matters, should it choose to do so. As to any supposed general doctrine of Commonwealth immunity from such jurisdiction: see Mark Leeming, 'The Liabilities of the Commonwealth and State Governments' (2006) 27 *Australian Bar Review* 217.