SUPREME COURT OF QUEENSLAND

CITATION:	*Owen v Menzies & Ors* [2010] QSC 387
PARTIES:	**RON OWEN** (appellant) **v** **RICHELLE MENZIES** (first respondent) and **TINA JOY COUTTS** (second respondent) and **RHONDA BRUCE** (third respondent) and **SUZANNE MARGARET TURNER** (fourth respondent) and **WOMEN 2 WOMEN** (fifth respondent)
FILE NO/S:	BS10395/08
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	18 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	16 September 2010
JUDGE:	Douglas J
ORDER:	**Set aside the orders of the Anti-Discrimination Tribunal made 19 September 2008 and 27 November 2008 and order that the matter be remitted to the Queensland Civil and Administrative Tribunal to be dealt with according to law.**
CATCHWORDS:	HIGH COURT AND FEDERAL COURT – THE FEDERAL JUDICATURE – NATURE AND EXTENT OF JUDICIAL POWER – ADMINISTRATIVE TRIBUNALS – where the respondents made a complaint against the appellant to the Anti-Discrimination Tribunal Queensland for vilification in contravention of s 124A(1) of the *Anti-Discrimination Act 1991* (Qld) – where the appellant argued before the Tribunal that s 124A of the Act was invalid as inconsistent with the Commonwealth *Constitution* and that the Tribunal was not capable of exercising the judicial power of the Commonwealth to attempt to determine that issue – where

the Tribunal made orders against the appellant without deciding these constitutional arguments – where the Tribunal's orders are registrable – whether the Tribunal impermissibly exercised the judicial power of the Commonwealth

Commonwealth Constitution, s 76(i)

Judiciary Act 1903 (Cth), s 30(a), s 39(1), s 39(2), s 40(1)

Anti-Discrimination Act 1991 (Qld), s 212

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 131, s 132, s 117, s 118, s 259

APLA Limited v Legal Services Commissioner (NSW) [2005] HCA 44; 224 CLR 322, cited

Attorney-General (NSW) v 2UE Sydney Pty Ltd & Ors [2006] NSWCA 349; (2006) 226 FLR 62; (2006) 236 ALR 385, followed

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245, applied

Commonwealth v Anti-Discrimination Tribunal (Tasmania) (2008) 169 FCR 85, followed

Menzies v Owen [2008] QADT 20, cited

COUNSEL: The appellant appeared on his own behalf

S J Hamlyn-Harris for the respondents

SOLICITORS: The appellant appeared on his own behalf

Caxton Legal Centre Inc for the respondents

[1] **Douglas J**: On 19 September 2008 the Anti-Discrimination Tribunal made orders against the appellant, Mr Owen, stemming from a complaint made against him in that Tribunal that he had engaged in a number of public acts in 2005 that incited hatred towards, serious contempt for, or severe ridicule of homosexuals on the ground of their sexuality contrary to s 124A of the *Anti-Discrimination Act* 1991. He appealed to this Court in 2008 against that decision and, in this application, seeks to argue separately one issue arising in the appeal, namely that the Tribunal had improperly attempted to exercise the judicial power of the Commonwealth.

Background

[2] Mr Owen had attempted to argue the appeal in full previously, relying on an affidavit and written submissions each of significant length and relevance that was difficult to discern. The learned judge at first instance and the Court of Appeal decided those documents should not have been filed by him and should be replaced

by more focussed documents.[1] The issue raised in this application filed in the appeal on 8 July 2010 is confined.

[3] Mr Owen argued before the Tribunal that s 124A of the Act was invalid as inconsistent with the Commonwealth *Constitution* and that the Tribunal was not capable of exercising the judicial power of the Commonwealth to attempt to determine that issue. The Tribunal's decisions were able to be enforced under the Act simply by being filed in a court of competent jurisdiction. The argument proceeded, therefore, to the conclusion that the filing of an order of the Tribunal deciding those arguments in this Court would lead to an impermissible exercise of federal jurisdiction. His case was that those arguments were effectively decided against him in the Tribunal because it decided the case against him without deciding those issues. Accordingly he submitted that the orders should be set aside. He also seeks a declaration that the orders made were beyond the powers of the Tribunal.

Proceedings in the Tribunal

[4] The issues were raised before the Tribunal and dealt with by it in these terms:[2]

> "253. Mr Owen argued that there are four constitutional reasons why the Act or parts of it are invalid. These are:
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> o (a) the Tribunal is exercising judicial power and is [*semble* "as"] a Court, it fails to meet the requirement of *"independence and impartiality"* and the provisions establishing it are contrary to Chapter III of the Commonwealth Constitution and are invalid: c.f. *Kable v. Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51;
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> o (b) s.124A of the Act is inconsistent with the protection of freedom of communication provided by the Commonwealth Constitution and is invalid;
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> o (c) s.124A is inconsistent with s.116 of the Commonwealth Constitution, which protects freedom of religion, and is invalid;
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> o (d) ………………………..
>
> 254. The first three of these arguments assert that s.124A of the Act or the parts of the Act that confer power upon the Tribunal are invalid because of their inconsistency with the Commonwealth Constitution.
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> 255. In *Attorney-General v. 2UE Sydney Pty Ltd* (2006) 236 ALR 385, the NSW Court of Appeal decided that a State tribunal is not entitled to consider the Constitutional validity of State legislation in circumstances where an order of the tribunal obtains judicial force upon registration in a Court. I note that Spigelman CJ at [88] described the issue as being virtually devoid of practical significance where there is a right of appeal on a question of law to a Court invested with federal jurisdiction.
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> 256. Section 212(1) of the Act provides that an order of the Anti-Discrimination Tribunal may be enforced by filing a copy of it with a Court of competent jurisdiction. Under s.212(3), the order is then enforceable as if [it] were an order of the Court.
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> 257. I consider that I am not permitted to decide upon the first three of the constitutional arguments raised by Mr Owen."

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1 See *Owen v Menzies* [2010] QCA 137.

2 *Menzies v Owen* [2008] QADT 20.

[5] Nonetheless the Tribunal then proceeded to decide the matter before it without a decision having been made as to those constitutional arguments. The argument, based on the decision in *Attorney-General (NSW) v 2UE Sydney Pty Ltd,*[3] is that it should have referred those issues to this Court for determination before resolving the matter before it finally.

[6] The Tribunal has since been abolished under s 247(1) of the *Queensland Civil and Administrative Tribunal Act* 2009. The Queensland Civil and Administrative Tribunal is the successor in law of the former tribunal[4] but, in respect of an appeal under the *Anti-Discrimination Act* which has been instituted and not finally dealt with, this Court must continue to hear and decide the appeal under the former Act as if it were still in force: see s 259 of the *QCAT Act*. The provision for enforcement of an order of the Anti-Discrimination Tribunal under the former Act by filing a copy of it with a court of competent jurisdiction pursuant to s 212 is, therefore, still relevant to my consideration of the issue raised by the appellant. It was omitted in 2009 but there are similar provisions in s 131 and s 132 of the *QCAT Act*.

[7] At the relevant time s 212 provided:

> "**212 Enforcement of orders**
>
> (1) A person may enforce an order of the tribunal (other than an order entitling the person to payment) by filing with a court of competent jurisdiction a copy of the order certified as a true copy by the registrar.
>
> (2) A person who is entitled to payment under an order may enforce the order by filing with a court of competent jurisdiction—
>
> (a) a copy of the order, certified as a true copy by the registrar; and
>
> (b) an affidavit stating the amount remaining unpaid.
>
> (3) An order is then enforceable *as if it were* an order of the court."
>
> (Emphasis added.)

The Constitutional issue

[8] Mr Owen issued notices pursuant to s 78B of the *Judiciary Act* 1903 (Cth) to the Commonwealth and State Attorneys-General. Those notices identified the matter said to arise under the *Constitution* or involving its interpretation as the submission that proceedings under the *Anti-Discrimination Act* in both the Tribunal and this Court are "invalid and inconsistent with the Judicial Process required under Chapter III and many are inconsistent with the Commonwealth Constitution". The notices then proceeded to specify a number of provisions of the *Anti-Discrimination Act* said to be inconsistent with, amongst other things, the implied freedom of political expression under the *Constitution* and the "Australian Standard of Judicial Process" required under Ch III of the *Constitution*. A range of other Commonwealth legislation with which the *Anti-Discrimination Act* was said to be inconsistent was also set out.

[9] The notices also asserted that when this Court acts to enforce orders of the Tribunal it would not be operating under the procedure required by Ch III of the *Constitution* because the executive "by an improper legislative mechanism, forces the Supreme

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[3] [2006] NSWCA 349; (2006) 226 FLR 62; (2006) 236 ALR 385.

[4] See s 248 of the *QCAT Act*.

Court to automatically give legal force to the Tribunals (sic) orders with only limited power of appeal to review the orders…".

[10] There was no suggestion made in argument before me that the notices were insufficient to notify the Attorneys-General of the relevant issues and I was told that none of them have indicated a wish to appear, at least at this stage of the proceeding. Nor has there been any submission to me that the arguments are not capable of triggering an exercise of the judicial power of the Commonwealth. It was also accepted by the respondents that the Tribunal was not a court of a State as that term is used in s 77(iii) of the *Constitution*.

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

[11] As I have said, the decision on which Mr Owen relied principally was that of the New South Wales Court of Appeal in *Attorney-General (NSW) v 2UE Sydney Pty Ltd*.[5] Before I go on to consider the effect of that decision it will be useful to point out that the Anti-Discrimination Tribunal had, at the relevant times, the ability at any stage of the proceeding to state a written case for the opinion of the Supreme Court on a question of law relevant to the proceeding; see s 216 of the *Anti-Discrimination Act*. This Court was then able to hear and decide the matter raised by the case stated and remit the case with its opinion to the Tribunal which had to give effect to the Court's opinion.

[12] That section of the *Anti-Discrimination Act* has since been removed from that Act but the *QCAT Act* now contains provisions for referring questions of law to the president, who must be a Supreme Court judge, or to the Court of Appeal by the president; see ss 117 and 118. The Court of Appeal is, of course, a division of the Supreme Court.[6] If a question of law is referred to the Court of Appeal under s 118(1) or s 118(2) the Court of Appeal may decide the question and make consequential or ancillary orders and directions; and the Tribunal or Appeal Tribunal must not make a decision about the matter for which the question arose or is relevant until it receives the Court of Appeal's decision on the question; and the Tribunal or Appeal Tribunal must not proceed in a way, or make a decision, that is inconsistent with the Court of Appeal's decision on the question.

[13] *Attorney-General (NSW) v 2UE Sydney Pty Ltd* was a decision similar factually to this one. There had been a complaint of homosexual vilification to the equal opportunity division of the New South Wales Administrative Decisions Tribunal where the Tribunal had ordered the respondent, a company that operated radio station 2UE, to broadcast an apology. There was then an appeal to the Appeals Panel of the Administrative Decisions Tribunal which argued that the equivalent section to s 124A of the *Queensland Anti-Discrimination Act*, namely s 49ZT of the *Anti-Discrimination Act* 1977 (NSW), was invalid or should be read down, because it contravened the constitutional immunity for political speech.

[14] The New South Wales Attorney-General intervened in the case, arguing that the Appeal Panel did not have the jurisdiction to hear or determine a question arising under the *Constitution* or involving its interpretation. The Appeal Panel found that the Administrative Decisions Tribunal did have that power and the Attorney-

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5 [2006] NSWCA 349; (2006) 226 FLR 62; (2006) 236 ALR 385.

6 *Supreme Court of Queensland Act* 1991 s 16(1)(b).

General applied to the Court of Appeal for orders determining the jurisdictional issues.

[15] Spigelman CJ identified the issue before the Court of Appeal as:[7]

> "…whether or not Ch III of the *Constitution* and/or s 39 of the *Judiciary Act* have the effect that the Appeal Panel is precluded from considering the Constitutional immunity for political speech in the course of interpreting the *Anti-Discrimination Act*, in the light of the directive of the New South Wales Parliament contained in s 31 of the *Interpretation Act*."

[16] Section 31 of the *Interpretation Act* 1987 (NSW) is their provision providing that an Act or instrument should be construed as operating to the full extent of, but so as not to exceed the legislative power of Parliament. The equivalent in Queensland is s 9 of the *Acts Interpretation Act* 1954.

[17] In *Attorney-General of New South Wales v 2UE Sydney Pty Ltd* there was a similar power to give judicial force to the Tribunal's decision upon mere registration of the orders in the New South Wales Supreme Court as that which existed here under s 212 of the *Anti-Discrimination Act*. It was that power which persuaded the Court of Appeal that the Tribunal's otherwise permissible action of considering and interpreting the constitutional immunity for political speech by reference to the relevant section of the *Anti-Discrimination Act* became an impermissible exercise of federal jurisdiction.[8] In reaching that conclusion the court relied upon the approach of the High Court in *Brandy v Human Rights and Equal Opportunity Commission.*[9]

[18] Spigelman CJ's reasons including the following passages:[10]

> "[76] From the perspective of Ch III, the Appeal Panel is a manifestation of the Executive. The rigour of Australian Ch III jurisprudence does not permit a distinction to be drawn between a quasi-judicial tribunal and any other executive agency. The position of the Tribunal is no different to that of a Minister. Consider the case of a statute which provides that a Minister's opinion about the Constitutional validity of a State Act can be registered as a judgment of the Supreme Court, enforceable as such against the persons involved in a dispute. It is only necessary to state that proposition to realise that it cannot be right. The Tribunal and Appeal Panel are in no different position.
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> [77] It makes no difference that, by s119 of the ADT Act, a party to proceedings before an Appeal Panel may appeal to the Supreme Court on any question of law or that by s122 of the ADT Act the judicial review jurisdiction of this Court, with respect to the Tribunal and the Appeal Panel, is preserved.
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> [78] The legislation under consideration in *Brandy* provided that, although upon registration a determination had effect as if it were an order made by the Federal Court, no action to enforce the determination could be made pending a 'review' by the Federal Court of the determination. Upon such an application for review being made, the Court had power to review 'all issues of fact and

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[7] See at [38].

[8] See at [70] – [80] of the decision of Spigelman CJ with whom Ipp JA agreed.

[9] (1995) 183 CLR 245. See *Attorney-General of New South Wales v 2UE Sydney Pty Ltd* at [75].

[10] See at [76] – [80].

law'. This did not save the legislation there under consideration. The use of the word 'review' rather than the word 'appeal' as in the present legislation is not material: see *Brandy* at 261.

[79] Indeed, as Mr Sexton submitted, the present legislation is more restrictive insofar as it does not permit any appeal with respect to questions of fact. In this case, as in *Brandy,* the Tribunal's decision has effect upon registration and becomes enforceable even if the appeal provisions are not invoked: see *Brandy* at 261-262 and 270-271.

[80] A State tribunal may, in my opinion, consider the Constitutional validity of State legislation in the course of the exercise of its statutory powers. However, no State tribunal can exercise the judicial power of the Commonwealth. The registration provisions to which I have referred have the consequence that if the Tribunal and Appeal Panel proceed to do the former, they will purport to do the latter."

[19] His Honour had previously said:[11]

"Even if the Appeal Panel, after due consideration, upheld the orders of the Tribunal, whether it did so after reading down the terms of s 49ZT or after determining that the Constitutional immunity had no effect upon the section, it could still be said that the Appeal Panel was determining the Constitutional issue in a manner binding on the parties."

[20] In this case the member of the Tribunal determined the matter without reference to the constitutional issues sought to be argued before him. That does not seem to me to be an appropriate way in which to determine the case. It results in a decision binding on the parties which, effectively, in this case, determined the constitutional issues against the appellant without their having been considered by the Tribunal or by a court with jurisdiction to determine them.

[21] That practical problem had not yet been reached before the New South Wales Supreme Court given the procedure which brought the matter to the Court of Appeal. Nonetheless, Spigelman CJ said that there were different ways in which the issue sought to be agitated before the Appeal Panel could be resolved:[12]

"Given the stage which the present proceedings have reached a reference of a question of law to the Supreme Court pursuant to s118 of the ADT Act would appear to be the most efficacious. *However, that is a matter for the parties and the Appeal Panel. The Constitutional issue having been raised the Panel cannot proceed to determine the matter on an assumption that there is no Constitutional question.*" (Emphasis added).

[22] Hodgson JA, in canvassing a number of possible alternatives to the exercise of that Tribunal's power, which did not, at first instance, permit the referral of a matter of law to the Supreme Court, said:[13]

"However, unless and until the registration provisions were held to be invalid by a court, or else amended as suggested by Spigelman CJ, the appropriate course for the Appeal Panel would be *to refrain from*

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11 See at [63].

12 See at [90].

13 See at [116].

> *deciding a Constitutional question, and thus from deciding any appeal that depended on a Constitutional question, unless and until that question had been decided by a court*." (Emphasis added).

What should the Tribunal have done?

[23] The solution to the problem that could and should have been adopted here by the Tribunal was to refer the issues arising under the *Constitution* to this Court for determination using its power under s 216 of the *Anti-Discrimination Act*. The passages I have just referred to from the reasons in *Attorney-General of New South Wales v 2UE Sydney Pty Ltd* suggest such a course and it would have resolved the issue. That it was not done is unfortunate as the consequence is that the decision of the Tribunal should be set aside. By ignoring the constitutional issues raised in the matter before it the Tribunal has determined them effectively in favour of the respondents and made a decision which will bind the appellant on the filing of the orders in this Court in an impermissible purported exercise of the judicial power of the Commonwealth.

[24] In supplementary written submissions Mr Hamlyn-Harris for the respondents tried to persuade me to distinguish or not follow *Attorney-General of New South Wales v 2UE Sydney Pty Ltd*. He argued that the language of s 212(3) in providing that a Tribunal "order is then enforceable *as if it were* an order of the court" after filing with a court implies that the order does not become an order of the court, but is merely enforceable as if it were such an order. As I point out below, however, the language of enforceability "*as if it were* an order" of the court mirrors that used in *Brandy v Human Rights and Equal Opportunity Commission,*[14] and warrants the conclusion that it constitutes an exercise of judicial power.

[25] Mr Hamlyn-Harris also argued that it was not the registration provision in s 212 that gave the decisions of the Tribunal their force and authority. In Queensland, he submitted, the lawful authority of the Tribunal was derived from the *Anti-Discrimination Act* conferring jurisdiction on the Tribunal as a State tribunal exercising entirely State jurisdiction and the Queensland registration provisions merely provided a convenient mechanism for enforcement through an existing court registry structure.

[26] They remain, however, the only statutory means of enforcement of the Tribunal's decision which is one that deals with a matter peculiarly within the judicial power of the Commonwealth, namely part of a matter or cause arising under the *Constitution* or involving its interpretation,[15] and the making of orders consequential on that interpretation. That is a subject matter within the original jurisdiction of the High Court[16] and exclusive of the jurisdiction of State courts by s 39(1) of the *Judiciary Act* 1903 (Cth) except insofar as State courts have been invested with federal jurisdiction pursuant to s 39(2). State courts have been invested with the jurisdiction to deal with matters or causes arising under the *Constitution* or involving its interpretation pursuant to s 39(2) but it would seem strange to construe s 39(1) to permit State tribunals, which are not State courts and not characterisable as courts for the purpose of exercising the judicial power of the Commonwealth, to

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14 (1995) 183 CLR 245, 264.

15 See s 76(i) of the Commonwealth *Constitution* and ss 30(a) and 40(1) of the *Judiciary Act* 1903 (Cth).

16 Section 30(a) of the *Judiciary Act.*

exercise such a jurisdiction conclusively, by what amounts to an exercise of judicial power, in the absence of a specific authorisation.[17] The carving out of specific subject matters from the High Court's original and exclusive jurisdiction for the benefit of State courts by s 38 and s 39 of the *Judiciary Act* hardly permits the conclusion that there remains some unstated residual jurisdiction to exercise the judicial power of the Commonwealth available to State tribunals.

[27] The correct approach to the issue whether a State tribunal can exercise the judicial power of the Commonwealth seems to me to be that articulated by Kenny J in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*:[18]

> "[219] The Court of Appeal [in *Attorney-General of New South Wales v 2UE Sydney Pty Ltd*] held that the appeal panel of the Administrative Decisions Tribunal had no jurisdiction to determine whether the State's anti-discrimination legislation should be read down so as not to infringe the constitutional implication of freedom of communication for political speech. In *2UE* 236 ALR 385, the Court followed its decision in *Stockland* 66 NSWLR 77 that the Administrative Decisions Tribunal was not a court for the purposes of s 39 of the *Judiciary Act*. As Spigelmen CJ, with whom Ipp J agreed, said, at 391, the Administrative Decisions Tribunal and the appeal panel were administrative bodies with statutory powers, the exercise of which had legal consequences. The Chief Justice explained that (at 392):
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> > But for any disentitling provision, whether statutory or constitutional, I do not doubt that it is open to the tribunal to approach the task of interpretation with a view to bringing the operation of s 49ZT into conformity with the constitutional immunity, assuming there to be any disconformity. The issue before the Court is whether there is any such disentitling provision in the Commonwealth Constitution or in a Commonwealth statute.
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> [220] In answering this in the affirmative, Spigelman CJ said (at 395):
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> > Federal jurisdiction, in the sense of the exercise of the judicial power of the Commonwealth, cannot be exercised by a tribunal as a manifestation of the executive arm of government, whether of the Commonwealth or of a state. That restriction arises by reason of the text and structure of the Constitution, including particularly the strong doctrine of separation of powers arising from Ch III of the *Constitution*.
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> > …
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> > A state parliament cannot 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*.

[17] See and cf Geoffrey Kennett, *Fault Lines in the Autochthonous Espedient: The Problem of State Tribunals*, (2009) 20 PLR 152, 157-166 where the author argues inconclusively that a residual power in State tribunals to exercise "federal jurisdiction" or the "judicial power of the Commonwealth" may exist because they are not courts and are exercising a jurisdiction derived entirely from State law even when that jurisdiction intersects with a constitutional issue.

[18] (2008) 169 FCR 85, 136-138 at [219]-[223].

[221] In support of this latter proposition, his Honour quoted the following passage from the judgment of Jacobs J in *Commonwealth v Queensland* (1975) 134 CLR 298 at 327-328:

> In my opinion the judicial power delineated in Ch III is exhaustive of the manner in and the extent to which judicial power may be conferred on or exercised by any court in respect of the subject matters set forth in ss 75 and 76, 'matters' in those sections meaning 'subject matters'. This is so not only in respect of federal courts but also in respect of State courts whether or not they are exercising jurisdiction conferred on them under s 77(iii). In respect of the subject matters set out in ss 75 and 76 judicial power may only be exercised within the limits of the kind of judicial power envisaged in Ch III and if in respect of those matters an investing with federal jurisdiction of a State court does not enable it to perform the particular judicial function, then in respect of those matters the State court cannot under any law exercise that judicial function. Therefore, if in respect of those matters a State court exercising federal jurisdiction cannot give 'advisory opinions' it cannot in respect of the same matters give such opinions in exercise of some State jurisdiction. Chapter III of the *Constitution* is so constructed that the limits of the Commonwealth power to invest State courts with federal jurisdiction with respect to the matters mentioned in ss 75 and 76 mark out the limits of the judicial power or function which in any case State courts can exercise in respect of those matters. A State thus could not empower one of its courts to give advisory opinions on those subject matters. The court would be exercising judicial power but not a judicial power envisaged by Ch III and able to be conferred on it by the Commonwealth. It is then no answer to say that the State is conferring a judicial power which the Commonwealth is unable to confer. There is here no residuary State power, because Ch III is an exhaustive enunciation.

[222] I accept, as indeed, the above passage indicates, that Ch III of the *Constitution* is the sole source of Commonwealth judicial power, which is the only power exercisable when federal jurisdiction is attracted. Federal jurisdiction is attracted whenever there is an exercise of judicial power in respect of a matter of the kind described in ss 75 and 76 of the *Constitution*. Furthermore, Ch III precludes the existence of residuary State judicial power in respect of any such matter. It follows from this that a State Parliament cannot confer State judicial power on either a State court or tribunal in respect of a matter in ss 75 and 76 of the *Constitution*, because these matters attract federal jurisdiction in which only Commonwealth judicial power is exercisable. If this were not so, then, as the Commonwealth submitted:

> [A] State could avoid the effect of Commonwealth laws giving exclusive jurisdiction to a federal court (as contemplated by s 77(ii) of the *Constitution*) or attaching conditions or restrictions to the investiture of federal jurisdiction in State courts (as in s 39(2) of the Judiciary Act) by conferring

> jurisdiction on a State tribunal in the matters specified in ss 75 and 76 of the *Constitution*.

This restriction on the State legislative and judicial power lives in the text and structure of Ch III of the *Constitution*. This restriction is, so it seems to me, 'logically or practically necessary for the preservation of the integrity of that structure': see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 per Mason CJ. I would not, therefore, accede to the contrary submissions made on Mr Nichols' behalf.

[223] Furthermore, I agree with Spigelman CJ, for the reasons he advanced in *2UE* 236 ALR at 395 that:

> [E]ven if it could be argued that covering cl 5 [of the *Constitution*] conferred on 'courts, judges' and, relevantly, quasi-judicial tribunals, something that was accurately described as 'jurisdiction', that could only be true on an interim basis pending the exercise by the parliament of the power in s 77(ii) to exclude such jurisdiction, a power which has long since been exercised in s 39(2) of the Judiciary Act. This role of covering cl 5 is now spent, with only the theoretical possibility of a revival if the relevant provisions of the Judiciary Act were repealed.

Covering cl 5 of the *Constitution* can no longer be a source of federal jurisdiction, or something akin to it: compare *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1136-1137 per Griffith CJ, Barton and O'Connor and 1142-1143 per Isaacs J; *Lorenzo v Carey* (1921) 29 CLR 243 at 252 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ and 255 per Higgins J; and *Felton v Mulligan* (1971) 124 CLR 367 at 394 per Windeyer J and 411-412 per Walsh; and *Moorgate Tobacco Company Ltd v Philip Morris Ltd* (1980) 145 CLR 457 (*Moorgate*) at 479 per Stephen, Mason, Aickin and Wilson JJ and 471 per Gibbs J. The argument for Mr Nichols identified no further source of the jurisdiction of State courts to decide matters in which the Commonwealth was a party. Indeed, this proposition is, so it seems to me, ultimately inconsistent with the position established in the jurisprudence of the High Court since *Moorgate*."

[28] What Spigelman CJ said in *Attorney-General of New South Wales v 2UE Sydney Pty Ltd* at [80], set out above[19] also seems to me to reflect what was said in the reasons of Mason CJ, Brennan J and Toohey J in *Brandy v Human Rights and Equal Opportunity Commission*:[20]

> "It follows from what has been said in these reasons that the Act, in providing for registration of a determination of the Commission and its enforcement *as if it were* an order of the Federal Court, purports to provide for an exercise of judicial power by the Commission and that the jurisdiction conferred on the Federal Court to review a determination of the Commission does not provide a sufficient answer to this conclusion.

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19 At [18].

20 (1995) 183 CLR 245, 264. See also the reasons of Deane, Dawson, Gaudron and McHugh JJ at 270-271.

> The consequence is that so much of the Act as provides for registration and enforcement of a determination is invalid." (Emphasis added.)

[29] That the Tribunal here is a State tribunal rather than a creation of a Commonwealth statute does not, in my view, alter the result. Rather than refuse to follow or distinguish *Attorney-General of New South Wales v 2UE Sydney Pty Ltd* I should follow it. In my respectful view it is correct and applicable to this case.[21] Once the permissible discussion of the effect of a matter arising under the *Constitution* or involving its interpretation on a case before a State tribunal achieves the form of a purportedly enforceable order, by the expedient simply of filing it in the registry of a court of competent jurisdiction, it seems to me that there has been an exercise of the judicial power of the Commonwealth by a body, here the Tribunal, on which that power has not been conferred.

[30] This conclusion follows from the decision in *R v Kirby; ex parte Boilermakers' Society of Australia*[22] and the discussion by Gummow J in *APLA Limited v Legal Services Commissioner (NSW)*[23] where his Honour summarised a number of principles relevant to the application of Ch III of the *Constitution* including the first, that "no part of the judicial power of the Commonwealth can be conferred other than by virtue of, and in accordance with, the provisions of Ch III of the Constitution. This was settled in the *Boilermakers' Case* …", and the fourth, that "the powers of the Parliament just mentioned are necessarily exclusive of those of the legislatures of the States".

Conclusion and orders

[31] Therefore the decision and orders of the Anti-Discrimination Tribunal should be set aside and referred back to QCAT. The practical effect of that would seem to be that the president of QCAT will then need to refer the matter back to this Court in the form of the Court of Appeal for the determination of those constitutional arguments, pursuant to s 118 of the *QCAT Act,* a course which is likely to be time consuming and clumsy but appears to me to be dictated by the "strict requirements of Ch III jurisprudence".[24] Once those issues have been litigated before a court capable of exercising the judicial power of the Commonwealth and a binding determination made, perhaps by a declaration, which must be applied by the Tribunal it seems to me that the constitutional or federal issues will have been determined validly even if the final orders are ones which issue from the Tribunal. In other words there will be an issue estoppel binding the parties arising from an adjudication of a Ch III court.[25]

[32] Accordingly I shall set aside the orders of the Anti-Discrimination Tribunal made 19 September 2008 and 27 November 2008 and order that the matter be remitted to the Queensland Civil and Administrative Tribunal to be dealt with according to law.

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[21] In saying this I recognise that it has been criticised in Kerr, *State Tribunals and Chapter III of the Australian Constitution*, (2007) 31 Melbourne University Law Review 622; [2007] MULR 24, as potentially inconsistent with *Re Residential Tenancies Tribunal (NSW); Ex parte the Defence Housing Authority* (1997) 190 CLR 410 and inherently unstable. See: http://www.austlii.edu.au/au/journals/MULR/2007/25.html#_Ref172459211

[22] (1956) 94 CLR 254, 273-275;

[23] [2005] HCA 44; 224 CLR 322, 405-407 at [227]-[233]; See also *MZXOT v Minister for Immigration and Citizenship* [2008] HCA 28; (2008) 233 CLR 601, 618 at [20].

[24] See *Attorney-General of New South Wales v 2UE Sydney Pty Ltd* at [87].

[25] Accordingly I disagree with the statement by Kennett, op cit, at 161.

I see no need to make the declaratory order sought in addition to the order I propose as the orders made would not be beyond the powers of the Tribunal if the procedure I suggest had been adopted in the first place.