Australia’s integrated judicial system is a product of Chapter III of *The Constitution*. This scheme, created pursuant to *Constitution* and the *Judiciary Act 1903*, results in a considerable number of cases involving important questions of constitutional law falling for decision in state courts and federal courts other than the High Court of Australia.

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 Commonwealth. 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 an immediate need to establish further federal judicial institutions an autochthonous Australian constitutional device, s 77 of the *Constitution*, empowered the Commonwealth Parliament to invest federal judicial power not only upon such other courts as it might later create but also upon state courts. To ensure Commonwealth supremacy in respect of this grant of federal judicial power s 77(ii) of the *Constitution* permitted the 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 1903* enacted under that power now provides that the jurisdiction of the High Court is exclusive of the jurisdiction of the courts of the States in respect of a limited range of matters, most importantly those involving suits between States or between States and the Commonwealth. In respect of the larger residuum ss 38 and 39(1) of the *Judiciary Act 1903* first entirely removes from, but then returns to, ‘the several Courts of the States’ the right to exercise federally invested 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, the most important of which is provided in s 39 (2) (d) which provides that the federal jurisdiction of a State Court of summary jurisdiction can only be exercised by a stipendiary or Police or Special Magistrate—thus excluding courts comprised of lay justices the right to exercise federal jurisdiction.

This important statutory device thus first withdrew from state courts all state judicial power that overlapped the judicial power of the Commonwealth; including, for illustrative purposes, jurisdiction over litigation between ‘residents of different States’ where, prior to the passage of the *Judiciary Act 1903* state courts, subject to the rules of private international law, routinely exercised state judicial power.

The *Judiciary Act* then re-invested the several courts of the States with the substance of their previously withdrawn jurisdiction (except in respect of matters defined in s 38) as an aspect of the judicial power of the Commonwealth. Since 1903 this scheme has permitted state courts to concurrently exercise both federal and state judicial power as part of an integrated Australian judicial system.

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2 Any cause under the *Constitution* or requiring its interpretation potentially may be removed from a State court into the High Court, but that course is not routinely taken and is usually reserved for matters of significant public interest—see *Judiciary Act 1903* s 40
The 2006 year was particularly rich in such jurisprudence.

About 20 illustrative examples are grouped by subject matter and summarised in brief at the end of this paper—but a substantive examination of even that limited number of cases would be impractical. Instead, as requested by the conference organisers, this paper will focus thematically on a selection of four cases that address the distribution of judicial power between the Commonwealth and the States.

The group of four cases I will focus upon are, *Radio 2UE Sydney Pty Ltd v Burns (2UE v Burns) (EOD) [2005] NSWADTAP 69*, *Commonwealth of Australia v Wood (Wood) [2006] FCA 60, Trust Company of Australia Limited (trading as Stockland Property Management) v Skiwing Pty Ltd (trading as Café Tiffany’s) (Stockland) [2006] NSWCA 185* and *Attorney-General v 2UE Sydney Pty Ltd & Ors (Radio 2UE). [2006] NSWCA 349*

*Wood and Stockland* allow us to compare and contrast two quite different approaches taken by the Federal Court and the NSW Court of Appeal towards the question of whether state tribunals may be regarded as courts of a State for the purposes of the *Constitution* and the *Judiciary Act 1903*.

*2UE v Burns* and *Radio 2UE* permit us to contrast different approaches to the question, whether state tribunals that are not ‘courts of a State’ are limited in their ‘jurisdiction’ over federal questions in consequence of implications arising from Chapter III of the *Constitution*.

This group of four decisions demonstrates the seeming protean possibility of Chapter III jurisprudence and highlights the ongoing potential overflow of that jurisprudence from the federal to the state sphere.

The consequences of this potential overflow cannot yet be fully known. Further litigation is likely as lawyers representing clients unwillingly involved in state administrative proceeding explore the possibilities of Ch III challenges as a bar to jurisdiction. It seems inevitable that the some of the questions raised by these cases will eventually return to the High Court.

For the foreseeable future the functioning of state tribunals, particularly those exercising admixed administrative and judicial functions, risks being inflicted with increasing complications regarding their power and jurisdiction not previously evident.

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3 Included for convenience as the first of the series although decided December 2005.
5 Special leave has been sought in *Stockland* but the grounds raised do not involve the constitutional issues discussed in this paper. From the point of view of the appellant seeking leave, 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) in relation to misleading and deceptive conduct.
The cases: facts and context

2UE v Burns

In 2UE v Burns Judge O’Connor of the Appeal Panel of the New South Wales Administrative Decisions Tribunal decided that that Tribunal was a court both in the ‘general sense’ and in the ‘Judiciary Act sense’.

The issue arose in the following way. A member of the public, Mr Burns, made a complaint about homosexual vilification to the Equal Opportunity Division of the NSW Administrative Decisions Tribunal. He complained about comments made by radio presenters John Laws and Steve Price that had been broadcast by radio station 2UE.

The Tribunal upheld the complaint under s 49ZT of the Anti-Discrimination Act 1977 (NSW) (the ADA). The Tribunal ordered 2UE to broadcast an apology to be read by Mr Laws and Mr Price.

Mr Laws, Mr Price and Radio 2UE appealed to the Appeals Panel of the Administrative Decisions Tribunal.

Their submissions challenged the constitutional validity of s 49ZT of the ADA. They argued that the New South Wales law placed an unlawful burden on their freedom of political communication, an implied right under the Commonwealth Constitution.

The Attorney General (NSW) intervened. He objected to the Tribunal considering this question on the ground that the Tribunal was not a ‘court’ within the meaning of s39(2) of the Judiciary Act 1903 and therefore was not invested with the authority to hear matters arising under the Constitution or involving its interpretation.

The Attorney argued that as administrative body constituted under state law, the Tribunal was bound to accept the constitutional validity of the laws of New South Wales including s 49ZT of the ADA. The Attorney General contended that if an argument of inconsistency with the Constitution was advanced the Tribunal was obliged to refer any such question to the Supreme Court pursuant to the Administrative Decisions Tribunal Act 1997 (NSW) s 118(1)\(^6\).

Judge O’Connor rejected the argument that Tribunal (both as constituted generally and more particularly, the Appeal Panel) was not a court.

His Honour also rejected the Attorney’s associated proposition that, assuming the Tribunal was not a court, it lacked authority to form a view regarding the validity of a state statute on the grounds it was inconsistent with Commonwealth law.

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\(^6\) Facts paraphrased from 2UE v Burns [1]-[7]. Note that while the Appeal Panel had power to refer such a question to the Supreme Court pursuant to s118(1) a similar power was unavailable to the Tribunal at first instance—creating the dilemma later noted by Hodgson JA in Radio 2UE at [103].
His Honour held 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—and was both competent and obliged to consider any question of law relating to its jurisdiction.

Wood

The litigation in Wood involved a challenge by the Commonwealth to the Anti-Discrimination Tribunal of Tasmania exercising any authority in respect of a matter in which the Commonwealth was itself a party.

The issue arose as follows.

In late 2000 Eleanor Tibble, a 15 year old former Air Force Cadet, hanged herself in a shed on her mother’s property. A military investigation conducted after Ms Tibble’s death revealed that earlier disciplinary allegations made against her had been badly mismanaged.

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% to Eleanor’s decision to commit suicide.

Soon after Eleanor’s death her mother, Mrs. Campbell, found her daughter’s body. Mrs. Campbell was deeply traumatized. She wanted to make sure similar mishandling of disciplinary allegations against young cadets could never happen again.

Among the steps Mrs. Campbell took was to complain to the Tasmanian Anti-Discrimination Commissioner, on her own and on her deceased daughter’s behalf. Her complaint included allegations against the Cadets of discrimination on the basis of age and gender in education and training/or membership and activities of clubs. Mrs. Campbell sought orders directed to prevent further discriminatory conduct. Her complaint was accepted by the Commissioner and referred to the Tribunal, constituted by Magistrate Helen Wood, for determination.

Mrs. Campbell’s complaints identified two Cadet Officers and the Australian Air Force Cadets as the parties against whom she sought remedies but after hearing preliminary submissions Ms Wood ruled that the Commonwealth should be substituted for the Australian Air Force Cadets as the proper party.

The Commonwealth then applied to the Federal Court seeking orders to prevent the Tribunal from further hearing and determining the complaints.

The Commonwealth’s submissions to the Federal Court were summarised by Heerey J as follows;

‘…that it is a necessary implication from Ch III that a State tribunal (i.e. a body which is not a "court of a State") cannot exercise any part of the judicial power of the Commonwealth”7.

7 At [51]
The prohibition contended for by the Commonwealth extended not only to matters in which the Commonwealth itself was a party but, for example, to all matters that involved residents of other states and all matters arising under any law made by the federal parliament.

Conceived in this way the contended limitation bore little resemblance to that which had been proposed by the Attorney General (NSW) in *2UE v Burns*. There the Attorney had submitted that because a tribunal could not exercise the judicial power of the Commonwealth it was obliged to accept the validity of any state legislation under which it operated.

As articulated by the Commonwealth in *Wood*, the prohibition would remove all jurisdiction from a tribunal whenever a case required any exercise of judicial power touching upon a federal question. That circumstance would instantly remove authority from a tribunal in respect of the entire matter.

Heerey J however decided the threshold question against the Commonwealth.

His Honour held that the Tasmanian Anti-Discrimination Tribunal was in fact a court of the State of Tasmania for the purposes of the receipt of federal jurisdiction. As such it had undoubted jurisdiction.

Heerey J did not find it necessary to adjudicate upon the wider propositions advanced by the Commonwealth.

**Stockland**

The Ch III issue in *Stockland* arose as a matter of statutory interpretation.

Skiwing Pty Ltd conducted a café in a shopping arcade owned by Stockland Property Management. Skiwing brought various claims before the Retail Leases Division of the Administrative Decisions Tribunal of New South Wales. Skiwing’s claims included alleged breaches of s 52 of the *Trade Practice Act 1974* (Cth). Federal legislation governed whether or not the Tribunal had the power to deal with these federal claims.

At one level the issue was a routine question of statutory interpretation. Section 86(2) of the *Trade Practices Act 1974* provided;

> 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 1903* and was clearly

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8 Constitution s 75(iv)
9 Judiciary Act 1903 and Constitution s 76(ii)
intended to confer jurisdiction on every court and tribunal that answered the description of a ‘court of a State’ in section 77(iii) of the Constitution.

Approaching the matter in the same manner as in *2UE v Burns* the Appeal Panel of the New South Wales Administrative Decisions Tribunal held that the Retail Leases Division of the Administrative Decisions Tribunal was a ‘court of the State’ and, as such, had jurisdiction to entertain Skiwing’s s 52 claim.

Stockland appealed to the Supreme Court of New South Wales Court of Appeal.

The Court of Appeal (Spigelman CJ, Hodgson and Bryson JJA concurring) held that it was not permissible to treat the Retail Leases Division of the Administrative Decisions Tribunal as a separate from its other constituent parts.

It concluded that, taken as a whole, the New South Wales Administrative Decisions Tribunal was not a ‘court of a State’ in the context of federal constitutional law.

The Court of Appeal disapproved the reasoning of Judge O’Connor in *2UE v Burns*.

It held that an essential feature of a ‘court of a State’, as that term is used in Chapter III, is that it be an institution exclusively or at least predominantly composed of judges 10.

The Court of Appeal acknowledged that its conclusion in that regard was inconsistent with the approach taken by Heerey J in *Wood* 11.

**Radio 2UE**

In the aftermath of *Stockland* a slightly differently constituted NSW Court of Appeal (Spigelman CJ, Hodgson and Ipp JJA) formally overruled 12 Judge O’Connor’s decision in *2UE v Burns*.

Their conclusion that the Administrative Decisions Tribunal was not a ‘court of a State’ for the purposes of the *Constitution* and the *Judiciary Act 1903* accordingly then required the Court of Appeal to address the consequential question of how a NSW administrative body should have dealt with the asserted inconsistency of state law with the federal *Constitution* that had been the subject of submissions on behalf of Mr Laws, Mr Price and Radio 2UE.

10 *Stockland* [29], [59], [65], [79],[84]. The Court of Appeal also concluded that applying ordinary principles of categorisation to the characteristics of the ADT resulted in the same outcome [66].

11 *Stockland* [67]

12 On the application of the Attorney General (NSW)—none of the other parties to the proceedings contending that *Stockland* should be re-opened.
In the earlier proceedings under appeal Judge O’Connor had held the Tribunal, even if it was not ‘a court of a State’ was both competent and obliged to consider any question of law relating to its jurisdiction.

The Court of Appeal in Radio 2UE however declared that the Appeal Panel of the Administrative Decisions Tribunal lacked jurisdiction to determine whether s49ZT of the Anti-Discrimination Act 1977 (NSW), should be read down so as not to infringe the constitutional implication of freedom of communication about government matters.

But the Court of Appeal reached its conclusion for reasons other than had been submitted on behalf of the Attorney General (NSW).

Spigelman CJ held that ordinarily a state tribunal could consider submissions regarding the constitutional validity of State legislation in the course of the exercise of its statutory powers.

Hodgson JA rejected the Attorney’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 Commonwealth Constitution.

The Tribunal (and the Appeal Panel) was held to lack jurisdiction ‘solely on the basis’ its decisions could be registered in and enforced as orders of the Supreme Court.

The Court of Appeal based this conclusion on Brandy v Human Rights and Equal Opportunity Commission and on the underlying premise articulated by Spigelman CJ that it was impermissible for ‘a State Parliament [to] confer on a court, let alone a tribunal, judicial power with respect to any matter referred to in s75 or 76 of the Constitution’.

Because decisions of the Tribunal could be enforced by registration in a court it gave them judicial force and converted what would otherwise have been an inherent and legitimate step in the administrative decision making process into a binding decision and an impermissible exercise of federal judicial power.

Discussion

When is a tribunal a ‘court of a State’?

Speaking of judicial power, the High Court has observed that;

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13 Radio 2UE per Spigelman CJ [96], but note the ‘understanding’ of that declaration expressed by Hodgson JA [117]. Ipp JA agreed with both Spigelman CJ and Hodgson JA [118]
14 Radio 2UE [70], [107], [111], [118]
15 Radio 2UE [80]
16 Radio 2UE [106], [110], [111]
17 Radio 2UE [70] per Spigelman CJ
18 (1995) 183 CLR 245] Note that Hodgson JA foreshadowed, but ultimately rejected, the view that Brandy was distinguishable [112], [114]
19 Radio 2UE [56], Ipp JA concurring [118]
The 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\textsuperscript{20}.

The same is equally true of 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 identifiable hallmark by which a court...may unerringly be identified. It is largely a matter of impression\textsuperscript{21}.

If no test can be definitive, differences between judges as to whether or not a particular body is or is not a ‘court’ should not surprise.

In \textit{Stockland} the Court of Appeal accepted that the Administrative Decisions Tribunal had many of the indicia of a court\textsuperscript{22}. It accepted that, Ch III considerations aside, the question of whether or not that body was a court was finely balanced\textsuperscript{23} and that for many statutory purposes the Tribunal would have sufficient of the characteristics of a court to allow a finding that it met that description\textsuperscript{24}.

As if to emphasise this point a later and differently constituted NSW Court of Appeal (Handley, Basten and McDougal JJA) in \textit{Trust Company of Australia Ltd v Skiwing Pty Ltd.}\textsuperscript{25} held that the Appeal Panel of the Administrative Decisions Tribunal\textsuperscript{26} possessed the relevant characteristics to be a “court” of New South Wales for the purposes of the \textit{Suitors’ Fund Act 1951} (NSW).

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

Let me first set out the two contending positions.

\textbf{The position of the Federal Court}

In \textit{Wood}, Heerey J, relying on \textit{North Australian Aboriginal Legal Aid Service Inc v Bradley}\textsuperscript{27} (Bradley), held that the critical test of whether or not the judicial power of

\textsuperscript{20} \textit{Precision Data Holdings v Wills} (1991) 173 CLR 167 per Mason CJ, Brennan, Deane, Dawson, Toohey Gaudron and McHugh JJ [22] pp188-9

\textsuperscript{21} \textit{Attorney General v BBC} (1981) AC 303 per Edmund-Davies LJ at p 351

\textsuperscript{22} \textit{Radio 2UE} [29]

\textsuperscript{23} \textit{Radio 2UE} [28]

\textsuperscript{24} \textit{Radio 2UE} [29]

\textsuperscript{25} [2006] NSWCA 387 [74]

\textsuperscript{26} Their Honours did not advert to the \textit{Stockland} proposition that not permissible to treat one component of the Administrative Decisions Tribunal as a separate from its other constituent parts.

\textsuperscript{27} (2004) 218 CLR 146
the Commonwealth could be exercised by a tribunal (however named) is that (a) applying the ordinary positive and negative indicia the tribunal must be a court, and (b) the tribunal must be and appear to be independent and impartial.

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 State.

Heerey J concluded that the Tasmanian Anti-Discrimination Tribunal was both capable of characterisation as a court and possessed 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.

Noting that specialist tribunals have come to play an important role in the legal institutional framework of the States His Honour also endorsed Judge O’Connor’s remarks in 2UE v Burns that;

The 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 bench….
and adopted his conclusion that it would,

…be a strange result if modern adjudicative functions…were not seen to be ‘courts’ within the meaning of the *Judiciary Act*.\(^{31}\)

**The position of the NSW Court of Appeal**

By contrast in *Stockland* Spigelman CJ concluded that;

> In order to be part of the [Australian] constitutionally required integrated judicial system, a tribunal must be able to be characterised not only as a court, but as a court of law.\(^{32}\)

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 require.

The Chief Justice continued:

> One aspect of a court of law is that it is comprised, probably exclusively although it is sufficient to say predominantly, of judges.\(^{33}\)

His Honour identified s 79 of the *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, requires that it be an institution comprised of judges.

Section 79 of the Constitution provides;

> The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Spigelman CJ noted that s 79 assumes that;

> a “court of a state” like any other court exercising the judicial power of the Commonwealth, will be comprised of “judges”.\(^{34}\)

The Chief Justice, the other judges of the Court of Appeal agreeing, dismissed Heerey J’s reference to s39(2)(d) of the *Judiciary Act 1903* as proof that the constitutional understanding at the time of federation had been otherwise, with the observation;

> …the meaning of a constitutional expression is not fixed at 1900, save with respect to its essential features.\(^{35}\)

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\(^{31}\) *Wood* [81]

\(^{32}\) *Stockland* [52]

\(^{33}\) *Stockland* [52]

\(^{34}\) *Stockland* [58]. Note that his Honour 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 [50]

\(^{35}\) *Stockland* [69]
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 Ch III ‘court of a State’ must be comprised exclusively, or at least predominantly, by judges.

The decision of the High Court Forge v Australian Security and Investments Commission (Forge) [2006] HCA 44, decided subsequently, may shed light on which approach is to be preferred.

Forge decided that the appointment of acting State Supreme Court judges did not offend Ch III.

The reasoning in Forge appears to be more consistent with the conclusions reached in the Federal Court than in Stockland.

Gleeson CJ’s analysis of the factors bearing upon whether a body should be regarded as a ‘court of a State’ includes a passage reflecting a striking similarity of approach to the analysis of Heerey J quoted, in order to disapprove it, in Stockland.

His Honour observed;

…No one ever suggested that, in that respect, Ch III of the Constitution 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.36

What was crucial, in the Chief Justice’s view, was a guarantee of impartiality and independence. The 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

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36 Forge [36]
now, specify those minimum requirements, either for State Supreme Courts or for other State courts that may be invested with federal jurisdiction.\(^{37}\)

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 \textit{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.\(^{38}\)

The passages cited above reinforce the often stated principle that, subject to compliance with the ‘stable principle’ of institutional independence and impartiality, the Commonwealth must take the States’ judicial system as it finds it.\(^{39}\)

Nothing in \textit{Forge} suggests that the High Court discerned any Ch III requirement that a ‘court of a State’ can only exercise federal judicial power if it is exclusively or predominantly constituted by ‘judges’.

\(^{37}\) \textit{Forge} [41]  
\(^{38}\) \textit{Forge} [82]-[84]  
Hayne 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."\(^{40}\)

That is directly contrary to, the proposition advanced by the Court of Appeal\(^{41}\) 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 federation\(^{42}\).

As the NSW Court of Appeal did not identify any other issues of principle which would justify the imposition of a higher threshold, Forge therefore appears likely to compel a reassessment of the correctness and authority of Stockland.\(^{43}\)

And, echoing both Judge O’Connor and Heerey J, unless there is a super-added Ch III requirement, it would be a ‘strange result’ if independent and impartial tribunals carrying out modern adjudicative functions are not seen to be ‘courts’ within the meaning of the Judiciary Act 1903.

However some minor cautions are in order.

Because Stockland was argued contemporaneously with Forge the conclusion and reasoning of the NSW Court of Appeal in that case was not available to the High Court. Perhaps the decision of a very strong bench of the NSW Court of Appeal might prompt some Justices to reconsider aspects of what they said in Forge should this issue again come before the High Court.

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

**Jurisdiction of non-court administrative tribunals**

In *Radio 2UE* the NSW Court of Appeal concluded that the Administrative Decisions Tribunal lacked jurisdiction to consider the constitutional validity of s 49 ZT of the *Anti-Discrimination Act 1977* (NSW) because decisions of the Tribunal could be registered in and enforced as orders of the Supreme Court.

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\(^{40}\) *Forge* [256] citing *King v Jones* (1972) 128 CLR 221 at 229 per Barwick CJ

\(^{41}\) *Stockland* [69]

\(^{42}\) Note English magistrate courts are to this day 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 for example *Boddington v British Transport Police* [1999] 2 AC 143 at 162 per Lord Irvine of Lairg LC

\(^{43}\) Note also that in *Dao v Australian Postal Commission* the High Court assumed, although without an express finding, that the then Equal Opportunity Tribunal (NSW) a body with close analogy to the Administrative Decisions Tribunal, was a court.
The NSW Court of Appeal held that where the subject matter before it involved a federal question, a State tribunal was in no different position to a Commonwealth tribunal in this respect.\textsuperscript{44}

As previously noted this had not been the argument advanced on behalf of the Attorney General (NSW).

\textit{Brandy}, upon which the NSW Court of Appeal relied for their conclusions, assumed prominence only during the course of oral argument\textsuperscript{45}.

This may explain why the Court of Appeal appears not to have been referred to, and certainly did not advert in its reasons to, the later decision of the High Court, \textit{Re Residential Tenancies Tribunal of New South Wales; Ex parte the Defence Housing Authority (Henderson’s Case)}\textsuperscript{46}.

\textit{Henderson’s Case} involved a challenge to the power of the Residential Tenancies Tribunal (NSW) to make orders binding the Commonwealth. The Residential Tenancies Tribunal was constituted under the \textit{Residential Tenancies Act 1987} (NSW).

The jurisdiction of the Residential Tenancies Tribunal was invoked by Dr Henderson who owned certain premises leased by the Commonwealth, manifested by the Defence Housing Authority\textsuperscript{47}.

The dispute before the Residential Tenancies Tribunal thus involved not only the Commonwealth as a party but also the resolution of the dispute required a NSW tribunal to consider whether or not there was any constitutional or federal statutory impediment to the application of state law.

Orders of the Tribunal for payment of money, including any amount awarded by way of costs, were enforceable by registration as an order of a court in the same manner as were the orders of the Administrative Decisions Tribunal\textsuperscript{48}.

The Defence Housing Authority applied for a writ of prohibition.

The High Court rejected the Commonwealth’s challenge to the jurisdiction of the Residential Tenancies Tribunal and to the Tribunal’s power to make orders binding the Commonwealth.

Two of the six majority justices, McHugh J\textsuperscript{49} and Gummow J\textsuperscript{50} arrived at that conclusion notwithstanding their positive findings that the Tribunal was not a court.

\textsuperscript{44} \textit{Radio 2UE} [70]-[90]
\textsuperscript{45} \textit{Radio 2UE} [81]-84
\textsuperscript{46} (1997) 190 CLR 410
\textsuperscript{47} A majority of the High Court was content to proceed on the assumption that the Defence Housing Authority was the Commonwealth. See Brennan CJ at 428, Dawson, Toohey and Gaudron JJ at 448 and Kirby J at 510. McHugh J made express (at 460) and Gummow J implicit findings (at 474) that it was.
\textsuperscript{48} Section 112(1) of the Act as then in force.
\textsuperscript{49} At 461
\textsuperscript{50} At 474
Dawson, Toohey and Gaudron JJ found it unnecessary to decide that point but 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 DHA is bound generally by the Residential Tenancies Act and the tribunal has jurisdiction over it.\textsuperscript{51}

Prohibition was refused.

The ratio of \textit{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\textsuperscript{52} over parties and subject matters which, if the tribunal had been a court, would have been an exercise of federal judicial power.\textsuperscript{53}

Although \textit{Brandy} had been decided by the High Court only months earlier, the fact that decisions of the NSW Residential Tenancies Tribunal could be given effect by registration as an order of a court was not identified as a relevant consideration by any of the Justices in \textit{Henderson}.

Accordingly \textit{Henderson} may suggest that \textit{Brandy} should be distinguished and confined to Commonwealth entities\textsuperscript{54}.

\textbf{Broader issues of principle}

However, criticism of the decision in \textit{Radio 2UE} on the narrow ground that it was reached without sufficient regard to \textit{Henderson’s Case} would not address the wider issues of principle that are common to the group of four cases under discussion.

If court registration of judgments is the only problem that Ch III creates for state tribunals, State Parliaments could readily devise other ways to enforce tribunal decisions to avoid disruption of their effective functioning.

But it is not at all clear how Spigelman CJ’s reasoning\textsuperscript{55} in \textit{Radio 2UE}\textsuperscript{56} can be reconciled with His Honour’s conclusion that it is only when the decision of a tribunal can be registered and enforced as a judgement of a court that a tribunal impermissibly exercises federal judicial power.

\textsuperscript{51} At 448
\textsuperscript{52} It is not apparent from the judgments as to whether the power being exercised by the Residential Tenancies Tribunal was executive, judicial, or a quasi-judicial admixture of both. It is arguable that the correct inference is that their Honours took the view that nothing turned on those distinctions as they applied to the jurisdiction of a state tribunal.
\textsuperscript{53} In consequence of the withdrawal of all relevant state judicial power and its reinvestment as federal jurisdiction by the \textit{Judiciary Act 1903}.
\textsuperscript{54} The alternative argument would be that \textit{Henderson} can be distinguished on the facts because, with the exception of a possible costs order, the actual remedies sought in that case could not have been enforced by registration.
\textsuperscript{55} That the text and structure of the 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 Constitution on a non court tribunal, see \textit{Radio 2UE} [55]-[56]
\textsuperscript{56} \textit{Radio 2UE} [55]-[56]
In respect of Chapter III issues the Commonwealth’s argument advanced in *Wood* had four steps:

- In hearing and determining a complaint under the *Anti-Discrimination Act* the Tribunal is exercising judicial power;

- 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;

- The Tribunal 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 *Constitution*;

- The Tribunal is not a "court of a State" for that purpose. [57]

If, as Spigelman CJ stated in *Radio 2UE* 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 Constitution on a non-court tribunal what objection can be offered to any of the logical steps argued for by the Commonwealth in *Wood*?

His Honour’s reasoning, carried to its logical conclusion, inevitably leads to the same end point submitted for on behalf of the Commonwealth in *Wood*; that it is a necessary implication from Ch 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 *Constitution*.

This underlying principle cannot be reconciled with the narrow conclusion reached in *Stockland*. The outcome in *Stockland* is therefore inherently unstable.

If the underlying principle is correct, its logical application requires the conclusion that a state quasi-judicial tribunal lacks jurisdiction to deal with cases involving the Commonwealth’s or residents of different states. [59] No non-court tribunal exercising state judicial power can consider any issue arising under the Constitution or any laws made by the federal Parliament. [60]

But there are objections that can be made to this analysis.

**Objections of principle**

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

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[57] *Wood* [50]
[58] *Constitution* s75(iii)
[59] *Constitution* s75(iv)
[60] *Constitution* s76(i)
[61] *Constitution* s76(ii)
Sections 75 and 76 of the *Constitution* did not withdraw any aspect of the pre-existent judicial power of the former Colonies, now States\(^{62}\). State judicial power was, and remains, capable of being exercised by state administrative tribunals as well as courts\(^{63}\).

The right of state tribunals other than courts to exercise state judicial power was not affected by section 77 of the Constitution. Nor was it diminished by the *Judiciary Act 1903*.

As Spigelman CJ observed in *Radio 2UE*, the *Judiciary Act 1903* 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’.\(^{64}\)

Any restriction on the jurisdiction of a state tribunal to exercise the judicial power of its State must rest not on the text of the *Constitution* (because no basis for that exists) but on an implication compellingly arising from the nature of the Ch III scheme.

But there is nothing in the existing case law to suggest any High Court support for the existence of this supposed implication.

The right of State Parliaments to confer admixed judicial and administrative powers on their courts is subject to one Ch III qualification. 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 impartiality—*Kable v Director of Public Prosecutions*\(^{65}\)

But *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 been consistently held not to require or 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 law\(^{66}\).

The indisputable constitutional entitlement of the States to intermingle judicial and administrative functions and to confer that admixed power on administrative tribunals (a entitlement not available to the Commonwealth) is consistent with the right of State administrative bodies lawfully to 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

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\(^{62}\) See above, fn 1.

\(^{63}\) However, in the case of courts, subject to the provisions of the *Judiciary Act 1903*.

\(^{64}\) *Radio 2UE* [54]-[55]

\(^{65}\) (1996) 189 CLR 51

\(^{66}\) *Fardon v Attorney General (Qld)* [2004] HCA 46 [37]-[42]. See also *Powercoal Pty Ltd v Industrial Relations Commission of NSW* (2005) 156 A Crim R 269 and *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* [2006] NSWCA 172.
'matter’ could also come within the original jurisdiction of the High Court pursuant to s75 or s76 of the Constitution\textsuperscript{67}.

Recent jurisprudence of the High Court has been dominated by Ch III questions yet no decision of that court can be referred to as authority for a supposed contrary implication.

Nor can any obiter of a Justice be advanced as a basis for its derivation—the only faintly arguable exception being a Delphic comment falling from Kirby J, in dissent, in \textit{Henderson’s Case}\textsuperscript{68}

In \textit{APLA Ltd v Legal Services Commissioner}\textsuperscript{69} Gummow J\textsuperscript{70} and Callinan J\textsuperscript{71} both set out, compendiously, what they understood to be the extent of all the implications arising from Ch III. Nothing in either of their Honours’ judgments provides any support for the proposed implication.

In the context of the Constitution, given that the High Court may reconsider its earlier decisions, an absence of case law in support of a proposition need not be fatal; but when that absence is coupled with an absence of any principled reasons for its necessity there must be good reason to doubt that a supposed implication exists.

As Kirby J recently noted it is always valid to test a legal proposition by reference to the consequences that would flow from its adoption.

Adopting the supposed implication would create some capricious outcomes.

Unless \textit{Henderson’s Case} is overruled\textsuperscript{72}, the Commonwealth\textsuperscript{73} and residents of different states\textsuperscript{74} would remain subject to the authority of state officials and state tribunals exercising executive and quasi-legislative powers yet they would be immune to the jurisdiction of impartial and independent state non-court tribunals exercising any authority capable of being characterised as a manifestation of judicial power.

The coherence of the integrated scheme created by Ch III and the \textit{Judiciary Act} would be damaged by this rather than enhanced. The seamless capacity of State courts and tribunals to resolve disputes including matters or parties referred to in ss 75 and 76 would be lost. State administrative law would become a labyrinth trapping those subject to it in a maze of complexity. Such a destructive outcome is not required to

\begin{footnotes}
\item[67] \textit{Henderson’s Case}, if it does not itself compel that conclusion, is strongly supportive of it—see the discussion of this case (above) under the heading; Jurisdiction of non court administrative tribunals.
\item[68] At 512
\item[69] [2005] HCA 44
\item[70] At [227]-[233]
\item[71] At [468]-[472]
\item[72] At the very least the ratio of \textit{Henderson’s Case} must extend this far—if it does not extend further—see note 54 above.
\item[73] \textit{Constitution} s75(iii)
\item[74] \textit{Constitution} s75(iv)
\end{footnotes}
render effective the ultimate supremacy of the Commonwealth in respect of the exercise of federal judicial or executive powers.

If the implication is required its effect would be to impose a separation of powers doctrine on the States.

The need to characterise what is done in state tribunals as belonging to executive, legislative or judicial power, in a State context in which no separation has hitherto been required, will be productive of endless complexity.

The considerations left unresolved by Hodgson JA in Radio 2UE illustrate just some of the many difficult subsidiary issues this would open up.

For the above reasons it may reasonably be doubted that the supposed implication exists.

Other cases—some illustrative examples

Section 109 of the Constitution.

Instances include:

- **Dowe v Commissioner of New South Wales Crime Commission** NSWSC 1312 in which a NSW law permitting controlled operations was held to be not inconsistent with the *Customs Act 1901* and *Criminal Code 1995* because the state law provided a statutory exemption from criminal liability only that would have arisen under state law and did not purport to remove liability under Commonwealth law.

- **S and the Adoption Act 2000 (NSW) (No2)** [2006] NSWSC1438 in which the NSW Adoption Act 2000 was held to be inconsistent with the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1988* and the latter applied.

- **Galati v Potato Marketing Corporation of Western Australia** [2006] FCA 895 in which pleadings alleging the inconsistency of state marketing laws with *Trade Practices Act 1974* were held to raise an arguable point of law.

- **Commonwealth of Australia v Wood** [2006] FCA 60 in which allegations of inconsistency between Tasmanian anti-discrimination laws and the *Air Force Act 1923* and *Cadet Forces Regulations 1977* were rejected.

- **IG Index v New South Wales** [2006] VSC 108 in which the Victorian Supreme Court held that provisions of the *Unlawful Gambling Act 1998 (NSW)* and the *Racing Administration Act 1998 (NSW)* relating to certain forms of gambling

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75 The Parliament can remove the jurisdiction of any State court over the Commonwealth by a law made under s77(ii) of the Constitution

76 Commonwealth supremacy in respect of the Executive can be guaranteed by s109 of the Constitution. As Gummow J observed in *Henderson’s Case* ‘Section 109 …protects those rights and liabilities against such destruction, modification or qualification by State law as amounts to inconsistency in the constitutional sense.’ As to any supposed doctrine of Commonwealth immunity from such jurisdiction see Leeming M, The liabilities of the Commonwealth and State Governments 27 Australian Bar Review 217.

77 At [102]-[103] and [113]
and its advertising were inconsistent with the provisions of the Corporations Act 2001 Ch 7 which regulates financial services and markets.

- **HHH Casualty and General Insurance Ltd (In liq) v R J Wallace and Ors** [2006] NSWSC 1150 in which it was held that there was no relevant inconsistency between the Insurance Act 1902 (NSW) and the International Arbitration Act 1974 and that the latter did not ‘cover the field’.

- **Glew v Shire of Greenough** [2006] WASCA in which it was held that the scheme of uniform taxes held to be valid in South Australia v The Commonwealth (1942) 65 CLR 373 did not, in consequence of s109, render state laws providing for rates on real property invalid.

**Ch III jurisprudence**

The cases include;

- **Osenkowski v Magistrates Court of South Australia** [2006] SASC 345 in which it was held that the power to grant orders compelling occupiers of a dwelling house to remove specified fortifications did not confer on the court functions inconsistent or incompatible with the exercise of judicial power.

- **Bagshaw v Carter and 3 Ors** [2006] NSWCA 113 in which it was held, in respect of Commonwealth criminal proceedings, that the substantial differences between committal proceedings in the several states (a) did not impermissibly permit the states to determine the content of federal judicial power and (b) did not result in inequality before the law or negate the right to a fair trial.

- **Regina v Lohdi** [2006] NSWSC 571 in which it was held that the National Security Information (Criminal and Civil Proceedings) Act 2004 that restricted disclosure of material relating to national security in criminal proceedings was not incompatible with the judicial power of the Commonwealth, nor did it confer impermissible non-judicial functions on the New South Wales Supreme Court.

- **Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board** [2006] FCAFC in which it was held that a federal tribunal’s conduct in cancelling a liquidator’s registration did not involve an exercise of Commonwealth judicial power.

**The implied right of freedom of political communication**;

The cases include;

- **Peek v Channel Seven Adelaide Pty Ltd** [2006] SASC 63 in which it was held that criticism of the handling of a small group of legal cases cannot constitute

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78 I understand that an appeal to the High Court in Lohdi is to be argued this year.
a publication on a government or political matter because the exercise of judicial power by the courts is not an element of representative and responsible government.

- *Regina v Lohdi* [2006] NSWSC 571 in which it was held that the secrecy provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* did not place an impermissible burden on political communications.

- *Highway v Tudor-Stack* [2006] NTCA 04 in which it was held that s 61 of the *Criminal Code* (NT) that created offences relating to disturbing Parliament while in session, did not impossibly burden freedom of speech.

- *Catch the Fire Ministries Inc and Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 in which it was held that s8 of the *Racial and Religious Tolerance Act 2001* (Vic) (a) did not burden political communications, but even assuming that it did, (b) to place a reasonable limit on the right to communicate view which incite hatred against people because of their religious beliefs was compatible with the requirements of representative democracy.

### Connection between a constitutional head of power and commonwealth legislation

The cases include;

- *Y v Australian Prudential Regulation Authority* [2006] FCAFC 37 in which it was held that the power of the Australian Prudential Regulation Authority’s power to disqualify a person under s 25A of the *Insurance Act 1973* was within the Commonwealth’s powers to make laws with respect to insurance.

- *S v Australian Crime Commission* [2006] FCAFC 5 in which it was held that if the Commonwealth has power to legislate to create substantive offences that is a sufficient nexus with a supporting head of Commonwealth power to permit it to authorise the Australian Crime Commission to investigate matters relating to offences against a law of a State.

The above are examples of the constitutional issues that most commonly arose in state and federal courts during the 2006 term.

Other interesting cases included;

### Prohibition against civil conscription

- In *Selim v Lele* [2006] FCA 126 it was held that the Medicare Scheme did not impose any compulsion to provide medical services and does not offend the constitutional prohibition against civil conscription. It was further held that a disciplinary system directed to supporting precautions integral to the responsible provision of medical services provided pursuant to s 51(xxiiiA) of the *Constitution* falls within the incidental power.

### Unarguable constitutional points
• In *Glew v Shire of Greenough* [2006] WASCA it was held that a failure to give a s 78B notice does not have the effect of rendering invalid any proceeding in which a notice should have been, but was not, given and that that a s 78B notice is not required if the constitutional point asserted is unarguable or vexatious.

And, as we move towards a national profession,

**Lawyers in State courts exercising federal jurisdiction**

• In *Cannon Street Pty Ltd v Karedis* [2006] QSC 78 it was held s 55B (4) of the *Judiciary Act 1903* requires the conclusion that an interstate lawyer who has a right of audience in a state court exercising federal jurisdiction can recover costs for the work he or she performs.