BINDING THE MONOLITH

Can state tribunals still hold the Commonwealth to account following Nichols' case?

BRENDAN GOGARTY and BENEDICT BARTL

In July 2006 terminally ill pensioner, Rodney Nichols, attended a Commonwealth office to discuss his disability entitlement. Confronted with a queue he asked a staff member whether it could be noted where he would otherwise be standing, but could he sit due to the pain he was experiencing from his terminal prostate cancer. He was told that he would be required to wait in the queue along with everyone else. Becoming increasing frustrated Nichols left the office, and later lodged a complaint of discrimination against the Commonwealth with Tasmania's Anti-Discrimination Commissioner, on the ground of disability. Nichols wanted three things from the Commonwealth to resolve his complaint: 'a suitably worded apology[,] ... an assurance [the Office] would review its procedures regarding disabled people, and the payment of an utterly paltry sum to compensate him for expenses incurred as a result of stress'.[1] The Commonwealth refused, instead choosing to attack the Anti-Discrimination Tribunal as not being a 'court of a State' capable of hearing a complaint against the Crown in the right of the Commonwealth.

While the case before the Full Court of the Federal Court was ultimately determined on other grounds,[2] it is clear that Justice Kenny's *obiter dictum* finding — that there was a lack of 'institutional arrangements and safeguards'[3] necessary for the Tribunal to be considered a 'court of the State' — will have ongoing and lasting repercussions for many decision-making bodies that have to this point believed they are able to hear matters involving the Commonwealth and its agencies.

It is clear that unless state and territory governments review, and where necessary reinforce, provisions concerned with the independence and impartiality of their decision-making bodies, those bodies will be susceptible to institutional attack; particularly where the Commonwealth is subject to their review. While such challenges may be a necessary means of ensuring that trust and confidence in the integrity of the judiciary is maintained, *Nichols* demonstrates that many otherwise uncontroversial but nevertheless substantive matters will be sidelined on technicalities rather than determined on their respective merits.

Independence and impartiality in the judicial system

At the beginning of the 21st century it is undeniable that independence and impartiality are essential requirements of any properly constituted judiciary. However, it is often forgotten that such 'rights' have been hard-won over many centuries and that ongoing disputes between the judicial and legislative branches continue as to where the boundary between the two should be drawn.[4] As such, discrepancies remain between the lofty aims proclaimed in many international instruments[5] and politically infused legislative instruments. As former High Court Chief Justice Murray Gleeson has observed extra-judicially:

> It is self-evident that the exercise of [judicial review] will, from time to time, frustrate ambition, curtail power, invalidate legislation, and further administrative action... This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.[6]

An illustration of this ongoing tension is demonstrated in the debate that surrounds the Constitutional phrase 'court of a State' and the decision-making bodies capable of being defined as such.

A Chapter III 'Court'

It is a well-accepted constitutional principle that Chapter III of the *Constitution* creates a separation of power between the judiciary and the other branches of government,[7] ensuring that only those courts specifically mentioned in Chapter III of the *Constitution* may wield federal judicial power. Of particular note is the federal judicial jurisdiction over matters:

- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party (s 75(iii));
- relating to the application or interpretation of the *Constitution* (s 76(i)); and
- arising under any laws made by the Parliament.

Such matters fall within the jurisdiction of the High Court. However, s 77 of the *Constitution* permits the Commonwealth Parliament to vest those matters within federal judicial jurisdiction in inferior courts, including 'courts of a State'. This is achieved in s 39(2) of the *Judiciary Act 1903* (Cth) which invests federal jurisdiction in 'the several Courts of the States'. With very limited exceptions,[8] the *Judiciary Act* permits state courts to adjudicate on the vast majority of matters falling within federal jurisdiction.

Federal jurisdiction can, therefore, be exercised by 'courts' at both the federal and state level. At the federal level this is a relatively clear and uncontentious issue due to the *Boilermaker* principles, which clearly demarcate the exercise of judicial from non-judicial power.[9] Consequently, there is no mixing of judicial and

REFERENCES

1. *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* (2008) 248 ALR 494 ('*Nichols*'), 524.

2. A majority of the Full Court of the Federal Court (Weinberg and Kenny JJ, Goldberg J dissenting) held that, as a matter of statutory interpretation, the *Anti-Discrimination Act 1998* (Tas) does not manifest in its definition and use of 'person' an intention to apply to the Commonwealth.

3. *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 ('*Forge*'), 68 (Gleeson CJ).

4. For example see Brendan Gogarty and Benedict Bartl, 'Tying Kable Down: The uncertainty about the independence and impartiality of state courts following *Kable v DPP (NSW)* and why it matters' (2009) 32 *University of New South Wales Law Journal* 75.

5. See, eg, art 10 of the *Universal Declaration on Human Rights* and arts 6 & 14 of the *International Covenant on Civil and Political Rights*.

6. Murray Gleeson, 'Legal Oil and Political Vinegar' (1999) 10 *Public Law Review* 108, 111.

7. *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26–27 (Brennan, Deane and Dawson JJ); *Forge* (2006) 228 CLR 45, 73 (Gummow, Hayne and Crennan JJ).

8. Namely interstate suits between the Commonwealth and the states.

9. The *Boilermaker* principles set out in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 dictate that only Chapter III courts can exercise federal judicial power and that Chapter III courts may not exercise, or be authorised to exercise, non-judicial powers.

It was held in Forge that the foundations underpinning independence and impartiality must be 'secured by a combination of institutional arrangements and safeguards'.

non-judicial powers — such as the executive power to review administrative decisions — at the federal level. Simply put, only a body which meets the constitutional definition of a 'court' (something discussed below) may exercise federal judicial power and any body — such as a tribunal or commission — which does not meet that definition, cannot. The situation at the state level is, however, somewhat more complex.

It is well accepted that there is no separation of powers at the state level. State Parliaments hold not only legislative, but also executive and judicial power. A state Parliament may, for instance, invest judicial power in a non-judicial tribunal, or require a state court to undertake administrative review. This flexibility has led the states to set up a wide range of bodies, infused with judicial and administrative functions. Such bodies are favoured by state governments and, in some cases, the judiciary, as alternatives to the court system, especially in minor or technical matters. As Cumes notes,[10] there are two main reasons for the adoption of tribunals and similar bodies:

- they provide a simplified dispute resolution mechanism, which — unbounded by the restrictions on courts, such as rules of evidence — facilitates an efficient resolution of disputes; and
- they ensure 'refined methods of dealings with disputes', dealing with specific or technical matters, which would either be beyond the immediate competency of the courts, or require large resources and expert evidence to fairly arbitrate in a specialist matter.

As a general rule tribunals are economical, expeditious and efficient.[11] Also attractive to governments is that tribunal members — who are often selected for their expertise in the subject matter of the tribunal, rather than the law generally — are much more likely to have an involved understanding of administration and governmental policy within, and relating to, the field of the statute.[12]

As a result of the perceived benefits of the tribunal system state governments have proved increasingly willing to rely on specialist tribunals rather than state courts to deal with specialist matters.[13] State tribunals and commissions now deal with a wide range of disputes including anti-discrimination, small claims, tenancy, licensing and workers' compensation. These are hardly unimportant or minor issues. Moreover, they are issues which often have the potential to involve the Commonwealth, in its capacity as an employer or corporate personality.

There are therefore a wide variety of situations where the Commonwealth may become a party to a tribunal matter. If the tribunal in such circumstances is acting in an administrative capacity, the only real question is whether the statute establishing the tribunal binds the Crown, in the right of the Commonwealth.[14] However, if the tribunal is exercising judicial power, then s 75(iii) of the *Constitution* is invoked,[15] and the power is properly characterised as federal judicial power under the exclusive jurisdiction of the High Court, or such courts of a state permitted to exercise that jurisdiction under s 77. For a tribunal to retain the jurisdiction to hear a matter it must be shown to be a Chapter III court for the purposes of the *Constitution*.

There is no definitive way by which to determine whether the power exercised by a body may be characterised as judicial or non-judicial. The High Court has, on a number of occasions, resisted providing a strict definition of judicial power, instead relying on a number of indicia to evaluate whether what the body is doing appears predominantly judicial in nature.[16] That is, judicial power is defined within the constructs of what a court is ordinarily understood to do. Yet the equally nebulous issue of defining a court may be answered by reference to whether it exercises judicial functions. As French CJ has stated:

> The evaluation process required [to determine whether a body is a court] is not unlike that involved in deciding whether a body can be said to be exercising judicial power.[17]

This circular and rather confusing approach has received its share of criticism.[18] It means that any tribunal with mixed powers is highly susceptible to being characterised as exercising judicial power.[19] Indeed, recent courts have seemed largely willing to characterise such tribunals as exercising judicial power, even where their predominant functions might be said to be administrative in nature. This is especially true of tribunals which consider matters affecting rights and duties, such as anti-discrimination.[20]

Requisite characteristics of a body exercising federal judicial power

In those situations where a tribunal is accepted to be exercising judicial power — which, at present, seem to be the majority of cases — that body necessarily falls under Chapter III of the *Constitution* and must be one of the courts recognised by s 71, in other words a 'court of a State'. Apart from this limited reference, the

10. Guy Cumes, 'Separation of powers, courts, tribunals and the state' (2008) 19 *Alternative Dispute Resolution Journal* 10, 12.

11. Ibid 14.

12. Gabriel Fleming, 'Tribunals in Australia' in Robin Creyke (ed), *Tribunals in the Common Law World* (2009) 84, 89.

13. Ibid 91.

14. This question is relatively settled: see, eg, *Bropho v Western Australia* (1990) 171 CLR 1, which establishes that a positive intention to bind the Commonwealth will ordinarily be sufficient. So long as the matter falls within the jurisdiction of the state, the Commonwealth will ordinarily be bound, even to the extent of enforceable administrative orders. Further, a tribunal which is determined to be exercising administrative power may create binding orders: see *Re Residential Tenancies Tribunal (NSW); Ex parte the Defence Housing Authority* (1997) 190 CLR 410.

15. This is because the Commonwealth is a party to the 'suit' created by the exercise of judicial power.

16. See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).

17. *K-Generation Pty Limited v Liquor Licensing Court* (2009) 252 ALR 471, 490 ('*K-Generation*').

18. See, eg, Duncan Kerr 'State Tribunals and Chapter III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622.

19. Ibid (discussing *Burns v Radio 2UE Sydney Pty Ltd* [2004] NSWADT 267).

20. For instance, with respect to the Tasmanian Anti-Discrimination Tribunal, Heerey J, in *Commonwealth v Wood* (2006) 148 FCR 276 ('*Wood*'), accepted without question that it was exercising judicial power. When this decision was challenged in *Nichols* (2008) 248 ALR 494, no member of the appellate bench gave any serious consideration to whether the body exercised judicial power.

Constitution does not provide a definition of what is or is not a 'court of a State'. Nor does the *Constitution* set out the institutional criteria for the establishment and maintenance of such a court. For instance, while s 72 of the *Constitution* requires that judges of federal courts are tenured and have security of remuneration, the section is silent on courts of state. Until quite recently it has therefore been accepted as trite law that, in relation to other courts, the Commonwealth must take the court 'as it finds it'.[21]

The position of the High Court on what constitutes a 'court of a State' shifted radically following the decision of *Kable v Director of Public Prosecutions (NSW)*.[22] This case involved an accepted 'court of a State', the Supreme Court of NSW, rather than a tribunal. The issue was whether such a body, as envisioned under ss 71 and 77 of the *Constitution*, could be directed by legislation to order a person to be detained if satisfied that the individual posed a significant danger to the public. A majority of the High Court held that the conferral of this function on the Supreme Court was incompatible with the exercise of federal judicial power because it resulted in an impermissible infringement by the legislature into the autonomy of the Court. While confined to the function of legislation, some members of the High Court hinted at the possibility of broader application,[23] a view reinforced in the subsequent decision of *Fardon v Attorney-General (Qld)*, [24] in which McHugh J noted:

> The *Kable* principle, if required to be applied in future, is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges ... rather than in the context of *Kable*-type legislation.[25]

In the later decisions of *Northern Australian Aboriginal Legal Service v Bradley*[26] and *Forge*[27] the High Court reiterated that independence and impartiality are the irreducible benchmarks of a Chapter III 'court'.[28] Although these decisions did not relate specifically to state tribunals, their application extends more broadly, restricting the capacity of state legislatures to direct those bodies characterised as courts, or dictate their form or functions.[29] The question that remains, however, is just how restricted state governments are after *Kable*, and equally, just what the boundaries of state courts actually are.

Is 'court of a State' a fixed constitutional expression?

Some disagreement has arisen amongst Australia's appellate judges as to whether the term 'court of a State' as defined in s 77 of the *Constitution* was fixed at the time of its writing in 1900 or whether it is malleable. The majority of Australia's appellate judges, particularly after *Kable*, have supported the view that the term is capable of flexibility. For example, in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*,[30] Gleeson CJ, McHugh and Callinan JJ noted:

> A suggestion, in 1915, that the magistrates and judges of all territories, internal or external, in whatever stage of development, were required to have life tenure, would have been regarded as startling by people who were familiar with the tenure of office of magistrates and judges in the various Australian States.[31]

However, in the later New South Wales Court of Appeal decision *Trust Company of Australia Ltd t/as Stockland Property Management v Skiwing Pty Ltd t/as Café Tiffany's*,[32] discussion arose as to whether a court must be constituted by 'judges', as that word is used in Chapter III of the *Constitution*. The issue in this case concerned whether the applicant could bring an action alleging breaches of the *Trade Practices Act 1974* (Cth) in the NSW Administrative Decisions Tribunal ('NSWADT'). In the Court of Appeal, Spigelman CJ (Hodgson and Bryson JJA in agreement) held that the NSWADT was not a court and was therefore unable to exercise Chapter III judicial power because it was not 'comprised ... predominantly, of judges'.[33] While the Court did not articulate why the members of the NSWADT were not 'judges', it is likely that their Honours had regard to the indicia of tenure and remuneration specified by Chapter III of the *Constitution*.[34]

Whilst Chief Justice Spigelman was able to point to a number of High Court cases in support of such a view,[35] this finding must be challenged in light of the 2006 decision of the High Court in *Forge* in which Gummow, Hayne and Crennan JJ observed that not 'all courts in a hierarchy of courts, must be constituted alike' and 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'.[36] It is clear from this decision that whilst guarantees of independence and impartiality are a 'stable principle',[37] the means by which these principles are assured is not solely through constitution by 'judges'. As Gleeson CJ remarked:[38]

> No one has 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.

Therefore, while historically Australia's High Court has been prepared to distinguish between the make up of courts according to jurisdiction, the demarcation has narrowed following *Forge* for those courts exercising federal judicial power. In future, all decision-making bodies exercising federal judicial power must contain an 'essential character',[39] and it is this which will distinguish a 'court' able to exercise federal judicial power from other decision-making bodies.

Essential characteristics of a Chapter III Court

In *Bradley* a majority of the High Court found it implicit in the terms of Chapter III of the *Constitution* that 'a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal'.[40] Nonetheless, difficulties will

21. See, eg, *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313 (Griffith CJ); *Kotsis v Kotsis* (1970) 122 CLR 69, 109 (Gibbs J); *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 61 (Mason J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 102 (Gaudron J).

22. (1996) 189 CLR 51 ('*Kable*').

23. See, for example *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 118 (per McHugh J).

24. (2004) 223 CLR 575.

25. Ibid 601–2.

26. (2004) 218 CLR 146 ('*Bradley*').

27. (2006) 228 CLR 45.

28. *Forge* (2006) 228 CLR 45, 75 (Gummow, Hayne and Crennan JJ).

29. This position was recently affirmed by Kirby J in *K-Generation* (2009) 252 ALR 471 who, along with the majority, rejected the proposition that *Kable* only applied to State Supreme Courts. Kirby J stated that 'it is inconsistent with the language of the *Constitution* and with the constitutional purpose of the *Kable* principle. That principle effectively assures Australian litigants that basic institutional standards will be observed, whether in federal or State courts, and also in Territory courts as this Court accepted in *North Australian Aboriginal Legal Aid Service Inc v Bradley* This is implicit in the membership of all such courts, continued or created, in the one integrated Judicature of the Commonwealth': ibid 515.

30. (1999) 200 CLR 322.

31. Ibid 338.

32. (2006) 66 NSWLR 77.

33. Ibid 87.

34. Their Honours' findings have been subject to criticism, with some commentators concluding that the argument is circular, on the basis that determining what is a 'judge' will ultimately be answered by asking what is a 'court': see, eg, Kerr, above n 18, 638.

35. See, eg, *Le Mesurier v Connor* (1929) 42 CLR 481, 511 (Isaacs J); *Kotsis v Kotsis* (1971) 122 CLR 69, 91 (Windeyer J); *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 60 (Mason J); *Harris v Caladine* (1991) 172 CLR 84, 92 (Mason CJ and Deane J).

36. *Forge* (2006) 228 CLR 45, 82–3.

37. Ibid 67.

38. Ibid 66.

It is untenable that there are decision-making bodies at present that lack institutional safeguards such as provisions detailing the tenure of tribunal members and the grounds upon which those members can be removed.

continue to arise as to when the requisite decision-making body exhibits sufficient independence and impartiality to be described as exercising federal judicial power. None of the members of the High Court in *Bradley* was prepared to define the minimum requirements of independence and impartiality, instead acknowledging that: 'there is no single ideal model of judicial independence', some 'legislative choice' is allowed in the mechanisms employed to promote judicial independence,[41] and 'no exhaustive statement of what constitutes the minimum in all cases is possible'.[42] As Kenny J subsequently noted in *Nichols*:

> Whether or not a decision-making body will be relevantly independent and impartial in this constitutional sense does not always admit of an easy answer. Much will often depend on the powers and functions of the body, the provisions for appeal and review of its decisions, its pre- and post-federation history, and the nature of the constitutional or legislative 'institutional arrangements and safeguards' for securing independence and impartiality ...[43]

Nevertheless, the majority in *Bradley* was prepared to articulate broad circumstances in which these minimum requirements would be breached. They include whether:[44]

- the judicial officer is 'inappropriately dependent on the legislature or executive... in a way incompatible with requirements of independence and impartiality';
- the circumstances 'compromise or jeopardize the integrity of the ... judicial system'; and
- 'reasonable and informed members of the public [would] conclude that the [judiciary] ... was not free from the influence of the other branches of government in exercising their judicial function'.

While some later, lower court decisions have taken this to mean that public perception of judicial independence was a sufficient safeguard[45], the High Court went on to qualify its position in *Forge*, to clarify that mere appearances of independence and impartiality were insufficient. It was held in *Forge* that the foundations underpinning independence and impartiality must be 'secured by a combination of institutional arrangements and safeguards'.[46] In other words it is *guarantees*, rather than simply appearances, which are the relevant pre-conditions for any decision-making body seeking to exercise federal judicial power.[47] Therefore, although the High Court acknowledged that not 'all courts in a hierarchy of courts, must be constituted alike',[48] mere 'practical political' constraints[49] will no longer be accepted as sufficient.

In *Nichols* the principles laid down in *Bradley* and *Forge* were applied by Kenny J to conclude that the lack of institutional arrangements and safeguards in Tasmania's *Anti-Discrimination Act 1998* ensured that it could not be a repository of Chapter III judicial power.

The *Anti-Discrimination Act 1998* (Tas)

The perceived protection of judicial independence and impartiality in Tasmania's *Anti-Discrimination Act 1988* had previously been thought to be contained in a number of provisions.[50] However, while s 12 of the *Anti-Discrimination Act 1998* provides the responsible Minister with the power to appoint members of the Tribunal, the Act contains no provisions concerning the tenure of members of the Tribunal, or any providing for their removal. In such cases, s 21(1)(a) of the *Acts Interpretation Act 1931* (Tas) provides that '[w]here an Act confers a power to make any appointment to an office or a position, the power includes a power ... to suspend or remove a person appointed under that power'.

During the course of proceedings in *Nichols* the State of Tasmania provided the Full Court of the Federal Court with copies of letters of appointment. Despite this, Kenny J was critical of the lack of institutional protections:

> In order to be a 'court of a State'... there must be some legislative or constitutional provision for tenure of some kind, precluding removal from office merely because the executive desires it.[51]

Her Honour went on to note:

> The absence of any provision as to tenure compromises the institutional independence of the Tribunal. The fact (as it appears) that the members of the Tribunal received letters of appointment advising that they were appointed for a term of years cannot relevantly diminish the Minister's statutory power of removal and this conclusion. ... Accordingly, I would not characterise the Tribunal as a 'court of a State' within s 77(iii) of the Constitution.[52]

The importance of Kenny J's decision is her insistence on clearly establishing basic institutional hallmarks of judicial independence: namely, that Tribunal members have their tenure, as well as grounds for removal, enshrined in legislation. Without such provisions, appellate courts in future are likely to continue to find that the decision-making body in question is insufficiently independent to exercise federal judicial power. While the High Court was only prepared to articulate in broad terms where such institutional safeguards would lie, Kenny J's preparedness to demarcate a boundary line

39. *Chu Kheng Lim v The Commonwealth* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

40. (2004) 218 CLR 146, 167 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). The majority went so far as to endorse the earlier comments of Gaudron J that independence and impartiality were essential for *all* courts and not simply those exercising Commonwealth judicial power: ibid 162–3 (citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363).

41. Ibid 152–3.

42. Ibid 163.

43. (2008) 248 ALR 494, 546.

44. (2004) 218 CLR 146, 172 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

45. In *Wood* (2006) 148 FCR 276, Heerey J was satisfied that 'reasonable and informed members of the public' would think the decision-making body under review 'was free from the influence of the other branches of the Tasmanian Government, and particularly the Executive' and observed that if the Executive were to 'just ring up the Tribunal and tell it how to decide cases ... public, political and media attacks on the government would be inevitable': ibid 293. Justice Heerey also held that there were sufficient legal remedies open to the decision-maker to safeguard against arbitrary dismissal. His Honour concluded that not only would the Minister be constrained by the potential of an order setting aside a dismissal decision, but there would be the prospect of controversial litigation with all its concomitant expense, delay, discovery of embarrassing documents and publicity: ibid 293–294. See also see *Northern Australian Aboriginal Legal Service v Bradley* (2001) 192 ALR 625, where Weinberg J states '[t]here is no doubt that *Kable* will, in certain circumstances, invalidate State legislation which operates to undermine public confidence in the independence of State courts': ibid 697 .

46. (2006) 228 CLR 45, 68 (Gleeson CJ).

for state decision-making bodies is, we would argue, a strong step in the right direction.

Justice Kenny's judgment was cited, with approval, by the majority of the High Court in *K-Generation Pty Limited*. In accepting Kenny J's reasoning, the majority considered the fact that the body in question (a liquor licensing court) was headed by a District Court judge — and specifically that security of tenure and remuneration would be assured — as 'significant' with respect to the notion of 'constitutional institutional independence'.[53] This would appear to indicate the High Court is willing to adopt a more concrete stance on the minimum criteria for Chapter III courts, in line with the position taken by Justice Kenny in *Nichols*.

Why decision-making bodies should continue to exercise Chapter III judicial power

Given the increasing willingness of the courts to accept that state and territory tribunals exercise judicial power, and the commensurate move towards stricter safeguards for the exercise of this power, it is likely that many of these bodies may, in future, be precluded from hearing matters in which the Commonwealth is a party. The result is that Commonwealth employees and services provided by Commonwealth agencies will, in practice, be exempted from much state and territory legislation.

We would argue there are significant policy reasons why state and territory governments should move to avoid their decision-making bodies being precluded from hearing matters on Chapter III jurisdictional grounds. Most important is the need for these governments to ensure that their citizens are able to enforce their rights as widely as possible, regardless of which body is alleged to have breached those rights. An excellent example of this is anti-discrimination law, where state-based legislation generally has a much wider scope and better enforcement provisions than its federal counterparts.

In a climate in which there is little political will at a Commonwealth level for broader anti-discrimination laws, complaints of discrimination able to be brought at a state level take on greater resonance, particularly when the Commonwealth's 'pervasive presence' is acknowledged. As Heerey J stated in *Wood*:

> In Tasmania, as in all Australian States and Territories, the Commonwealth in its various manifestations is a highly pervasive presence. Discrimination is, as a matter of reality, committed by people, not abstract entities. In Tasmania at any one time there would be many people acting in a myriad of areas on behalf of the Commonwealth in situations where discriminatory conduct could occur. Apart from the Tasmanian capacity, the Crown's capacity in the right of the Commonwealth is, of all the Crown's capacities, the one most likely to be exercised in Tasmania, as the Tasmanian Parliament would be well aware.[54]

It is vital that trust and confidence in the integrity of all decision-making bodies are considered incontrovertible. It is untenable that there are decision-making bodies at present that lack institutional safeguards such as provisions detailing the tenure of tribunal members and the grounds upon which those members can be removed. Without such protections, some sections of the community may query the legitimacy of such decision-making bodies, an unacceptable outcome that must be promptly rectified.

Conclusion

In light of the recent High Court jurisprudence in *Forge*, its application by Kenny J of the Full Court of the Federal Court in *Nichols*, and the endorsement of those propositions by the full bench of the High Court in *K-Generation*, legislatures have no choice but to guarantee the independence of their decision-making bodies if they want them to remain repositories of Chapter III judicial power. Specifically, tenure and the grounds for removal must be assured through enshrinement in legislation. Without such safeguards, it is likely that the Commonwealth will continue to attack such bodies, and that otherwise uncontroversial but substantive matters are sidelined. With the Commonwealth and its agencies likely to remain a 'pervasive presence' in all states and territories it is vital that justice is served through the assurance that litigants will be able to have their grievances heard against such a monolith.

It is therefore imperative that all states and territories undertake reviews and, where necessary, strengthen provisions concerned with the independence of their decision-making bodies. Such amendments will not only ensure that the Commonwealth is in appropriate cases brought to account, but more importantly will demonstrate forcefully that trust and confidence in the integrity of the judicial system remains sound.

BRENDAN GOGARTY is a lecturer at the University of Tasmania. **BENEDICT BARTL** was the instructing solicitor with the Hobart Community Legal Service in the Full Court of the Federal Court case of *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)*.

email: Brendan.Gogarty@utas.edu.au
Benedict.Bartl@utas.edu.au

47. Stephen Donaghue, 'Judicial Independence: *Bradley, Fardon* and *Baker*' (Paper presented at the Gilbert + Tobin Centre of Public Law 2005 Constitutional Law Conference, Sydney, 18 February 2005).

48. (2006) 228 CLR 45, 82 (Gummow, Hayne and Crennan JJ).

49. *Wood* (2006) 148 FCR 276, 293.

50. See, eg, *Anti-Discrimination Act 1998* (Tas) ss 12, 13, 86, 87, 88, 89, 90, 93.

51. (2008) 248 ALR 494, 547.

52. Ibid 548–9.

53. *K-Generation Pty Limited* (2009) 252 ALR 471, 495–6 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). The Chief Justice, in a separate judgment, agreed that the appointment of a district court judge was an extremely important safeguard, as was the obligation that the licensing court act 'lawfully, rationally and fairly' in reaching its decisions: ibid 488 (French CJ).

54. *Wood* (2006) 148 FCR 276, 283.