SUPREME COURT OF QUEENSLAND

CITATION:	*Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170
PARTIES:	**RONALD OWEN** (applicant/respondent/respondent) **v** **RICHELLE MENZIES** (first respondent/not applicable/applicant) **RHONDA BRUCE** (second respondent/applicant/not applicable) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (intervener/not applicable/not applicable)
FILE NO/S:	Appeal No 7138 of 2011 Appeal No 10318 of 2011 Appeal No 10868 of 2011 SC No 10478 of 2008 SC No 10395 of 2008
DIVISION:	Court of Appeal
PROCEEDINGS:	Case Stated Removal or Remission Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 June 2012
DELIVERED AT:	Brisbane
HEARING DATES:	27 February 2012 28 February 2012
JUDGES:	Chief Justice and Margaret McMurdo P and Muir JA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In Appeal No 7138 of 2011:** **The application for leave to amend the case stated is refused.** 1. Were the proceedings in the Anti-Discrimination Tribunal an impermissible exercise by the tribunal of the judicial power of the Commonwealth under Chapter III of the *Commonwealth Constitution*? **Unnecessary to decide.** 2. Is section 212 of the *Anti-Discrimination Act* 1991, providing for the registration and enforcement of orders of the Anti-Discrimination Tribunal, inconsistent with Chapter III of the *Commonwealth*

Constitution, and therefore invalid, so far as it purports to apply in these proceedings?

Unnecessary to decide.

3. Is section 124A of the *Anti-Discrimination Act* 1991 inconsistent with the implied protection of freedom of political communication provided by the *Commonwealth Constitution* and therefore invalid?

   No.

4. Alternatively, to what extent is section 124A of the *Anti-Discrimination Act* 1991 to be read down in order to comply with the implied protection of freedom of political communication provided by the Commonwealth Constitution?

   It is unnecessary to read down s 124A in order to comply with the implied protections of freedom of political communication provided by the *Commonwealth Constitution*.

5. Does a bisexual person have standing under section 134(1)(a) of the *Anti-Discrimination Act* 1991 to complain about vilification on the ground of homosexuality?

   Depending on the circumstances, a bisexual person may have standing under s 134(1)(a) of the *Anti-Discrimination Act* to complain about vilification on the ground of homosexuality.

In Appeal No 10318 of 2011:

Application refused.

In Appeal No 10868 of 2011:

Application refused.

The Court will receive submissions as to the costs of the appeal hearing in accordance with Practice Direction No 2 of 2010, para [52].

CATCHWORDS: CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – GENERAL MATTERS – CONSTRUCTION OF THE CONSTITUTION – GENERALLY – where Queensland Civil and Administrative Tribunal ("QCAT") is described in the *Queensland Civil and Administrative Tribunal Act* 2009 as a "court of record"– where QCAT is not bound by rules of evidence or any practice or procedure applying to courts of record – where QCAT is to determine matters on a "fair and equitable basis" in minor civil disputes – where QCAT's final decisions in minor civil disputes do not prevent other courts or tribunals from reconsidering issues determined by QCAT – where only two members of QCAT may exercise the power to punish for contempt – where senior members and ordinary members of QCAT may be removed from office by the

executive government – where QCAT cannot enforce its own orders – where members of QCAT serve relatively short terms in office – where the position of only two members is linked to the holding of judicial office – where the executive government can include conditions in the appointment of senior and ordinary members – where the President of QCAT given administrative powers over QCAT – whether QCAT is a "court of a State" within the meaning of the *Commonwealth Constitution*

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – CONSTRUCTION OF THE CONSTITUTION – GENERALLY – where the applicant submitted if QCAT was not a court it would not be permitted to exercise the judicial power of the Commonwealth – where the applicant submitted that the result of s 260(4) of the *Queensland Civil and Administrative Tribunal Act* was that QCAT could only make a decision that the former Anti-Discrimination Tribunal could have made – whether QCAT can refer a constitutional issue to the Supreme Court for determination – whether QCAT is deprived of its state jurisdiction if a question involving federal jurisdiction arises – whether QCAT can form a view on an arising federal issue – whether QCAT is obliged to form such view – whether stating the case to the Supreme Court involved a purported exercise of jurisdiction with respect to the constitutional issue – whether the determination of this Court becomes a finding or determination of QCAT – whether s 131 of the *Queensland Civil and Administrative Tribunal Act* which deems a final decision of QCAT to be a final decision of the court in which it is registered purports to exercise federal judicial power – whether QCAT has jurisdiction to hear and determine matters arising under the *Constitution* or involving its interpretation if it is not a court

CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – RESTRICTIONS ON COMMONWEALTH AND STATE LEGISLATION – RIGHTS AND FREEDOMS IMPLIED IN THE COMMONWEALTH CONSTITUTION – FREEDOM OF POLITICAL COMMUNICATION – PARTICULAR CASES – whether s 124A of the *Anti-Discrimination Act* 1991 (Qld) burdens the implied freedom of political communication – whether any such burden is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – whether a bisexual person can have standing under s 134(1)(a) *Anti-Discrimination Act* 1991 (Qld) to complain about homosexual vilification

Acts Interpretation Act 1954 (Qld), s 9
Administrative Decisions Tribunal Act 1997 (NSW), s 82, s 118
Anti-Discrimination Act 1991 (Qld), Preamble, s 4A, s 6, s 121, s 124A, s 134, s 155, s 212, s 216
Commonwealth Constitution (Cth), cl 5, Chapter III, s 75, s 76, s 77
Judiciary Act 1903 (Cth), s 39
Magistrates Act 1991 (Qld), s 43
Public Sector Ethics Act 1994 (Qld), s 11, s 12D, schedule
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 11, s 12, s 13, s 28, s 126, s 131, s 132, s 152, s 162, s 164, s 165, s 172, s 186, s 188, s 189, s 219, s 244, s 259, s 260
Supreme Court of Queensland Act 1991 (Qld), s 68(5)

Anderson v Eric Anderson Radio and TV Pty Ltd (1965) 114 CLR 20, [1965] HCA 61, cited
APLA Ltd v Legal Services Commissioner (New South Wales) (2005) 224 CLR 322; [2005] HCA 44, cited
Attorney-General (Cth) v Alinta Ltd (2008) 233 CLR 542, [2008] HCA 2, cited
Attorney-General (NSW) v 2UE Sydney Pty Ltd (2006) 236 ALR 385; [2006] NSWCA 349, distinguished
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46, cited
Australian Securities and Investments Commission v Edensor Nominees Pty Ltd (2001) 204 CLR 559, [2001] HCA 1, cited
Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245; [1995] HCA 10, considered
Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436; [1990] HCA 1, cited
Catch the Fire Ministries Inc v Islamic Council of Victoria Inc (2006) 15 VR 207; [2006] VSCA 284, considered
Coleman v Power (2004) 220 CLR 1; [2004] HCA 39, applied
Commonwealth v Wood (2006) 148 FCR 276, [2006] FCA 60, cited
Cunliffe v The Commonwealth (1994) 182 CLR 272; [1994] HCA 44, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, applied
Fardon v Attorney-General (Qld) (2004) 223 CLR 575; [2004] HCA 46, cited
Felton v Mulligan & Anor (1971) 124 CLR 367; [1971] HCA 39, considered
Fencott v Muller (1983) 152 CLR 570; [1983] HCA 12, cited
Forge v Australian Securities and Investments Commission (2006) 228 CLR 45, [2006] HCA 44, considered
Hogan v Hinch (2011) 243 CLR 506; [2011] HCA 4, cited
Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR

330, [1909] HCA 36, cited
IW v City of Perth (1997) 191 CLR 1; [1997] HCA 30, cited
Jones v Scully (2002) 120 FCR 243; [2002] FCA 1080, cited
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, considered
K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501, [2009] HCA 4, applied
King v Hoare (1844) 13 M & W 494; [1844] EngR 1042, cited
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520; [1997] HCA 25, applied
Lorenzo v Carey (1921) 29 CLR 243; [1921] HCA 58, cited
Menzies & Ors v Owen [2008] QADT 20, related
Menzies & Ors v Owen (No 2) [2008] QADT 30, related
MZXOT v Minister for Immigration and Citizenship (2008) 233 CLR 601; [2008] HCA 28, cited
North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146; [2004] HCA 31, applied
Northern Territory v GPAO (1999) 196 CLR 553; [1999] HCA 8, cited
Owen v Menzies & Ors [2010] QSC 387, (2010) 243 FLR 357, related
Owen v Menzies & Anor [2011] QCA 241, related
R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254; [1956] HCA 10, cited
Re Adams and The Tax Agents' Board (1976) 12 ALR 239, [1976] AATC 1, cited
Re Macks; Ex parte Saint (2000) 204 CLR 158; [2000] HCA 62, cited
South Australia v Totani (2010) 242 CLR 1; [2010] HCA 39, cited
Sunol v Collier [2012] NSWCA 14, distinguished
Sunol v Collier (No 2) [2012] NSWCA 44, considered
The Commonwealth v Anti-Discrimination Tribunal (Tas) (2008) 169 FCR 85, [2008] FCAFC 104, cited
The Commonwealth v Queensland (1975) 134 CLR 298; [1975] HCA 43, considered
Toben v Jones (2003) 129 FCR 515; [2003] FCAFC 137, cited
Victoria v The Commonwealth (1996) 187 CLR 416; [1996] HCA 56, cited
Waters v Public Transport Corporation (1991) 173 CLR 349; [1991] HCA 49, cited
Trust Co of Australia Ltd v Skiwing Pty Ltd (2006) 66 NSWLR 77; [2006] NSWCA 185, distinguished
Valente v The Queen [1985] 2 SCR 673, cited
Wotton v State of Queensland [2012] HCA 2, cited

COUNSEL: R W Haddrick for the applicant in the case stated, Owen
S J Hamlyn Harris, with S Robb, for the first and second respondents in the case stated, Menzies and Bruce

G Del Villar for the intervener in the case stated, the Attorney General for the State of Queensland

SOLICITORS: S K Lawyers for the applicant in the case stated, Owen
Caxton Legal Centre for the first and second respondents in the case stated, Menzies and Bruce
Crown Law for the intervener in the case stated, the Attorney General for the State of Queensland

[1] **CHIEF JUSTICE:** I am grateful to the President for her recitation of the history of the proceeding.

[2] As to whether the applicable provision of the *Anti-Discrimination Act* 1991, s 124A, infringes the implied constitutional freedom of communication about government and political matters, it is arguable that its proscription of extreme forms of objectionable acts (such as inciting hatred or serious contempt or severe ridicule) nevertheless leaves citizens sufficiently free to engage in communications about governmental and political matters, including the civil rights which should be accorded homosexuals, so that the first question posed by *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (as modified by *Coleman v Power* (2004) 220 CLR 1, 50-51) should be answered "no": the law does not effectively burden the relevant constitutional freedom.

[3] It is also however arguable that this court would be constrained by *Sunol v Collier (No 2)* [2012] NSWCA 44 (para 45 per Chief Justice, and Allsop P) to find that the provision does infringe the implied constitutional freedom (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-2), on the basis that *Sunol v Collier* addressed an issue indistinguishable from the present, whereas the issue in *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, while similar, was not the same as here.

[4] But it is not necessary for this court to take a definitive position on that issue, because any burden is incidental and reasonably appropriate and adapted, in light of both sub-sections. I agree with the views expressed by my colleagues in relation to the application in this case of the second limb of the test under *Lange*.

[5] I agree with the President's reasoning and conclusion that the respondent Ms Bruce has and had *locus standi* as an applicant before the Queensland Civil and Administrative Tribunal ("QCAT") and its predecessor. Critically, such legislation should be construed broadly and beneficially. Vilification of homosexuality may amount to vilification of bisexuals insofar as the orientation of bisexuals includes a sexual inclination towards persons of their own gender.

[6] I agree with the reasons of Muir JA, and His Honour's (and the President's) proposed answers to the questions raised for the consideration of this Court.

[7] In these reasons, I address the question whether QCAT is a court of a State within the purview of Chapter III of the *Commonwealth Constitution*. In a sense this is a non-issue. If QCAT is such a court, it may exercise federal jurisdiction, including determining the constitutional validity of s 124A of the *Anti-Discrimination Act*. But as explained by Muir JA, if not, it may as a tribunal exercise State jurisdiction. In doing so, it would not be necessary for QCAT to determine the constitutional issue. That is because this court is determining that issue, and the result of that

determination is that there is no constitutional impediment to QCAT's determining the applications before it, applying s 124A to its full effect, as QCAT would proceed to do.

[8] Nevertheless, since the question whether QCAT is a court featured so prominently and extensively in the submissions made to this court, the issue warrants comprehensive exposition in this judgment.

[9] The applicant contends that QCAT is not a court of a State within the meaning of Chapter III, with the consequence that the judicial power of the Commonwealth cannot have been vested in it under s 77 of the *Constitution*, leaving it incompetent to determine the matter of constitutional interpretation. The respondents and the Attorney-General for the State of Queensland contend to the contrary.

[10] One may begin with s 164(1) of the *Queensland Civil and Administrative Tribunal Act* 2009, which provides that QCAT is a "court of record". As observed by Kirby J in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 562, while not conclusive, that designation may constitute a "very strong consideration" in determining the true nature of the body.

[11] In exercising its jurisdiction, QCAT decides controversies between the parties before it, making the "binding and authoritative" decisions which ordinarily characterize the exercise of judicial power (*Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357).

[12] Counsel for the applicant referred to QCAT's jurisdiction in relation to a "minor civil dispute", prescribed by ss 11 and 12 of the Act, and the provision in s 13 that QCAT must make orders that it considers "fair and equitable". Counsel submitted that QCAT was not, in this situation, necessarily obliged to apply the law, and he sought to contrast QCAT's statutory jurisdiction with the terms in which equitable and common law jurisdiction is invested by statute in Magistrates Courts in various jurisdictions.

[13] That provision did not however exclude the Tribunal's implied obligation to make its determinations in accordance with the parties' legal rights and obligations. In certain situations, the legislature has specified the legislation which prescribes the orders which may be made (s 13(2)(b)-(d)), itself inconsistent with a view that the Tribunal is unconstrained by the law.

[14] In *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 Gleeson CJ referred to "[t]he fundamental importance of judicial independence and impartiality", pointing out there is "no single ideal model of judicial independence, personal or institutional", and that there is "room for legislative choice" in that area. In the case of QCAT, the legislature has provided (s 162) that in exercising its jurisdiction, the Tribunal "must act independently" and that it "is not subject to direction or control by any entity, including any Minister", which are pivotal features of a judicial process.

[15] Yet notwithstanding those provisions, Counsel for the applicant submitted that a number of features combined to "sap" QCAT of the independence necessary for it to be characterized as a court. Those features, with discussion of their significance, follow.

1. Although designated as a court of record, the Tribunal "is not bound by the rules of evidence, or any practice or procedure applying to courts of record"

(s 28(3)(b)). As observed in *K-Generation Pty Ltd v Liquor Licensing Court*, supra, p 537, however, such provisions are "not inimical to the exercise of judicial power", and the Tribunal would remain obliged to apply the law and rules of procedural fairness.

2. Section 126(2) of the QCAT legislation provides that the Tribunal's "final decision" in a proceeding for a minor civil dispute does not prevent a court or other tribunal revisiting, in another proceeding, an issue considered by the Tribunal, if relevant to that other proceeding. Counsel for the applicant referred to *King v Hoare* (1844) 13 M & W 494, 504; 153 ER 206, 210, as to the finality of court judgments.

   Counsel for the Attorney-General referred in response to legislative provision to similar effect in other jurisdictions, in relation to Magistrates Courts for example, concerning the treatment of minor claims. This consideration is of no substantial weight in the end.

3. The power to punish for contempt is exercisable only by the President or Deputy President of the Tribunal (s 219(5), (6)). Counsel for the applicant advanced that limitation as telling against designating the Tribunal as a court.

   The point is answered by *K-Generation v Liquor Licensing Court*, supra, pp 538-9, referring to "the long history of inferior courts in Australia, extending back to the period before federation. They may well have lacked a power [to punish for contempt] but that must have been within contemplation when s 77(iii) [of the Constitution] was formulated".

   This Tribunal has a power to punish for contempt: the limitation relates to those members who may exercise it. Again, this consideration is of no substantial weight in the end.

4. Senior members and ordinary members, who account for the vast majority of the membership of the Tribunal, may be removed from office by the executive government for nothing more than inefficiency, or for conduct which would warrant dismissal from the public service.

   Section 188(1)(a)(ii) allows for the removal of a senior or ordinary member, by the Governor-in-Council on the Minister's recommendation, for carelessness, incompetence or inefficiency. Section 188(1)(a)(iii) provides for removal for conduct which would warrant dismissal from the public service "if the member were a public service officer". Counsel for the applicant offered the example of a member's finding fault with legislation in the course of determining a matter before the Tribunal and dealing with that in published reasons: a public servant may not comment on governmental policy unless authorized to do so.

   As to removal generally, it is important to note that there is an avenue for challenge under the *Judicial Review Act* 1991. The availability of the Supreme Court's "supervisory jurisdiction" is considered a safeguard for the independence of inferior courts or tribunals (*Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 82-3).

   As to removal on grounds applicable to public servants, attention focused in argument on whether senior and ordinary members would thereby be

rendered subject, if indirectly, to an approved "code of conduct" or "standard of practice" under the *Public Sector Ethics Act* 1994. That Act provides that a "public official" is so subject (ss 11, 12D) but members of the Tribunal are expressly excluded from that designation (Schedule). It therefore seems unlikely that s 188(1)(a)(iii) of the QCAT legislation would be construed to extend to a breach of such a code as if it applied to a member.

5. QCAT cannot enforce its orders. Sections 131 and 132 provide for enforcement by filing the Tribunal's order in the Registry of "a court of competent jurisdiction", whereupon the Tribunal's decision "is taken to be an order of the court in which it is filed and may be enforced accordingly". Counsel for the applicant referred to the statement of Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead*, supra, p 357 that the exercise of judicial power "does not begin until some tribunal which has power to give a binding and authoritative decision…is called upon to take action". Counsel relied on *Attorney-General (Commonwealth) v Alinta Ltd* (2008) 233 CLR 542, 599 for a contention that this circumstance is a "strong factor weighing against the characterization of [the Tribunal's] powers as judicial".

Yet in *Brandy v Human Rights and Equal Opportunities Commission* (1995) 183 CLR 245, 269 the High Court observed that it was "not essential to the exercise of judicial power that the tribunal should be called upon to execute its own decision", and referred to the situation with courts of petty sessions, where orders for the payment of money, made in the exercise of judicial power, were enforced by a means of warrants granted independently, and administratively, by justices of the peace.

Counsel separately submitted that this provision for registration in the Supreme Court was apt to impair the institutional integrity of that court, contrary to *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. The submission is answered by a recognition that QCAT is obliged to act independently and impartially, that is, judicially. The registration in the Supreme Court of a decision made in consequence of such a process could not imperil the perception or the reality that the Supreme Court exhibits institutional integrity.

6. The President, the Deputy President, senior members and ordinary members of the Tribunal "serve relatively short terms in office meaning that they do not enjoy security of tenure in office", raising a perception they may need to persuade the executive government that they should be reappointed at the conclusion of their terms.

The appointment of judicial officers for fixed terms does not deny their court that character. In *Forge v Australian Securities and Investments Commission*, supra, p 59 Gleeson CJ referred to the reference by Le Dain J in *Valente v The Queen* [1985] 2 SCR 673, 698 to "tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner". Other matters aside, the availability of judicial review in relation to the process of removal under the QCAT legislation ensures that protection, should it become necessary.

7. The Tribunal does not "predominantly or principally" comprise Judges. The President and Deputy President are the only members of the Tribunal (of more than 160 members over all) whose tenure is linked to judicial office. Counsel for the applicant referred to the observation in *Forge v Australian Securities and Investments Commission*, supra, p 79 that "a court, or at least the Supreme Court, of a State must *principally* be constituted by permanent judges". (See also the less qualified observation in *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 226 FLR 147, 157.) The qualification expressed in the High Court in *Forge* in the words, "or at least the Supreme Court", is significant.

   Senior members and ordinary members, appointed by the Governor-in-Council for fixed terms, may only be removed from office in limited circumstances, being those specified in s 188. They are obliged to act independently and they are not subject to any external direction or control, including by any Minister (s 162). That they lack *Act of Settlement* tenure does not weigh substantially against their constituting a court, because their appointment is, in the words of Le Dain J, "secure against interference by the executive…in a discretionary or arbitrary way" (*Valente v The Queen*, supra, 698).

8. Senior and ordinary members hold office on the conditions set out in their instruments of appointment (s 186). Counsel submitted that was apt to erode perceptions of institutional independence.

   The decision of the High Court in *North Australian Aboriginal Legal Service Inc v Bradley*, supra, is however to the contrary: judicial officers may hold office on such conditions consistently with the stipulation for independence and impartiality.

9. Various powers given to the President are, it was submitted, irreconcilable with the President's being a "proper repository of the judicial power of the Commonwealth". Those powers include: the power to suspend a senior or ordinary member "with the Minister's approval" (s 189); "managing the business of the Tribunal to ensure it operates efficiently" (s 172(2)(a)); "managing the members of the tribunal and adjudicators" (s 172(2)(c)); to decide "selection criteria for appointment of members and adjudicators" (s 72(2)(c)(iv)); to advise the Minister "about the appointment of members" (s 172(2)(e)); "advising the Minister…how the tribunal could improve the carrying out of its functions" (s 172(3)(a)); and the President must choose the members who will constitute the Tribunal for a particular matter (s 165(1)).

   As to a power of suspension with the approval of the Minister, in Queensland the Governor-in-Council may only suspend a Magistrate if a Supreme Court Judge, on application by the Attorney-General, determines there is reasonable ground for believing cause for removal exists (*Magistrates Act* 1991, s 43). That illustrates a situation of removal facilitated by the determination of a judicial officer. Powers of management are regularly accorded heads of jurisdiction by statute. Consultation between heads of jurisdiction and Attorneys-General as to appointments to courts is an established feature of the judicial landscape, as is a flow of advice from a court to the executive government in relation to ways of improving the efficiency of courts. Finally, determining who is to constitute

the Tribunal for the hearing of a matter is a purely administrative function appropriately given to the President.

None of these features is incompatible with the President's discharging a judicial function.

10. Counsel for the applicant relied on extra-mural statements by the President of QCAT describing it, with some emphasis, as a tribunal by contrast with a court. Plainly, the character of QCAT falls to be determined by reference to the legislation which constitutes it.

[16] There was debate before this court as to the appropriateness of a "balance sheet" type aggregation of relevant considerations, and also on judicial reflection about whether one should invoke historical considerations when assessing contemporary manifestations of institutions as courts.

[17] Considerations like those should not deflect this court from an appropriately broad, overall assessment whether QCAT is to be considered as a Chapter III court.

[18] It is in the end important to revert to the aspects emphasized at the outset.

[19] The legislature has ordained QCAT as a court of record, and has militated independence and impartiality, hallmarks of the judicial process, as mandatory for QCAT.

[20] Insofar as the actual operating conditions within the Tribunal may for argument's sake not have been ideal in terms of judicial criteria, high authority supports the view that one need not nevertheless secure that ultimate ideal in order to justify the "court of law" characterization. Ultimately there is the assurance that this Tribunal is to apply the law, and to do so in the manner in which courts traditionally operate, that is, independently and impartially. That is enough to justify calling this Tribunal a "court of the State" within the meaning of the Constitution: none of the additional features tabulated for the applicant, nor their combination, excludes that conclusion.

[21] **MARGARET McMURDO P:** This is a case stated under s 216 *Anti-Discrimination Act* 1991 (Qld) (7138 of 2011) together with related applications (10318 of 2011 and 10868 of 2011). The background to the case stated and the applications has some complexity.

The background

The proceeding in the Anti-Discrimination Tribunal

[22] Rhonda Bruce (the applicant in 10318 of 2011 and the second respondent in 7138 of 2011) and Richelle Menzies (the applicant in 10868 of 2011 and the first respondent in 7138 of 2011)[1] made a complaint of vilification on the ground of sexuality under s 124A *Anti-Discrimination Act* 1991 (Qld) against Ronald Owen, the applicant in 7138 of 2011 and the respondent in both 10318 of 2011 and 10868 of 2011.

[23] The complaint was heard by the Anti-Discrimination Tribunal (the former tribunal) which has since been replaced by the Queensland Civil and Administrative Tribunal (QCAT) with the passing of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the *QCAT Act*).[2] Mr Owen contended that s 124A was unconstitutional. The former tribunal determined that it was not permitted to decide

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1 Together with Tina Joy Coutts and Suzanne Margaret Turner, who have since withdrawn their complainants: see para 23 in the agreed facts in the case stated.

2 See definition of "former tribunal": *QCAT Act*, ss 244, 247(1), Sch 1 [1].

that issue.[3] It found that Mr Owen had vilified Ms Menzies[4] in contravention of s 124A as follows:

"

- On at least 23 August 2005 Mr Owen drove a motor vehicle on public roads displaying a sticker that read:

  '*GAY RIGHTS? UNDER GOD'S LAW THE ONLY RIGHTS GAYS HAVE IS THE RIGHT TO DIE LEV.20:13*'

…

- On 30 August 2005 Mr Owen provided a report to the Cooloola Shire Council tabled on 6 September 2005 which contained a number of statements that vilified homosexuals, including '*Sodomite's (sic) cannot reproduce, their only means of recruitment to their way of life is by preying on the children of normal human beings …*'.
- On 7 September 2005 Mr Owen participated in a television interview broadcast on Channel 7 in which he stated:

  '*I think it is a very perverse lifestyle. … Can our health services cope with the sodomite's epidemic? … As you have prisoners who break the law lose certain rights and I do believe homosexuals lose rights. … I think that they know they are going to die shortly I mean AIDS is pretty prevalent.*'

…

- In mid to late 2005 Mr Owen caused a letter written by him to be published on the website lockstockandbarrel.org entitled '*No Human Rights For Non-Humans*' which included a number of statements vilifying homosexuals, including '*Any person who commits acts that no ignorant animal would commit declares war on his community, and therefore may be destroyed by any or all of that community …*'"[5]

[24] On 19 September 2008, the former tribunal ordered that Mr Owen pay Ms Menzies $5,000.[6] It also ordered that Mr Owen publish an apology to the successful complainants in the *Gympie Times*. It dismissed Ms Bruce's complaint of vilification. Although the former tribunal accepted that she felt offended and disturbed by Mr Owen's statement,[7] it determined that she had no standing as a bisexual person to bring the complaint.[8] On 27 November 2008, it ordered Mr Owen to pay half the costs of Ms Menzies.[9]

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3 *Menzies & Ors v Owen* [2008] QADT 20, [253]–[257].
4 And also Ms Coutts and Ms Turner.
5 *Menzies & Ors v Owen* [2008] QADT 20, [4]–[5].
6 The former tribunal also ordered Mr Owen pay Ms Coutts $5,000 and Ms Turner $2,500.
7 *Menzies & Ors v Owen* [2008] QADT 20, [246].
8 Above, [243]–[247].
9 The former tribunal also ordered that Mr Owen pay half the costs of Ms Coutts and Ms Turner, see *Menzies & Ors v Owen (No 2)* [2008] QADT 30.

The appeals before Douglas J

[25] Mr Owen appealed to the Trial Division of the Supreme Court against the former tribunal's orders of 19 September 2008 (BS No 10395 of 2008) and against the costs orders of 27 November 2008 (BS No 100 of 2009). Ms Bruce appealed to the Trial Division of the Supreme Court against the former tribunal's order dismissing her complaint (BS No 10478 of 2008). As the appeals of Ms Bruce and Mr Owen were instituted prior to and not finally dealt with before the *QCAT Act* came into operation, the Supreme Court must continue to hear and decide the appeals as if the *Anti-Discrimination Act* was still in force as it was before the *QCAT Act*.[10]

[26] Mr Owen's appeals (BS No 10395 of 2008 and BS No 100 of 2009) were heard by Douglas J on 16 September 2010.[11] Mr Owen had issued notices under s 78B *Judiciary Act* 1903 (Cth) to the Commonwealth and State Attorneys-General,[12] but none wished to appear.[13] His Honour summarised Mr Owen's constitutional arguments in this way. He contended that s 124A was invalid. The former tribunal was not capable of exercising the judicial power of the Commonwealth in determining that issue. The former tribunal's orders had been made without a determination of the constitutional arguments. The filing of those orders in the Supreme Court under s 212 *Anti-Discrimination Act* was unconstitutional. Accordingly, Mr Owen argued, the former tribunal's order should be set aside.[14]

[27] His Honour noted that the respondents to Mr Owen's appeals did not submit that his constitutional arguments were incapable of triggering an exercise of the judicial power of the Commonwealth. The respondents also accepted that the former tribunal was not a court of a State as that term is used in s 77(iii) of the *Constitution*.[15]

[28] Douglas J reached the following conclusions. The decision of the New South Wales Court of Appeal in *Attorney-General (NSW) v 2UE Sydney Pty Ltd*[16] was factually similar.[17] The former tribunal's orders were registered in the Supreme Court of Queensland under s 212 *Anti-Discrimination Act*. This made the otherwise permissible action of the former tribunal's consideration and interpretation of constitutional arguments an impermissible exercise of federal jurisdiction.[18] As the former tribunal had determined the case without reference to the constitutional issues raised by Mr Owen, its binding orders effectively determined those issues against him, without considering the arguments and without a court with appropriate jurisdiction considering them.[19] The former tribunal should have referred the issues arising under the *Constitution* to the Supreme Court for determination under s 216 *Anti-Discrimination Act*.[20]

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10 *QCAT Act*, s 259.

11 Earlier, on 10 November 2009, Ann Lyons J had made orders refusing to accept parts of Mr Owen's material and requiring him to file further material in a concise form. Mr Owen unsuccessfully appealed to the Court of Appeal from that order: *Owen v Menzies & Ors* [2010] QCA 137.

12 *Owen v Menzies & Ors* [2010] QSC 387, [8].

13 Above, [10].

14 Above, [3].

15 Above, [10].

16 (2006) 226 FLR 62; [2006] NSWCA 349 (*2UE Sydney*).

17 *Owen v Menzies & Ors* [2010] QSC 387, [13].

18 Above, [17], citing *2UE Sydney* (2006) 226 FLR 62, 76–77 [70]–[80] and *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (*Brandy*).

19 Above, [20].

20 Above, [23].

[29] Accordingly, in Mr Owen's appeals Douglas J set aside the decision and orders of the former tribunal and sent the matter to QCAT for referral back to the Court of Appeal Division of the Supreme Court under s 118 *QCAT Act* for determination of the constitutional arguments. Once the Court of Appeal determined those issues, QCAT would apply that determination to the case. There would then be an issue estoppel binding the parties arising from the adjudication of a Chapter III (Ch III) court under the *Constitution*.[21]

The case stated

[30] As Douglas J anticipated, on 4 March 2011 a senior member of QCAT stated the following case to the Supreme Court of Queensland under s 216 *Anti-Discrimination Act*:

> "1. Were the proceedings in the Anti-Discrimination Tribunal an impermissible exercise by the tribunal of the judicial power of the Commonwealth under Chapter III of the *Commonwealth Constitution*?
>
> 2. Is section 212 of the *Anti-Discrimination Act 1991*, providing for the registration and enforcement of orders of the Anti-Discrimination Tribunal, inconsistent with Chapter III of the *Commonwealth Constitution*, and therefore invalid, so far as it purports to apply in these proceedings?
>
> 3. Is section 124A of the *Anti-Discrimination Act 1991* inconsistent with the implied protection of freedom of political communication provided by the *Commonwealth Constitution* and therefore invalid?
>
> 4. Alternatively, to what extent is section 124A of the *Anti-Discrimination Act 1991* to be read down in order to comply with the implied protection of freedom of political communication provided by the *Commonwealth Constitution*?
>
> 5. Does a bisexual person have standing under section 134(1)(a) of the *Anti-Discrimination Act 1991* to complain about vilification on the ground of homosexuality?"[22]

[31] Mr Owen filed and served the case stated in the Supreme Court and successfully applied in the Court of Appeal on 6 September 2011 to transfer the case stated from the Trial Division to the Court of Appeal (7138 of 2011).[23]

[32] As the case stated raised constitutional issues, supplementary notices pursuant to s 78B *Judiciary Act* 1903 (Cth) were served on the Commonwealth and State Attorneys-General. Only the Queensland Attorney-General chose to intervene under s 78A *Judiciary Act*.

[33] During the hearing of the present matters, counsel for the Attorney-General submitted that questions 1 and 2 of the case stated do not address the apposite issues. If the Supreme Court decides to remit a decision of the former tribunal to QCAT, QCAT must deal with the matter under the *Anti-Discrimination Act* as if

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21 Above, [31].

22 Question 5 was not an issue in Mr Owen's appeals; it was the issue in Ms Bruce's appeal which remained unheard in the Trial Division of this Court.

23 *Owen v Menzies & Anor* [2011] QCA 241.

that Act was still in force as it was prior to the enactment of the *QCAT Act*.[24] In doing so, although QCAT has only the functions of the Anti-Discrimination Tribunal[25] and can make only decisions which the former tribunal could have made,[26] it is exercising QCAT's jurisdiction under the *QCAT Act*. It follows that to ask in question 1 whether the former tribunal would have impermissibly exercised federal jurisdiction by hearing and determining the complaints of vilification against Mr Owen is not the same as asking whether QCAT would impermissibly exercise federal jurisdiction by hearing and determining the complaints. It is the latter question which is now relevant.

[34] Similarly in terms of question 2, s 212 *Anti-Discrimination Act* only applies to the registration of a decision by the former tribunal. A decision of QCAT made exercising the functions of the former tribunal remains a decision of QCAT; it is not a decision of the former tribunal. QCAT's decisions may be enforced through Pt 7 Div 4 (ss 129–132) of the *QCAT Act*. It is the validity of those provisions and not s 212 *Anti-Discrimination Act* that are now in issue.

[35] As a result, counsel for Mr Owen and counsel for Ms Menzies and Ms Bruce, without conceding that questions 1 and 2 in the case stated are deficient, sought to amend the case stated to include the following questions:

> "1A. Are the proceedings in the Queensland Civil and Administrative Tribunal an impermissible exercise by the Tribunal of the judicial power of the Commonwealth under Chapter III of the *Commonwealth Constitution*?
>
> 2A. Are sections 131 and 132 of the *Queensland Civil and Administrative Tribunal Act* 2009, which provide for the registration and enforcement of orders of the Queensland Civil and Administrative Tribunal, inconsistent with Chapter III of the *Commonwealth Constitution*, and therefore invalid, so far as they purport to apply in these proceedings?"

[36] Counsel for the Queensland Attorney-General did not support the amendment of the case stated. He submitted it was sufficient for this Court to consider the following three issues in addressing the case stated. The first is whether Ch III of the *Constitution* prohibits QCAT from hearing and determining the complaint against Mr Owen under s 124A *Anti-Discrimination Act*. The second is whether s 124A infringes the implied constitutional freedom of political communication. The third is whether a bisexual person can have standing under s 134(1)(a) *Anti-Discrimination Act* to complain about vilification on the ground of homosexuality.

[37] It does not seem that further supplementary notices containing the proposed questions 1A and 2A were served on the Commonwealth and State Attorneys, other than the Queensland Attorney. Despite the deficiencies in questions 1 and 2, the three issues identified by counsel for the Attorney-General adequately encompass all the issues intended to be raised in the case stated. In these circumstances, I would refuse the application for leave to amend the case stated by adding

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24 *QCAT Act*, s 260(3).

25 *QCAT Act*, s 260(4)(a). The functions of the Anti-Discrimination Tribunal were set out in s 248 *Anti-Discrimination Act* 1991 (Qld) but have now been repealed by *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act* 2009 (Qld) s 1354.

26 *QCAT Act*, s 260(4)(b). Under s 244 *QCAT Act*: "***decision***, of a former tribunal or court, includes an order made or direction given by the former tribunal or court".

questions 1A and 2A. I will instead address the three questions identified by the Attorney-General.

Ms Bruce's application

[38] As Ms Bruce's appeal in the Trial Division (SC No 10478 of 2008) from the former tribunal's dismissal of her complaint raised the same question of law as the fifth question in the case stated, she has applied to have her appeal removed from the Trial Division to the Court of Appeal under s 68(5) *Supreme Court of Queensland Act* 1991 (Qld) (10318 of 2011).[27]

Ms Menzies's application

[39] Ms Menzies seeks an extension of time within which to appeal from Douglas J's orders on the same ground as the first issue raised in the case stated. She contends that she did not file an appeal within time against Douglas J's orders as she initially considered that the substantive legal issues would be determined in the way anticipated by his Honour. Later her lawyers became apprehensive that, in the absence of an appeal, Douglas J's orders may give rise to an issue estoppel preventing the Court of Appeal from reconsidering the constitutional point decided by his Honour. She contends that her appeal would allow this Court to set aside Douglas J's orders, avoiding the need for the complaint of vilification to be remitted to QCAT for further determination. This, she submits, would more efficiently resolve the issues in her dispute with Mr Owen.

Mr Owen's request for declarations

[40] Mr Owen submits that in addition to answering the questions in the case stated, this Court should, under s 118(4) *QCAT Act*, declare that the former tribunal was not constitutionally competent to hear and decide the complaint against him or, alternatively, declare that in the event of him being found to have contravened the *Anti-Discrimination Act*, Ms Bruce and Ms Menzies are not permitted to register and enforce any orders of the former tribunal against Mr Owen under s 131 and s 132 *QCAT Act*.

[41] I will deal in turn with each of the three issues raised in the case stated.

Does Ch III of the Constitution prohibit QCAT from hearing and determining the complaint against Mr Owen under s 124A *Anti-Discrimination Act*?

Mr Owen's contentions

[42] Mr Owen contends that QCAT and the former tribunal are and were prohibited from determining whether s 124A *Anti-Discrimination Act* was unconstitutional because this involves an exercise of federal jurisdiction which they are prohibited from exercising. Neither QCAT nor the former tribunal is a court of a State within the meaning of that term in s 77(iii) of the *Constitution*.[28] They are therefore incapable of being vested with the judicial power of the Commonwealth under Ch III. Alternatively, he argues that if QCAT and the former tribunal are courts of a State under s 77(iii), then the principle discussed in *Kable v Director of Public*

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27 *Owen v Menzies & Anor* [2011] QCA 241.

28 Section 77(iii) *Constitution* relevantly provides:
"**Power to define jurisdiction**
With respect to any of the matters mentioned in the last two sections the Parliament may make laws: … (iii) investing any court of a State with federal jurisdiction."

Prosecutions (NSW)[29] applies. This has the result that they lack the institutional integrity and impartiality required of a court exercising the judicial power of the Commonwealth and cannot exercise it.

Is QCAT a court of a State under s 77(iii) Constitution*?*

[43] As I have explained,[30] because the former tribunal's functions have been subsumed by QCAT, it is only QCAT's authority to exercise federal jurisdiction which is now relevant.

[44] In order to determine if QCAT is a court of a State under s 77(iii), it is necessary to understand the scheme of Ch III. Its general scheme was identified by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia*.[31] It institutes a coherent, integrated federal scheme under which federal courts can be established and courts of States are capable of being invested with the judicial power of the Commonwealth under s 77(iii) whilst also exercising State judicial power. If there is a conflict between Commonwealth and State laws, the *Constitution*'s covering cl 5 and s 109 ensure the Commonwealth law prevails.

[45] It follows that if QCAT is a court of a State under s 77(iii), by way of s 39(2) *Judiciary Act*,[32] it is capable of being invested with and exercising the judicial power of the Commonwealth, including exercising federal jurisdiction under s 76(i) of the *Constitution*[33] in determining the constitutionality of s 124A. That conclusion is subject to the proviso, established in *Kable*, that State courts capable of exercising federal jurisdiction under s 77(iii) must have institutional independence and impartiality.

[46] The issues relied upon by Mr Owen as demonstrating that QCAT is not a court of a State under s 77(iii) may well have been sufficient in combination to prevent a comparable federal body from exercising federal jurisdiction under Ch III: see *Re Adams and Tax Agents' Board*[34] and *Brandy v Human Rights and Equal Opportunity Commission*.[35] But in terms of the integrated federal justice system established by Ch III, there is a critical distinction between federal courts to which s 72 of the *Constitution*[36] applies and a court of a State vested with federal jurisdiction under s 77(iii). The separation of judicial and executive power is not

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29 (1996) 189 CLR 51 (*Kable*).

30 See [33] and [34] of these reasons.

31 (1956) 94 CLR 254, 267–270; see also *Forge v ASIC* (2006) 228 CLR 45, 73 [56] (Gummow, Hayne and Crennan JJ).

32 Section 39 *Judiciary Act* 1903 (Cth) relevantly provides:

"**Federal jurisdiction of State Courts in other matters**

(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in 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, and subject to the following conditions and restrictions…"

33 Section 76(i) *Constitution* relevantly provides: "The Parliament may make laws conferring original jurisdiction on the High Court in any matter– arising under this Constitution, or involving its interpretation".

34 (1976) 12 ALR 239, 241–242; (1976) 1 ALD 251, 253–254 (Brennan J).

35 (1995) 183 CLR 245.

36 Section 72 *Constitution* concerns the appointment, tenure and remuneration of federal judges.

a constitutional requirement of all courts at State level,[37] although I note that in Queensland the separation of powers insofar as Supreme and District Court judges are concerned is impliedly acknowledged in Ch 4 *Constitution of Queensland* 2001 (Qld). Chapter III gives recognition to the principle that the organisation of State courts is a matter for State legislatures. But Ch III permits the investing of federal jurisdiction under s 77(iii) only on a body which is a court in the sense of the meaning of that word in the *Constitution*.[38]

[47] The New South Wales Court of Appeal in *Trust Co of Australia Ltd v Skiwing Pty Ltd*,[39] applied in *2UE Sydney*[40] and in the more recent decision of *Sunol v Collier (No 1)*,[41] held that the New South Wales equivalent of the former tribunal is not a court of a State under s 77(iii). Unless these cases can be distinguished from the present case on some proper factual basis or they are plainly wrong, this Court is bound by them: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.[42]

[48] But the question here is not whether the former tribunal is a court of a State under s 77(iii), but whether QCAT is. The answer to whether a tribunal like QCAT is a court of a State under s 77(iii) will depend on the many applicable factors. The New South Wales Administrative Decisions Tribunal[43] differed, at least in one critical respect, from QCAT in that QCAT is a court of record: see s 164 *QCAT Act*. This in itself is a compelling factor in favour of finding that QCAT is a court of a State when it determines complaints under s 124A and makes decisions of the former tribunal in matters remitted to it under the *QCAT Act*'s transitional provisions.[44] It may explain why the New South Wales Attorney-General in *2UE Sydney* and more recently in *Sunol (No 1)* contended that the New South Wales tribunal was not a court of a State under s 77(iii), whereas in the present case the Queensland Attorney-General has contended that QCAT is a court of State under s 77(iii). The fact that QCAT is a court of record provides a sound reason for this Court to distinguish *2UE Sydney*, *Sunol (No 1)* and *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* from the present case.

[49] Despite QCAT's nomenclature as a tribunal and the many other matters raised by Mr Owen, the following factors in combination persuade me that it is a Queensland court, albeit an inferior court of summary jurisdiction. First, as already noted, QCAT is a court of record. Second, it is an independent tribunal resolving disputes between parties.[45] Its independence is not jeopardised solely because the majority

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37 See *Kable* (1996) 189 CLR 51; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598–601 [36]–[42] (McHugh J); *Forge v ASIC* (2006) 228 CLR 45, 65–66 [36] (Gleeson CJ), 75 [61], 82–83 [82]–[85] (Gummow, Hayne and Crennan JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 [84] (French CJ); The Hon Duncan Kerr SC, MP (as his Honour then was) 'State Tribunals and Ch III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622, 622, 625, 642.

38 *Forge v ASIC* (2006) 228 CLR 45, 75 [61] (Gummow, Hayne and Crennan JJ).

39 (2006) 226 FLR 147; (2006) 66 NSWLR 77; [2006] NSWCA 185 (Spigelman CJ, Hodgson and Bryson JJA) (*Skiwing*).

40 (2006) 226 FLR 62 (Spigelman CJ, Hodgson and Ipp JJA), followed by Kenny J in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85, 136–138 [219]–[223].

41 [2012] NSWCA 14 (Bathurst CJ, Allsop P and Basten JA) (*Sunol (No 1)*).

42 (2007) 230 CLR 89, 151–152.

43 And also the Tasmanian Anti-Discrimination Tribunal with which Kenny J was concerned in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85, 136–138 [219]–[223].

44 See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 [85] (French CJ), 562–563 [219]–[221] (Kirby J).

45 *QCAT Act*, ss 3(a), 162.

of its judicial officers are part-time and do not have the same financial security or security of tenure enjoyed by Queensland magistrates and District and Supreme Court judges: *North Australian Aboriginal Legal Aid Service Inc v Bradley*.[46] Third, QCAT's decisions bind the parties[47] and are enforceable.[48] The fact that the enforcement of QCAT decisions turns on the filing of material in another court[49] does not mandate that QCAT is not exercising judicial power: see *Brandy*[50] and *Attorney-General (Cth) v Alinta*.[51] QCAT hearings are ordinarily in public[52] and it must give reasons for its decisions.[53] Its decisions as a court of summary jurisdiction are subject to appeal[54] and to the Supreme Court's supervisory and appellate jurisdiction.

[50] It is true that the majority of members of QCAT are not called judges. In *Skiwing*,[55] Spigelman CJ (Hodgson and Bryson JJA agreeing), noted that: "One aspect of a court of law is that it is comprised, probably exclusively although it is sufficient to say predominantly, of judges."[56] But this concept of what constitutes a court becomes a 'chicken and egg' argument as it raises the question of what is a judge. The Magistrates Courts of Australian States and Territories are presided over by magistrates, not judges, but there is no doubt that Magistrates Courts are courts of a State under s 77(iii).[57] At the time of federation, Magistrates Courts were commonly constituted by justices of the peace who for the most part were not legally qualified. Indeed, justices of the peace can still constitute a Magistrates Court in Queensland for limited purposes.[58] The fact that many QCAT members determining disputes are not called judges, or may not even be legally qualified, does not mean it is not a court.

[51] Mr Owen also places emphasis on the observations of Gummow, Hayne and Crennan JJ in *Forge*[59] that a court must be principally constituted by permanent judges whereas most QCAT members are part-time and with limited tenure. But their Honours in *Forge* qualified those comments as applying to the Supreme Court of a State. They were made in the context of considering the constitutionality of acting judicial appointments to the Supreme Court of a State, not in the context of whether a State tribunal like QCAT was a court of a State for the purposes of s 77(iii). The fact that the majority of QCAT members are part-time with limited tenure does not preclude QCAT from being a court of a State under s 77(iii).

[52] For these reasons, as well as those of the Chief Justice, I consider QCAT is a court of a State for the purposes of s 77(iii), albeit one of summary jurisdiction. This conclusion marries with the obvious legislative intention, inferred from Ch III and s 39(2) *Judiciary Act*, to establish a practical and functional federal scheme whereby

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46 (2004) 218 CLR 146, 159–173 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
47 *QCAT Act*, s 126(1).
48 *QCAT Act*, ss 129–133.
49 *QCAT Act*, ss 131–132.
50 (1995) 183 CLR 245, 269 (Deane, Dawson, Gaudron and McHugh JJ).
51 (2008) 233 CLR 542, 599 [175] (Crennan and Kiefel JJ).
52 *QCAT Act*, s 90.
53 *QCAT Act*, ss 121–122, 158–160.
54 *QCAT Act*, ss 142–145.
55 (2006) 226 FLR 147; (2006) 66 NSWLR 77; [2006] NSWCA 185.
56 (2006) 226 FLR 147, 157 [52], see also 157–159, especially [58]–[61].
57 See, for example, *South Australia v Totani* (2010) 242 CLR 1, 39–40 [54] (French CJ).
58 See, for example, *Justices Act* 1886 (Qld) ss 19, 27–29; and Pt 6 'Proceedings in case of simple offences and breaches of duty'; and also *Magistrates Act* 1991 (Qld) s 8.
59 (2006) 228 CLR 45, 79 [73].

State courts can exercise delegated federal judicial power concurrently with their State judicial power.

Does QCAT offend the Kable *principle?*

[53] I turn now to Mr Owen's alternative contention in his Ch III argument, that even if QCAT is a court of a State, it offends the *Kable* principle and cannot exercise federal jurisdiction. As I have explained, Ch III leaves for the States to determine the form and makeup of their own courts, but always subject to the *Kable* principle which requires that, to exercise federal jurisdiction under s 77(iii), State courts must have institutional independence and impartiality. That principle does not prohibit State legislatures from conferring judicial and administrative functions on a State court such as QCAT even though a federal court established under Ch III of the *Constitution* could not exercise administrative functions.[60] The fact that QCAT exercises both judicial and non-judicial functions does not mean it offends the *Kable* principle. Magistrates Courts also undertake administrative functions, for example, committing defendants on serious criminal charges for trial and sentence in the District and Supreme Courts, or in extradition proceedings.[61] Indeed, the Supreme Court of Queensland may arguably be undertaking administrative functions in its decision making under the *Dangerous Prisoners (Sexual Offences) Act* 2003 (Qld), but this does not amount to a breach of the *Kable* principle as it did not impair the Supreme Court's institutional integrity in such a way as to be incompatible with the Court's constitutional position as a repository of federal judicial power: see *Fardon v Attorney-General (Qld)*.[62] Mr Owen has not demonstrated that any of QCAT's administrative functions are such as to compromise its institutional independence and integrity.

[54] It is true that QCAT does not enforce its own decisions but files them with supporting affidavit material in other State courts for enforcement. There are sound economic reasons for a State legislature to decide not to duplicate existing judicial enforcement procedures when establishing a summary court like QCAT. The enforcement provisions in Pt 7 Div 4 (ss 129–132) *QCAT Act* do not amount to a mere executive requirement on the Queensland Supreme, District or Magistrates Courts to enforce QCAT decisions. The use of the word "may" throughout those provisions shows that the Supreme, District and Magistrates Courts could refuse to enforce a decision of QCAT in appropriate circumstances, for example, where the decision was obtained by fraud. QCAT is independent and impartial.[63] In terms of the *International Covenant on Civil and Political Rights*[64] Art 14(1), a litigant like Mr Owen against whom a complaint under s 124A is brought, is entitled under the *QCAT Act* to "a fair and public hearing by a competent, independent and impartial tribunal established by law".[65] QCAT's independence and impartiality is safeguarded by the appellate[66] and supervisory jurisdiction of the Supreme Court. As a court of a State under s 77(iii), QCAT is subject to the *Kable* principle. But the fact that QCAT does not enforce its own decisions, which have been made

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60 Cf *Brandy* (1995) 183 CLR 245.

61 See, for example, *O'Donoghue v Ireland* (2008) 234 CLR 599.

62 (2004) 223 CLR 575.

63 See *QCAT Act*: under s 3(a) the first objective of the Act is to establish an independent tribunal. Under s 28(3)(a) proceedings before QCAT must observe the rules of natural justice. Under s 90 QCAT hearings are ordinarily in public. Under s 162 QCAT must act independently.

64 Opened for signature 16 December 1966, 999 UNTS 171 (in force 23 March 1976); [1980] ATS 23.

65 See also *QCAT Act*, s 28(3)(a) regarding QCAT's adherence to the rules of natural justice.

66 *QCAT Act*, ss 142–145.

independently, impartially and fairly and are subject to the appellate and supervisory jurisdiction of the Supreme Court, but instead files them with supporting material in other courts for their consideration for enforcement (*QCAT Act* ss 129–132) does not interfere with its institutional independence so as to infringe the *Kable* principle. This conclusion appears consistent with the statement by Deane, Dawson, Gaudron and McHugh JJ in *Brandy* that "it is not essential to the exercise of judicial power that [a] tribunal should be called upon to execute its own decision".[67]

[55] It follows that in my view QCAT, as a court of a State which does not offend the *Kable* principle, by way of s 77(iii) *Constitution* and s 39(2) *Judiciary Act*, can determine issues such as whether s 124A *Anti-Discrimination Act* is unconstitutional in the exercise of federal judicial power under s 76(i) *Constitution*, whilst concurrently exercising its State judicial power under the *QCAT Act*.

2UE Sydney *and* Sunol (No 1)

[56] I appreciate this construction of Ch III is inconsistent with that taken by the New South Wales Court of Appeal in *Skiwing*, *2UE Sydney* and *Sunol (No 1)*. But as I have explained, there are sound reasons for distinguishing the present case which concerns QCAT, a court of record, from the New South Wales Administrative Decisions Tribunal, which is not. The principle, stated by the High Court in *Farah Construction v Say-Dee Pty Ltd* which requires intermediate appellate courts to follow the reasoning of other intermediate appellate courts on uniform legislation, does not apply here. In the circumstances of this case, I feel constrained to distinguish *Skiwing*, *2UE Sydney* and *Sunol (No 1)*. I take a different construction of Ch III based on my finding that QCAT is a court of a State under s 77(iii) and my understanding of High Court authority concerning, and the terms of, Ch III.

[57] I receive some comfort in this bold step from Heerey J's decision in *Commonwealth v Wood*.[68] I also note that the *2UE Sydney* approach has been questioned by learned commentators including the Hon Duncan Kerr SC, MP (as his Honour then was).[69]

[58] I emphasize the distinction in Ch III between federal courts to which s 72 applies and a court of a State which is vested with federal jurisdiction under s 77(iii). I also emphasize the use of the word "may" throughout ss 129–132 *QCAT Act* so that the filing of QCAT decisions and supporting materials in the Supreme, District and Magistrates Courts does not require those Courts to undertake executive action. These provisions are in stark contrast to s 82 and s 114 *Administrative Decisions Tribunal Act* 1997 (NSW) which applied in *2UE Sydney*[70] and, it may be accepted, in *Skiwing*[71] and *Sunol (No 1)*.[72]

[59] The reasoning in *2UE Sydney* pivots on Jacob J's observations in *Commonwealth v Queensland*.[73] The principal judgment in that case was given by Gibbs J (as his Honour then was) with whom Barwick CJ, Stephen and Mason JJ agreed. Only McTiernan J was in substantial agreement with Jacobs J. Jacobs J made those

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67 (1995) 183 CLR 245, 269 (Deane, Dawson, Gaudron and McHugh JJ) cited by Crennan and Kiefel JJ in *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542, 599 [175].

68 (2006) 148 FCR 276.

69 See 'State Tribunals and Ch III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622.

70 *2UE Sydney* (2006) 226 FLR 62, 68 [23].

71 *Skiwing* (2006) 226 FLR 147, 153 [26].

72 *Sunol (No 1)* [2012] NSWCA 14, [10].

73 (1975) 134 CLR 298, 327–328.

observations in a context very different to the present. With respect, I do not consider Jacob J's observations in those circumstances provide a persuasive platform from which to construe "court of a State" in s 77(iii). This is especially so in light of the clearly intended purpose of Ch III, namely, to establish a functional judicial system amongst a federation of established States with extant judicial systems.

[60] In my opinion, the construction of Ch III adopted in *Skiwing*, *2UE Sydney*[74] and *Sunol (No1)*[75] and urged upon us by Mr Owen would have undesirable consequences, unlikely to have been intended by those who drafted Ch III. It would mean that an independent and impartial State court like QCAT, set up to be accessible, fair, just, economical, informal and quick[76] in an open and accountable way[77] and upon which no non-judicial functions infringing the *Kable* principle have been conferred, could not determine federal constitutional law intermingled with and directly relevant to its exercise of State judicial power.[78] In the context of the present case, this would mean that any person the subject of a complaint under s 124A could thwart the jurisdiction of QCAT simply by raising a constitutional issue, no matter how unmeritorious. I also receive some comfort in taking this construction of Ch III by the fact it is consistent with the approach presently adopted in construing broadly comparable constitutional provisions in the federations of the United States of America[79] and in Canada.[80]

[61] It follows that in my view QCAT is a court of a State under s 77(iii) and, by way of s 39(2) *Judiciary Act*, has the power both to hear and determine whether s 124A offended the *Constitution* and the complaint against Mr Owen remitted to it under the transitional provisions of the *QCAT Act*.

Is s 124A *Anti-Discrimination Act* inconsistent with the implied freedom of political communication under the Constitution?

[62] Mr Owen contends s 124A is inconsistent with the implied freedom of political communication under the *Constitution*. In discussing that contention it is necessary to understand the scheme of the *Anti-Discrimination Act* and to construe s 124A so as to determine if and how it might fetter that freedom.[81]

The scheme of the Anti-Discrimination Act

[63] The full title to the *Anti-Discrimination Act* is "An Act to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain

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74 *2UE Sydney* (2006) 226 FLR 62, 77 [76]–[80] (Spigelman CJ).

75 *Sunol (No 1)* [2012] NSWCA 14, [17]–[21].

76 *QCAT Act*, s 3(b).

77 *QCAT Act*, s 3(e).

78 This difficulty was eloquently acknowledged by Spigelman CJ in *2UE Sydney* (2006) 226 FLR 62, 78. And see, by way of example: *Sunol (No 1)* [2012] NSWCA 14, [21]–[24]. On the reasoning adopted in *Sunol (No 1)*, not only did the tribunal lack jurisdiction to hear constitutional issues, it was also prevented from referring those issues to competent courts for determination. To resolve the stalemate, the Court invited the applicant to file an amended summons seeking declaratory relief.

79 *Claflin v Houseman* (1876) 93 US 130, 136–137; *Howlett v Rose* (1990) 496 US 356, 367; *Haywood v Drown* (2009) 556 US 729; *Erb v The Maryland Department of Environment* (1996) 676 A.2d 1017 (Md Ct Spec App1996).

80 *Nova Scotia (Workers' Compensation Board) v Martin* [2003] 2 SCR 504; *R v Conway* [2010] 1 SCR 765.

81 *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ).

areas of activity and from sexual harassment and certain associated objectionable conduct."

[64] The preamble to the *Anti-Discrimination Act* includes:

> "**Parliament's reasons for enacting this Act are—**
>
> 1 The international community has long recognised the need to protect and preserve the principles of dignity and equality for everyone.
>
> 2 This is reflected in a number of international human rights instruments that the Commonwealth has ratified, including—
>
> …
>
> • the International Covenant on Civil and Political Rights[82]
>
> …
>
> 3 The Parliament is supportive of the Commonwealth's ratification of these international instruments.
>
> 4 In fulfilling its obligations under these international instruments the Commonwealth has enacted certain human rights legislation.
>
> 5 The Parliament is satisfied that there is a need—
>
> (a) to extend the Commonwealth legislation; and
>
> (b) to apply anti-discrimination law consistently throughout the State; and
>
> (c) to ensure that determinations of unlawful conduct are enforceable in the courts of law.
>
> 6 The Parliament considers that—
>
> (a) everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination; and
>
> (b) the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society; and
>
> (c) the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.
>
> 7 It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by the Act, for the promotion of equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct."

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[82] Of particular relevance are the Covenant's Articles 19 and 20. See also *Toonen v Australia*, Communication No 488/1992 (1994) [8.7]; *Young v Australia*, Communication No 441/2000 (2003) [10.4].

[65] The Act's anti-discrimination purpose and how it is to be achieved is set out in s 6 which relevantly provides:

> "(1) One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, … .
>
> (2) This purpose is to be achieved by—
>
> …
>
> (b) allowing a complaint to be made under chapter 7 against the person who has unlawfully discriminated; and
>
> (c) using the agencies and procedures established under chapter 7 to deal with the complaint."

[66] Chapter 4 is headed "Associated objectionable conduct (complaint)" and relevantly provides:

> "**Part 1 Act's freedom from associated objectionable conduct purpose**
>
> **121 Act's freedom from associated objectionable conduct purpose and how it is to be achieved**
>
> (1) One of the purposes of the Act is to promote equality of opportunity for everyone by prohibiting certain objectionable conduct that is inconsistent with the other purposes of the Act.
>
> (2) This purpose is to be achieved by—
>
> (a) prohibiting certain conduct; and
>
> (b) allowing a complaint to be made under chapter 7 against a person who has engaged in that conduct; and
>
> (c) using the agencies and procedures established under chapter 7 to deal with the complaint.
>
> …"

[67] The impugned provision is also contained in Chapter 4:

> **"Part 4 Racial and religious vilification**
>
> **124A Vilification on grounds of race, religion, sexuality or gender identity unlawful**
>
> (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.
>
> (2) Subsection (1) does not make unlawful—
>
> (a) the publication of a fair report of a public act mentioned in subsection (1); or

(b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter."

[68] Also relevant is s 4A:

"(1) A ***public act*** includes—

(a) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing of tapes or other recorded material, or by electronic means; and

(b) any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.

(2) Despite anything in subsection (1), a ***public act*** does not include the distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter."

Mr Owen's contentions

[69] Mr Owen contends that s 124A is either wholly invalid or should be read down to exclude conduct such as Mr Owen's which is protected by the implied constitutional freedom of political communication. Section 124A effectively burdens freedom of communication about government or political matters in its terms, operation and effect. The statutory prohibition in s 124A is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. He submits that s 124A does not properly account for Mr Owen's political communication of his views regarding the rights of homosexual persons in the community. The section is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This Court should read down s 124A to exclude conduct like Mr Owen's which is in furtherance of political communication.

Conclusion as to whether s 124A is unconstitutional

[70] The High Court first set out the test for determining the validity of a statutory provision which is contended to impermissibly burden the implied freedom of political communication in *Lange v Australian Broadcasting Corporation*[83] subsequently refining it in *Coleman v Power*;[84] more recently unanimously restating it in *Hogan v Hinch*;[85] and most recently applying it in *Wotton v State of Queensland*.[86] Adopting that test in the present case, the first question is whether,

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83 (1997) 189 CLR 520, 561–562.

84 (2004) 220 CLR 1.

85 (2011) 243 CLR 506, 542 [47] (French CJ), 555–556 [94]–[97] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

86 [2012] HCA 2, [25].

in its terms, operation or effect, s 124A effectively burdens freedom of communication about government or political matters. If it does not, it is not unconstitutional. If it does burden the freedom, the second question is whether s 124A is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.

[71] In answering the first question, the observations of Hayne J in *APLA Ltd v Legal Services Commissioner (New South Wales)*;[87] Kirby J in *Australian Broadcasting Corporation v O'Neill*;[88] and Heydon J[89] and Kiefel J[90] in *Wotton* are pertinent. The implied freedom is not an individual right but a limitation on legislative power. Determining whether s 124A burdens the constitutional freedom of communication about government or political matters involves a consideration as to how s 124A may affect the freedom generally.

[72] Section 124A[91] does not seek to prevent or burden public discussion on race, religion, sexuality or gender identity. But it does, subject to the matters set out in s 124A(2), make unlawful those public acts (as broadly defined in s 4A[92]) inciting hatred towards, serious contempt for or severe ridicule of others on the ground of their sexuality. In this respect, s 124A is more limited in the terms of its proscription and can be distinguished from the legislation under consideration in *Coleman v Power*, *Hogan v Hinch* and *Wotton*. Section 124A should be construed as a whole and in the context of the scheme of the Act. Reading s 124A(1) and (2) together, I would construe the provision as not burdening the freedom of communication about government or political matters under the first limb of the *Lange* test. In fact, I consider the terms of s 124A set parameters to enhance communications about government and political matters in a civilised, diverse democracy which values all its members, irrespective of race, religion, sexuality or gender identity.

[73] It is true, as Mr Owen submits, that insult and invective can be legitimate forms of political communication protected by the implied freedom.[93] But simply because a statement contains insult and invective does not mean it relates to government or political matters. Insult and invective can be an effective form of legitimate political and government communication without, in the terms of s 124A, inciting hatred towards, serious contempt for, or severe ridicule of others on the ground of their race, religion, sexuality or gender identity. I cannot see that the incitement of hatred towards, serious contempt for, or severe ridicule of others on the grounds of race, religion, sexuality or gender can amount to political and government communication of the kind contemplated by the implied freedom under a diverse, modern democracy.

[74] This conclusion is consistent with that reached by the Victorian Court of Appeal (Nettle, Ashley and Neave JJA) in *Catch the Fire Ministries v Islamic Council of Victoria Inc*.[94] In that case, the court considered statutory provisions comparable to

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87 (2005) 224 CLR 332, 451 [381].
88 (2006) 227 CLR 57, 95–96 [113]–[114].
89 *Wotton v State of Queensland* [2012] HCA 2, [54].
90 Above, [80].
91 Set out at [67] of these reasons.
92 Set out at [68] of these reasons.
93 *Coleman v Power* (2004) 220 CLR 1, 78 [197] (Gummow and Hayne JJ), 91 [239] (Kirby J).
94 (2006) 15 VR 207, 246 [113] (Nettle JA), [119] (Ashley JA), 265 [208] (Neave JA).

s 124A which prohibited conduct inciting hatred against, serious contempt for, or revulsion or severe ridicule of persons on the ground of religious belief.[95] Their Honours also concluded that, even if wrong on that question, in terms of the second question in the *Lange* test the provision was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.[96]

[75] More recently in *Sunol v Collier (No 2)*,[97] the majority of the New South Wales Court of Appeal (Bathurst CJ and Allsop P, Basten JA dissenting) determined that s 49ZT *Anti-Discrimination Act* 1977 (NSW),[98] (a comparable provision to s 124A) regardless of the context of the alleged vilification, does effectively burden freedom of communication about government or political matters either in its terms, operation or effect.[99] But all three judges, agreed that, in terms of the second question in the *Lange* test, s 49ZT was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of our constitutional system of government.[100] Their Honours were referred to *Catch the Fire Ministries* but Bathurst CJ and Allsop P, whilst not stating the decision was plainly wrong, clearly did not feel constrained by *Farah v Say-Dee Pty Ltd* to follow it.[101]

[76] There are therefore presently conflicting approaches taken by respected State appellate courts as to the construction of provisions comparable to each other and to s 124A. It follows that this Court must make up its own mind in construing s 124A, after giving careful consideration to the diverging views of both courts. I prefer the view of the Victorian Court of Appeal and Basten JA's minority view in *Sunol (No 2)*. For the reasons I have given, I consider that s 124A does not, in its terms, operation or effect, effectively burden freedom of communication about government or political matters.

[77] If I am wrong, it is necessary to consider the second question in the *Lange* test. I am in no doubt that s 124A is a provision reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. That end is the promotion of equality of opportunity for all members of the community by prohibiting objectionable conduct inconsistent with the purposes of the Act[102] and the Queensland Parliament's desire to improve the quality of democratic life through an educated community appreciative and respectful of the dignity and worth of all its members.[103]

[78] The Queensland legislature's intention to reasonably balance that legitimate end with the implied constitutional freedom of communication is clearly manifested in s 124A(2)(c) which states that s 124A(1) does not make unlawful "a public act, done reasonably and in good faith, for [various] purposes, including public discussion or debate about, and expositions of, any act or matter". A "public act"

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95 See *Racial and Religious Tolerance Act* 2001 (Vic) s 8(1).

96 *Catch the Fire Ministries v Islamic Council of Victoria* (2006) 15 VR 207, 246 [113], [119], 265–266 [209]–[210].

97 [2012] NSWCA 44 (*Sunol (No 2)*).

98 Set out in *Sunol (No 2)* at [11].

99 *Sunol (No 2)* [2012] NSWCA 44, [42]–[45] (Bathurst CJ), [55], [66]–[68] (Allsop P), *contra* [79]–[91] (Basten JA).

100 Above, [46]–[53] (Bathurst CJ), [69]–[74] (Allsop P), [94] (Basten JA).

101 Above, [45].

102 *Anti-Discrimination Act* 1991 (Qld) ss 6, 121.

103 *Anti-Discrimination Act* 1991 (Qld) Preamble para 6(c).

includes any form of communication to the public.[104] The exemption in s 124A(2)(c) ensures that s 124A provides a reasonably appropriate balance between, and is adapted to address the tension between, on the one hand, the legitimate end of promoting equality of opportunity for everyone by prohibiting specified objectionable conduct in Queensland[105] and, on the other, Queenslanders' constitutional right to freedom of communication about government and political matters.

[79] This conclusion is consistent with that reached in both *Catch the Fire Ministries* and *Sunol (No 2)*. I also note that, in resolving a similar tension between the implied constitutional freedom of communication and a comparable provision in the *Racial Discrimination Act* 1975 (Cth),[106] Hely J in *Jones v Scully*[107] and the Full Federal Court in *Toben v Jones*[108] reached a similar conclusion.

[80] I do not consider that s 124A, read as a whole and in context, effectively burdens the implied constitutional freedom of communication about government or political matters. If it does, s 124A(2)(c) ensures that s 124A is reasonably appropriate and adopted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government. Section 124A is not inconsistent with the implied protection of freedom or political communication under the *Constitution*.

[81] It follows that the answer to question 3 in the case stated is "No". The answer to question 4 is "It is unnecessary to read down s 124A in order to comply with the implied protections of freedom of political communication provided by the *Commonwealth Constitution*".

Can a bisexual person have standing under s 134(1)(a) *Anti-Discrimination Act* to complain about vilification on the ground of homosexuality?

[82] Section 134 *Anti-Discrimination Act* relevantly provides that a person who is subjected to an alleged contravention of the *Anti-Discrimination Act* may complain.

[83] The former tribunal reasoned as follows. Ms Bruce identified as a person of bisexual orientation.[109] She did not have standing to bring a complaint as Mr Owen's conduct was in the nature of "hatred of, serious contempt for or severe ridicule of, homosexuals".[110] The expression "sexuality" in s 124A(1) is defined in the *Anti-Discrimination Act* in a way which distinguishes between heterosexuality, homosexuality and bisexuality. The word "homosexuality" has the dictionary definition of "sexual feeling for a person of the same sex". Mr Owen's incitement was on the basis of the sexuality of homosexuals. Although Ms Bruce considered herself to be a part of the Gympie homosexual community and she felt offended and disturbed by Mr Owen's statements, as a bisexual she was not a person who, under s 134(1)(a), was subjected to the alleged contravention and her complaint must be dismissed.[111]

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104 *Anti-Discrimination Act* 1991 (Qld) s 4A; set out at [68] of these reasons.
105 *Anti-Discrimination Act* 1991 (Qld) s 121.
106 *Racial Discrimination Act* 1975 (Cth) ss 18C–18D.
107 (2002) 120 FCR 243, 306 [240].
108 (2003) 129 FCR 515.
109 *Menzies & Ors v Owen* [2008] QADT 20, [243].
110 Above, [245].
111 Above, [247].

[84] Ms Bruce and the Attorney-General contend that this construction is wrong and that she has standing. Mr Owen supports the construction adopted by the former tribunal. He points out that s 124A(1) refers to "sexuality"; that term is defined as "heterosexuality, homosexuality or bisexuality";[112] and he emphasizes the use of the disjunctive "or". He argues that this has the effect that only homosexuals could complain about vilification of homosexuals.

[85] The legislature intended that the *Anti-Discrimination Act* benefit those sections of the community who are perceived to be unfairly discriminated against, sexually harassed and subjected to associated objectionable conduct. So much is obvious from the full title to the Act; the preamble; the Act's anti-discrimination purpose and how it is to be achieved;[113] and the Act's freedom from associated objectionable conduct purpose and how it is to be achieved.[114] Courts have a special responsibility to take account of and give effect to that statutory purpose when construing legislation which has a beneficial purpose and protects or enforces human rights: *Waters v Public Transport Corporation*[115] and *IW v City of Perth*.[116] This Court should adopt a broad construction of s 124A in favour of those intended to benefit from it.

[86] The expressions "homosexuality" and "bisexuality" as used in the definition of the term "sexuality" in s 124A[117] are not defined in the *Anti-Discrimination Act*. The Macquarie Dictionary[118] defines bisexuality as "attraction to both males and females as sexual partners" and homosexuality as "sexual feeling for a person of the same sex". The former tribunal found that Mr Owen's public acts in contravention of s 124A(1)[119] were directed against homosexuals. But an essential aspect of bisexuality is a sexual feeling for a person of the same sex, that is, homosexuality. It follows that vilification of homosexuals is also vilification of bisexuals at least where, like Ms Bruce, the bisexual person identifies with homosexuals.

[87] For these reasons, I consider the former tribunal erred in finding that, because Ms Bruce was bisexual, she could not have standing under s 134(1)(a) to bring her complaint against Mr Owen for his vilification of homosexuals. A bisexual person can have standing under s 134(1)(a) to complain about vilification on the ground of homosexuality.

[88] But that does not mean that question 5 in the case stated should be answered affirmatively. The question is in the most general of terms. Whether a bisexual person, or indeed a heterosexual or a homosexual person has standing under s 134(1)(a) to complain about vilification on the ground of homosexuality will depend on the circumstances of the alleged vilification in each case. For example, if a person vilifies only male homosexuals contrary to s 124A, a homosexual woman and a bisexual woman may not have standing to bring a complaint under s 134(1)(a). It follows that question 5 in the case stated should be answered "Depending on the circumstances, a bisexual person may have standing under

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112 *Anti-Discrimination Act* 1991 (Qld), Schedule, dictionary.
113 See s 6 relevantly set out at [65] of these reasons.
114 See s 121 set out at [66] of these reasons.
115 (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J), 394 (Dawson and Toohey JJ).
116 (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).
117 See *Anti-Discrimination Act* 1991 (Qld), Schedule, dictionary.
118 Federation edition.
119 Set out in [23] of these reasons.

s 134(1)(a) of the *Anti-Discrimination Act* to complain about vilification on the ground of homosexuality".

Summary and Conclusion

[89] The application for leave to amend the case stated is refused.

[90] The Anti-Discrimination Tribunal has been replaced by QCAT. For the reasons I have given in [33] and [34], it is unnecessary to decide the first two questions in the case stated. But Ch III of the *Constitution* does not prohibit QCAT from hearing and determining complaints such as those brought against Mr Owen under s 124A and from determining the constitutionality of s 124A. Nor is Pt 7 Div 4 (ss 129–132) *QCAT Act* invalid as inconsistent with Ch III.

[91] **Question 1** in the case stated:

> "Were the proceedings in the Anti-Discrimination Tribunal an impermissible exercise by the tribunal of the judicial power of the Commonwealth under Chapter III of the *Commonwealth Constitution*?"

should be answered:

> "**Unnecessary to decide**".

[92] **Question 2** in the case stated:

> "Is section 212 of the *Anti-Discrimination Act 1991*, providing for the registration and enforcement of orders of the Anti-Discrimination Tribunal, inconsistent with Chapter III of the *Commonwealth Constitution,* and therefore invalid, so far as it purports to apply in these proceedings?"

should be answered:

> "**Unnecessary to decide**".

[93] **Question 3** in the case stated:

> "Is section 124A *of the Anti-Discrimination Act 1991* inconsistent with the implied protection of freedom of political communication provided by the *Commonwealth Constitution* and therefore invalid?"

should be answered:

> "**No**".

[94] **Question 4** in the case stated:

> "Alternatively, to what extent is section 124A of the *Anti-Discrimination Act* 1991 to be read down in order to comply with the implied protection of freedom of political communication provided by the *Commonwealth Constitution*?"

should be answered:

> "**It is unnecessary to read down s 124A in order to comply with the implied protections of freedom of political communication provided by the *Commonwealth Constitution***".

[95] Ms Bruce has standing as a bisexual person under s 134(1)(a) to complain about Mr Owen's alleged vilification on the grounds of homosexuality. But **question 5** in the case stated:

> "Does a bisexual person have standing under section 134(1)(a) of the *Anti-Discrimination Act 1991* to complain about vilification on the ground of homosexuality?"

should be answered:

> "**Depending on the circumstances, a bisexual person may have standing under s 134(1)(a) of the *Anti-Discrimination Act* to complain about vilification on the ground of homosexuality**".

[96] Douglas J set aside the decision and orders of the former tribunal and referred them to QCAT. It is appropriate for QCAT to now deal with those complaints against Mr Owen, including Ms Bruce's. Ms Bruce's application to remove her appeal from the Trial Division to the Court of Appeal should be refused.

[97] As Ms Menzies's complaint will now be determined by QCAT, her application for an extension of time to appeal from Douglas J's orders should also be refused.

[98] I have found that QCAT is not prohibited from hearing and determining complaints under s 124A *Anti-Discrimination Act* and matters of the former tribunal remitted to it under the transitional provisions of the *QCAT Act*. It follows that the further declarations sought by Mr Owen under s 118(4) *QCAT Act* should not be given.

[99] The Court will receive submissions as to the costs of the appeal hearing in accordance with Practice Direction No 2 of 2010, para [52].

[100] **MUIR JA:**

The issues for determination

The central issues for determination by this Court are whether:

1. QCAT is a "court" within the meaning of Ch III of the *Constitution*, it being accepted by the applicant that if it is a court there is no constitutional impediment to its hearing and determining matters arising under the *Constitution* or involving its interpretation;

2. If QCAT is not a "court" within the meaning of Ch III of the *Constitution*, it has jurisdiction to hear and determine matters within its State invested jurisdiction notwithstanding that a party contends that QCAT lacks jurisdiction because of a matter or matters arising under the *Constitution* or involving its interpretation;

3. The stating of the case for the opinion of this Court would involve QCAT in an impermissible exercise of Federal Jurisdiction.

4. Section 124A of the *Anti-Discrimination Act* infringes the implied freedom of political communication and is thereby rendered invalid;

5. A bisexual person may have standing under s 134(1)(a) of the *Anti-Discrimination Act* to complain about vilification on the grounds of homosexuality.

[101] I have had the advantage of reading the reasons of the Chief Justice and the President. I respectfully agree with the Chief Justice's reasons in respect of the first issue and with the President's reasons in respect of the fifth issue. I am also grateful for the President's exposition of the history of these proceedings. As for the fourth issue, I agree that s 124A of the *Anti-Discrimination Act* is not invalid and will give brief reasons for that conclusion later.

[102] In advancing his case on the second of these issues, the applicant relied on *Attorney-General (NSW) v 2UE Sydney Pty Ltd*[120] and dicta in *Commonwealth v Anti-Discrimination Tribunal (Tasmania) & Anor*[121] to support the proposition that there is a constitutional impediment to a state investing in a tribunal of that state jurisdiction to determine matters arising under the *Constitution* or involving its interpretation. The Attorney-General contended that, to the extent that they were contrary to the arguments advanced by him, these decisions should not be followed. Those arguments are recorded later in these reasons.

[103] The second issue, of undoubted interest though it is, does not arise for consideration if QCAT is a Ch III court. In my opinion, for the reasons given by the Chief Justice, it is. But even if QCAT had been found not to be a Ch III court, the question of QCAT's jurisdiction to deal with the issue under consideration would still not arise for the reasons stated below.

Does QCAT have jurisdiction to hear and determine the constitutional issues if it is not a Ch III court?

[104] The Attorney-General contended that even if, contrary to his submissions, QCAT was not a Ch III court, there was no impediment to its hearing and determining the matter remitted to it by Douglas J in the exercise of jurisdiction conferred on it by the law of Queensland. It was submitted that:

- If QCAT was not a Ch III Court and unable to determine constitutional questions in the exercise of its state jurisdiction, the stating of the case to the Supreme Court had the effect that the Supreme Court and not QCAT would be exercising the judicial power of the Commonwealth; and
- Even if QCAT is a tribunal and not a court, it, like the Anti-Discrimination Tribunal, has not only the right but the obligation to consider and reach an opinion on the constitutional question.

[105] The applicant's argument in response to the Attorney-General's contentions may be summarised as follows. Section 260(4)(b) of the *Queensland Civil and Administrative Tribunal Act* 2009 (the '*QCAT Act*') provides that QCAT can only "make a decision the former tribunal could have made". Section 260(4)(a) preserves the operation of the powers of the former Tribunal "to make a decision". "Decision" is defined in s 244 of the *QCAT Act* as:

> "***decision***, of a former tribunal or court, includes an order made or direction given by the former tribunal or court."

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120 (2006) 236 ALR 385.

121 (2008) 169 FCR 85.

[106] The effect of the word "includes" is to make plain that the definition is not exhaustive.[122] "Decision" means any finding of fact or law, including preliminary findings of fact or law that are necessary for the operation of the provisions of the statutory language and includes the act of deciding any matter arising under the *Constitution*, or involving its interpretation. If the Tribunal could not have made "a decision" as to the operation of constitutional principles because it could not exercise the judicial power of the Commonwealth, then, by operation of sub-section (4)(b), QCAT also lacks the power to make that decision.

[107] Counsel for the applicant submitted that if QCAT was found to be a court, it would not be permitted to exercise the judicial power of the Commonwealth for present purposes. This result was said to flow from s 260(4) under which QCAT only has the functions of the Tribunal and can only make a decision the Tribunal could have made.

[108] Both the applicant and the Attorney-General relied on *Attorney-General (NSW) v 2UE Sydney Pty Ltd & Ors*[123] and *Sunol v Collier*[124] to support their respective arguments. The latter case was decided after the hearing of this appeal and the parties availed themselves of the opportunity to make further written submissions in relation to it.

[109] In *2UE*, the New South Wales Court of Appeal considered whether the appeal panel of the Administrative Decisions Tribunal (NSW) had jurisdiction to hear and determine a question arising under the *Constitution* or involving its interpretation, namely whether s 49ZT of the *Anti-Discrimination Act* 1977 (NSW) contravened the implied constitutional protection of political speech. The Court held that the appeal panel had no such jurisdiction. The Court acted on the premise that the tribunal and the appeal panel were administrative bodies, there being no argument to the contrary. Spigelman CJ, in his reasons, with which Ipp JA agreed, identified the issue before the Court as:[125]

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

[110] The Chief Justice held that the tribunal and the appeal panel had no jurisdiction to decide the constitutional issue as the judicial power of the Commonwealth could not be "exercised by a tribunal as a manifestation of the Executive arm of Government, whether of the Commonwealth or of a State".[126] It was also held,[127] ftn8 that a state parliament "cannot confer on a court, let alone on a tribunal, judicial power with respect to any matter referred to in s 75 or s 76 of the Constitution" and that the role of covering cl 5 of the *Constitution* conferring "something that was accurately

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122 D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 7th ed, Chatswood NSW, LexisNexis Butterworths, 2011 at 248 – 252.

123 (2006) 236 ALR 385.

124 [2012] NSWCA 14.

125 At [38].

126 At [55].

127 At [56].

described as 'jurisdiction'" on courts, judges and quasi-judicial tribunals was spent.[128]

[111] It was implicitly held, however, in reliance on *Re Adams and The Tax Agents' Board*,[129] that although the appeal panel could consider the constitutional question and interpret the relevant section so as to conform with the constitutional implication of freedom of communication, it could not make a "definitive or final" decision on that question. The submission by the Attorney-General for New South Wales that it was impermissible for the tribunal or the appeal panel to "consider, even by way of interpretation, the Constitutional freedom", as to do so would involve a matter arising under the *Constitution* or involving its interpretation, was rejected.[130]

[112] However, the Attorney-General's submission that the provision of the *Anti-Discrimination Act* 1977 (NSW) under which a certificate of the registrar of the Tribunal as to an amount ordered to be paid by the Tribunal when filed in the registry of a court of appropriate jurisdiction operated as a judgment of that court was invalid was upheld. Applying *Brandy v Human Rights and Equal Opportunity Commission*,[131] the Chief Justice concluded that the use of the processes of a court to enforce a determination of a tribunal which was "a manifestation of the Executive" was a purported exercise of the judicial power of the Commonwealth by a body in which that power could not be vested. In this regard, the Chief Justice said:[132]

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

[113] His Honour expressed the opinion that the constitutional difficulty was capable of being avoided by "a reference of a question of law to the Supreme Court pursuant to s 118 of the ADT Act".[133]

[114] Issues similar to those considered in *2UE* arose in *Sunol* in which the Appeal Panel of the Administrative Decisions Tribunal, on appeal from a decision of the Equal Opportunities division of the Administrative Decisions Tribunal ordering the registration of a conciliation agreement, referred questions of law to the New South Wales Court of Appeal for determination.

[115] In *Sunol*, the Court was also of the view that the raising of a constitutional issue by a defendant before a tribunal would not prevent the tribunal from deciding the matter before it by reference to its determination of whether the constitutional point was sound or otherwise. Their Honours said in this regard:

> "Federal jurisdiction is the authority exercised by a court to determine an issue in federal juridical power. A matter will involve

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128 At [52].
129 (1976) 12 ALR 239.
130 At [58].
131 (1995) 183 CLR 245.
132 At [80].
133 At [90].

> the exercise of federal judicial power if, for example, one party has a defence which owes its existence to a law of the Commonwealth Parliament: *LNC Industries Ltd v BMW (Australia) Ltd* [1983] HCA 31; 151 CLR 575 at 581. The resolution of any matter arising under the Constitution or involving its interpretation will constitute an exercise of federal judicial power: *British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47; 217 CLR 30. Once such a matter is identified, the whole of the jurisdiction being exercised by the court is federal jurisdiction: *Felton v Mulligan* [1971] HCA 39; 124 CLR 367 at 373. Accordingly, the applicable law must be that identified under Commonwealth law: it may be a State law picked up and applied by a Commonwealth law, such as ss 79 and 80 of the *Judiciary Act 1903* (Cth). However, such provisions operate only in respect of federal jurisdiction being exercised by a court of a State or Territory.
>
> …it does not follow [from the fact that the Tribunal is not a Chapter III court] that the powers and authority conferred on the Tribunal by State law in some way evaporate immediately an issue is raised in a case, as to, for example, the Constitutional validity of a provision of the State law under which a claim has been made. Pursuant to covering cl 5 of the *Constitution Act 1902* (NSW), the Tribunal is bound by the Constitution. If the law is invalid, it is not invalid because a court has declared it to be such: it is invalid because a 'pretended law made in excess of power is not and never has been a law at all': *South Australia v The Commonwealth* [1942] HCA 14; 65 CLR 373 at 408 (Latham CJ). As his Honour continued, '[a]nybody in the country is entitled to disregard it'.
>
> If the Tribunal is persuaded that a State law is invalid and cannot support a claim, it may decline to grant relief. Alternatively, it may grant relief, in which case the unsuccessful party may disregard the order or, more prudently, take steps to have the order set aside."[134]

[116] The Court rejected the conclusion in *2UE* that the following statement of principle of Mason CJ, Brennan and Toohey JJ in *Brandy*[135] applied without qualification to a state tribunal and a supreme court:

> "An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination."[136]

[117] Their Honours said, in effect, that *2UE* did not explain why the analysis in *Brandy* was relevant to a state tribunal and the Supreme Court of that state unless it concerned an application of the principles enunciated in *Kable v Director of Public Prosecutions (NSW)*.[137]

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134 *Sunol v Collier* [2012] NSWCA 14 at [7] – [9].
135 (1995) 183 CLR 245 at 260.
136 *Sunol v Collier* [2012] NSWCA 14 at [16].
137 (1996) 189 CLR 51.

[118] The Court raised the following impediments in relation to the suggestion in *2UE* that jurisdictional difficulties could be overcome by the constitutional issue being referred to and determined by the Supreme Court and then returned to the Tribunal for it to exercise its statutory powers:

> "First, if there were an issue as to the constitutional propriety of a Tribunal judgment being registered in the Supreme Court and given effect as a judgment of that Court, it would presumably arise whether or not there was a constitutional issue underlying the validity of the judgment. Secondly, the possibility that the Tribunal could, in circumstances where a federal issue had arisen, continue to deal with the matter as if it were no longer exercising federal jurisdiction, would appear to be incompatible with *Felton v Mulligan*: until resolved, the whole of the matter must involve an exercise of federal jurisdiction, if it be an exercise of judicial power at all."[138]

[119] Another and "more fundamental difficulty" identified by the Court was that "the operation of the Constitution involves an exercise of federal judicial power" which could not be conferred by the Commonwealth on an entity which was not a Ch III court or by the State on its own courts or tribunals.

[120] The final difficulty with the reasoning in *2UE* raised by the Court was that s 118(1) of the *Administrative Decisions Tribunal Act* 1997 (NSW), which empowers the appeal panel to refer to the Supreme Court "a question of law arising in the appeal", was confined to questions of state law. That construction was consistent with the principle that a reference to any matter or thing in a New South Wales Act is a reference to such matter or thing "in and of New South Wales"[139] and with the requirement that the Act be construed so as not to exceed the legislative power of the parliament.[140]

[121] The following discussion of the parties' competing contentions, except when the contrary is stated, proceeds on the premise that QCAT is not a Ch III court. Section 260 of the *QCAT Act*, which is one of number of provisions dealing with an appeal against a decision of a former tribunal, relevantly provides:

> "…
>
> (3) If the court's decision in the appeal is to remit the matter to the former tribunal, with or without directions —
>
> (a) the court must remit the matter to QCAT; and
>
> (b) QCAT must deal with the matter under the former Act as if it were still in force.
>
> (4) For subsection (3) —
>
> (a) QCAT has, and only has, the functions of the former tribunal; and

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138 *Sunol v Collier* [2012] NSWCA 14 at [17].

139 *Sunol v Collier* [2012] NSWCA 14 at [18] referring to the *Interpretation Act* 1987 (NSW), s 12(1)(b).

140 *Interpretation Act* 1987 (NSW), s 31(1).

(b) QCAT can, and can only, make a decision the former tribunal could have made in relation to the matter under the former Act.

(5) For subsections (2) to (4), the former Act, and other relevant laws, continue to have effect as if they were still in force."

[122] Section 216 of the *Anti-Discrimination Act* provides:

"**216 Supreme Court opinion**

(1) The tribunal may, at any stage of a proceeding, and on the terms it considers appropriate, state a written case for the opinion of the Supreme Court on a question of law relevant to the proceeding.

(2) The court may —

(a) hear and decide the matter raised by the case stated; and

(b) remit the case, with its opinion, to the tribunal.

(3) The tribunal must give effect to the court's opinion."

[123] The Tribunal stated the case now under consideration in exercise of the power conferred on it by s 216, which remained in force by operation of s 260(5) of the *QCAT Act*.

[124] The problem to which s 118(1) of the *Administrative Decisions Tribunal Act* 1997 (NSW) gives rise does not exist here. That section permits an appeal panel to "refer a question of law **arising in the appeal** to the Supreme Court for the opinion of the Court" (emphasis added). Section 216 of the *Anti-Discrimination Act* enabled the Tribunal to state a case "on a question of law **relevant to the proceeding**" (emphasis added). The constitutional questions, raised and relied on by the appellant in the proceeding, plainly meet that description.

[125] The applicant contends, in reliance on *Sunol*, that the constitutional question having been raised by him in the proceeding, QCAT was deprived of jurisdiction to determine, not only the constitutional question, but issues under or in respect of the *Anti-Discrimination Act*.

[126] In *Sunol*, the Court perceived *Felton v Mulligan*[141] to be an impediment to the Tribunal's ability to deal in any way with the federal issue.

In *Felton v Mulligan*, Barwick CJ relevantly said:

> "… the jurisdiction invested in the Supreme Court by the *Judiciary Act* may be attracted by the defence raised to the applicant's claim for relief. If it is, the jurisdiction which is exercised by the Supreme Court throughout the case will be federal, that is to say, part of the jurisdiction invested in the Supreme Court by the *Judiciary Act*, unless perhaps there is some completely disparate claim constituting in substance a separate proceeding. In this connexion, I agree with my brother Walsh's analysis of the case law and with his view of the opinions expressed in the decided cases to which he refers. I further

141 (1971) 124 CLR 367.

> agree with the view that if federal jurisdiction is attracted at any stage of the proceedings, there is no room for the exercise of a State jurisdiction which apart from any operation of the *Judiciary Act* the State court would have had. **In my opinion, s 109 of the Constitution, working with the *Judiciary Act*, ensures that there is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court.**"[142] (emphasis added)

[127] In *ASIC v Edensor Nominees Pty Ltd*,[143] Gleeson CJ, Gaudron and Gummow JJ referred to observations of Barwick CJ included in the above passage and said:[144]

> "A State court receives State jurisdiction under the constitution and laws of that State. It may also be invested with federal jurisdiction by a law made by the Parliament under s 77(iii) of the Constitution; s 39(2) of the *Judiciary Act* 1903 (Cth) is an example of such a law. The federal courts established by the Parliament, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court, exercise their jurisdiction, necessarily federal, by reason of its conferral by laws enacted under s 77(i) of the Constitution. A "matter" in respect of which that jurisdiction is conferred may, in a given case, include claims arising under common law or under the statute law of a State. But the jurisdiction invoked remains, in respect of all of the claims made in the matter, "wholly" federal; even in a State court 'there is no room for the exercise of a State jurisdiction which apart from any operation of the *Judiciary Act* the State court would have had' and 'there is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court'. These terms were used by Barwick CJ in *Felton v Mulligan*." (citations omitted)

[128] Both *Felton v Mulligan* and *ASIC v Edensor Nominees* were concerned with the nature of the jurisdiction to be or being exercised by a court with the power to exercise federal jurisdiction. As Windeyer J said in *Felton v Mulligan*,[145] in a passage approved of by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller*:[146]

> "The existence of federal jurisdiction depends upon the grant of an authority to adjudicate rather than upon the law to be applied or the subject of adjudication."

[129] In the circumstances under consideration, QCAT's jurisdiction remains wholly a state jurisdiction. Jurisdiction in respect of the constitutional question could not be conferred or invoked and therefore was not conferred or invoked.

[130] The intrusion of the constitutional questions into a proceeding involving state matters before the Tribunal and subsequently before QCAT did not deprive either

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142 At 373.
143 (2001) 204 CLR 559.
144 At 571.
145 At 393.
146 (1983) 152 CLR 570 at 606; see also *Lorenzo v Carey* (1921) 29 CLR 243 at 252; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 30 per Kitto J and 44 – 45 per Windeyer J; and *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 589 – 590 per Gleeson CJ and Gummow J.

the Tribunal or QCAT of its power to exercise its state jurisdiction. The contrary conclusion would be inconsistent with the approach in *Re Adams and The Tax Agents' Board*,[147] approved in both *2UE* and *Sunol*. Brennan J said in *Re Adams*:[148]

> "It follows that neither the Tribunal nor the Board can give a definitive answer to the question of constitutional validity. It is one thing to deny to the Tribunal and the Board the power definitively to answer the question; it is another thing to deny their competence to consider and to reach an opinion on the question. An opinion formed by an administrative body on such a question does not, however, produce any effect in point of law. It is incapable of adding to or subtracting from any authority, or purported authority, conferred by the challenged statute. It is incapable of affecting any legal requirement as to the exercise of an authority actually conferred upon the administrative body.
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> …
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> An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect."[149]

These expressions of principle have been referred to with approval or applied elsewhere.

[131] In my respectful opinion, there is no statement of principle in *Felton v Mulligan* which would prevent QCAT from referring a constitutional issue to a Supreme Court for determination. That case was concerned with a question whether the Supreme Court of New South Wales was exercising federal jurisdiction in a proceeding. If it was, as the majority held to be the case, s 39(2) of the *Judiciary Act* 1901-1968 (Cth) precluded an appeal from the Supreme Court to the Privy Council.

[132] It was accepted in *2UE* and *Sunol* that the fact that a question giving rise to a federal issue arises in a proceeding in respect of a state issue before a tribunal does not deprive the tribunal of the jurisdiction vested in it by the State and that not only may the Tribunal, for the purposes of its adjudication on matters remaining properly before it, form a view on the federal issue, it may be obliged to do so.

[133] At the time the case was stated by QCAT, jurisdiction to determine the constitutional questions was already vested in the Supreme Court by the *Judiciary Act*. The stating of the case was merely the mechanism which enlivened the power of the Supreme Court to determine issues within its jurisdiction. Nor did the stating of the case by QCAT involve a purported exercise of jurisdiction in respect of the constitutional issue. QCAT attempted no adjudication or determination of the

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147 (1976) 12 ALR 239.

148 At 241 – 242.

149 *Re Adams and Tax Agents' Board* (1976) 12 ALR 239 at 254.

constitutional question and there was no grant to the Tribunal of an authority to adjudicate in respect of the constitutional questions.[150]

[134] This Court's determination of the constitutional questions will not, or need not, become a finding or determination of QCAT. It will be required to act on it, just as it would have acted on its own appreciation of the merits of the questions had it not stated a case to this Court.

[135] The fact that QCAT's order, after filing under either s 131 or s 132 of the *QCAT Act*, "in the registry of a court of competent jurisdiction" and after fulfilment of the requirements of the relevant section "is taken to be an order of the court" does not further the applicant's argument. The order is merely the relief to be granted consequent on QCAT's determination of the matter before it on the merits: a determination which will have been made on the basis of this Court's rulings on the constitutional issues. The determination of those issues will be binding on the parties, not because of any decision or order of QCAT, but because of this Court's orders and/or findings.

[136] The position of QCAT, on the present hypothesis, may be contrasted with that of a Ch III court. Once federal jurisdiction has been invoked or attracted by a defence, such as that raised by the applicant, such a court, if it proceeds to deal with the matter, would be exercising federal jurisdiction in respect of all of the matters before it.

[137] In determining whether QCAT was purporting to exercise the judicial power of the Commonwealth in stating a case, or whether it would be purporting to do so by arriving at its decision conformably with this Court's findings, regard should be had to matters of substance rather than form.[151] In substance, and indeed in fact, any adjudication or determination of the constitutional question will not have been undertaken by QCAT.

[138] I turn now to the question whether the provisions of s 131 of the *QCAT Act* which deem a final decision of QCAT to be an order of the Court in which it is registered results in the Tribunal's purporting to exercise federal judicial power when the order is registered. In *2UE*, Spigelman CJ said:[152]

> "In my opinion, a Commonwealth tribunal which performed the same functions as are in issue in the present case and which operated as part of a legislative scheme that did not have the registration provisions could validly do so. However, a scheme which gives judicial force to a Tribunal decision upon mere registration is not valid. It is the presence of such a provision, and only that presence, that converts what would otherwise be a permissible scheme into an exercise of federal jurisdiction which is impermissible. In my opinion a State Tribunal is in no different position.
>
> From the perspective of Chapter III, the appeal panel is a manifestation of the executive. The rigour of Australian Chapter III jurisprudence does not permit a distinction to be drawn between a quasi-judicial tribunal and any other executive agency. The position of the Tribunal is no different to that of a Minister.

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150 c.f. *Fencott v Muller* (1983) 152 CLR 570 at 606.

151 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 466 – 467.

152 At [75] – [76].

> Consider the case of a statute which provides that a Minister's opinion about the Constitutional validity of a State Act can be registered as a judgment of the Supreme Court, enforceable as such against the persons involved in a dispute. It is only necessary to state that proposition to realise that it cannot be right. The Tribunal and Appeal Panel are in no different position."

[139] However, as was implicitly acknowledged in *Sunol*, the application of registration provisions of the type under consideration will constitute an exercise of federal jurisdiction only where the orders are in respect of a federal issue. If this Court determines that the constitutional point lacks substance, there will not be any exercise of federal jurisdiction by QCAT. It will merely be determining the state issue before it on the basis of this Court's ruling on the constitutional issue. As has been explained, the ruling on the constitutional issue will be binding on the parties, not because of any determination or order of QCAT, but because of this Court's decision.

[140] In *Brandy*, it was held that certain provisions of the *Racial Discrimination Act* 1975 (Cth) were invalid on the grounds that they purported to vest the judicial power of the Commonwealth in the Human Rights and Equal Opportunity Commission contrary to Ch III of the *Constitution*. It was held that s 25ZAB of that Act, in purporting to give a determination of the Commission which was registered in the Federal Court effect "as if it were an order made by the Federal Court", was invalid. Mason CJ, Brennan and Toohey JJ explained:[153]

> "An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. Thus, s 25ZAB purports to prescribe what the Constitution does not permit."

[141] It is apparent from the foregoing that the case concerned the constitutional limitations on the exercise of the judicial power of the Commonwealth by bodies which are not Ch III courts.

[142] Except as may arise from the application of the principle first articulated by the High Court in *Kable v Director of Public Prosecutions (NSW)*,[154] there is no constitutional impediment to a state vesting judicial powers in its tribunals, whether by the mechanism of provisions such as s 131 and s 132 of the *QCAT Act* or otherwise. As the Attorney-General pointed out in supplementary written submissions, states have traditionally provided for the registration in their courts of foreign judgments, arbitrator's decisions and tribunal decisions.[155]

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153 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 260.

154 (1996) 189 CLR 51.

155 See *South Australia v Totani* (2010) 242 CLR 1 at 64 [136] per Gummow J. See also *Foreign Judgments Act* 1971 (SA) and now *Foreign Judgments Act* 1991 (Cth). As to arbitrator's decisions, see s 8 of the *International Arbitration Act* 1974 (Cth). In relation to State Tribunals, see s 121 and s 122 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic); s 85 and s 86 of the *State Administrative Tribunal Act* 2004 (WA); s 14 of the *Dust Diseases Tribunal Act* 1989 (NSW); s 47 of the *Fair Trading Tribunal Act* 1998 (NSW); s 51 of the *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW); s 82 and s 82A of the *Administrative Decisions Tribunal Act* 1997 (NSW).

[143] The following observations of Gummow J in *Re Macks; ex parte Saint*[156] support the Attorney-General's submissions:

> "There is ample legislative precedent at the State and federal level for providing, if stipulated conditions be satisfied, for the registration of foreign judgments in State Supreme Courts and in the Federal Court with the effect they would have if given in those courts and entered on the day of registration. The functions performed by courts of federal jurisdiction under such laws of the Commonwealth or the States are not incompatible with the exercise of the judicial power of the Commonwealth by those courts. The reasoning in *Kable* might be applicable where, for example, legislation of a State obliged its Supreme Court to enforce as if it were its own judgment an executive or legislative determination of a nature which was at odds with the fundamentals of the judicial process."

[144] As the Chief Justice points out: QCAT is bound by the rules of natural justice; its proceedings are to be heard in open court and reasons must be given for its decisions. One of the objects of the *QCAT Act* is to "establish an independent tribunal";[157] and in exercising its jurisdiction QCAT must act independently and not be subject to executive direction or control.[158]

[145] Section 150 of the *QCAT Act* provides for appeals from the Appeal Tribunal of QCAT to the Court of Appeal, by leave of that Court, on questions of law. The Court of Appeal has power to stay orders appealed against.[159]

[146] There is nothing in s 131 and s 132 of the *QCAT Act* which is "at odds with the fundamentals of the judicial process" and, as the Chief Justice's reasons show, the registration in the Supreme Court of an order under those sections "could not imperil the perception or the reality that the Supreme Court exhibits institutional integrity". Nor does a consideration of s 131 and s 132 of the *QCAT Act* lead "to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law".[160] The following passage, from the reasons of McHugh J in *Fardon v Attorney-General (Qld)*,[161] suggests that it is quite unlikely that provisions such as s 131 and s 132 would, without the operation of other factors not present here, attract the operation of the *Kable* principle:

> "The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. State legislation may alter the burden of proof and the rules of evidence and procedure in civil and criminal courts in ways that are repugnant to the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation. State legislation may require State courts to exercise

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156 (2000) 204 CLR 158 at 232 – 233.
157 *QCAT Act*, s 3(a).
158 *QCAT Act*, s 162.
159 *QCAT Act*, s 152.
160 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601 per McHugh J.
161 (2004) 223 CLR 575 at 600 – 601.

> powers and take away substantive rights on grounds that judges think are foolish, unwise or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill of Rights, the institutional integrity of those courts is compromised."

[147] Finally in this regard, there is merit in the Attorney-General's submission that if the *Kable* principle applied, s 131 and s 132 would be read down to limit the operation of the provisions to decisions within the jurisdiction of QCAT.[162] As QCAT would make its orders only after this Court pronounced on the constitutional question, no jurisdictional problem should arise for the reasons already discussed.

[148] The applicant argued that if the Tribunal lacked power to make "a decision" as to the operation of constitutional principles, then, by operation of s 260(4)(b) of the *QCAT Act*, QCAT also lacked such power. The above discussion, with the exception of that part of it which relates to the application of the *Kable* principle, proceeded on the hypothesis that QCAT was not a Ch III court. Consequently, for the reasons given above, this argument must be rejected.

[149] It was also submitted by the applicant that as the former Tribunal could not have made a decision capable of being registered and enforced under the repealed s 212, then by operation of section 260(4)(b), QCAT also lacks power to make a decision capable of being registered and enforced under s 212 or under the provisions of the *QCAT Act*. This contention must be rejected. Section 260(4)(b) is directed to the nature of the determination which QCAT may make under the transitional provisions in the *QCAT Act*. QCAT "can, and can only, make a decision the former tribunal could have made". These words of empowerment and limitation do not describe or relate to the operation of the machinery provisions of the *QCAT Act* or of the *Anti-Discrimination Act* with respect to the registration of orders. That is a process which may or may not take place consequent on a decision.

[150] For generally similar reasons, s 260(4)(a), which provides that QCAT "has, and only has, the functions of the former tribunal", does not have the effect that if an order of the Tribunal would have been invalid as a result of the application of the principle in *Kable*, QCAT lacks power to make the same order. The "functions" of the Tribunal are the activities entrusted by statute to the Tribunal by means of which it fulfils its statutory purpose, e.g. holding, and making orders in respect of conciliation conferences, accepting or registering complaints, investigating complaints pursuant to s 155 of the *Anti-Discrimination Act* and the hearing of complaints. Section 260(4)(a) says nothing about the efficacy of the orders QCAT may make in exercising its jurisdiction under the transitional provisions.

[151] Another issue addressed at length on the hearing of the appeal was whether, if not a court, QCAT had power to determine constitutional questions in the exercise of its State conferred jurisdiction. The Attorney-General argued that there is nothing in Ch III of the *Constitution* to suggest that State tribunals, which are not courts, are incapable of exercising judicial power with respect to matters or controversies arising under the *Constitution* or involving its interpretation.

[152] The applicant contended to the contrary in reliance on *2UE*, *Sunol* and *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*.[163] The Attorney-

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[162] E.g., *State of Victoria v Commonwealth of Australia* (1996) 187 CLR 416 at 502 – 503; and the *Acts Interpretation Act* 1954 (Qld), s 9.

[163] (2008) 169 FCR 85.

General criticised the reasoning in these decisions, asserting that there was a failure to appreciate that "Federal jurisdiction" referred to the authority to adjudicate granted, in the case of state courts, by s 77(iii) of the *Constitution* rather than to the exercise of judicial power with respect to the matters or controversies in s 75 and s 76 of the *Constitution*. Particular reliance was placed on *Lorenzo v Carey*[164] ftn45 and *Anderson v Eric Anderson Radio & TV Pty Ltd*.[165]

[153] Issue was taken also with the correctness of para [56] of the reasons in *2UE* in which it was said that a State Parliament cannot confer on a Tribunal judicial power with respect to any matter referred to in s 75 or s 76 of the *Constitution*. It was submitted that, although this proposition was supported by the reasoning of Jacobs J in *Commonwealth v Queensland*,[166] that reasoning was not adopted or approved of by Gibbs J with whom Barwick CJ, Stephen and Mason JJ agreed.

[154] The Attorney-General further argued that:

- The proposition in para [56] is inconsistent with s 77(ii) of the *Constitution* which contemplates that there may be an overlap between federal and state jurisdiction: it refers in terms to jurisdiction that "belongs to… the courts of the States";[167]
- Such proposition is inconsistent also with authorities on the effect of s 39 of the *Judiciary Act* 1903 (Cth) which are premised on the states retaining their ability to confer jurisdiction with respect to at least some of the matters in s 75 and s 76. Such authorities hold the state laws invalid under s 109 of the *Constitution*. If Ch III had the effect attributed to it in para [56] the state would lack legislative capacity to confer any jurisdiction: questions of inconsistency would not arise.

[155] For the reasons given above, however, it is unnecessary for this Court to determine the merits of these contentions.

The validity of s 124A of the *Anti-Discrimination Act*

[156] I have concluded that s 124A of the *Anti-Discrimination Act* is "reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government".[168] ftn49 Consequently I have not found it necessary to decide whether the section effectively burdened freedom of communication about government or political matters either in its terms, operation or effect.[169]

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164 (1921) 29 CLR 243 at 252.

165 (1965) 114 CLR 20 at 30 per Kitto J, at 44-45 per Windeyer J and *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 589-590 [87] per Gleeson CJ and Gummow J adopting the formulation in *Anderson*.

166 (1975) 134 CLR 298 at 327 – 328.

167 The jurisdiction being the authority that state courts possess to adjudicate under the *Constitution's* laws of the states: *MZXOT v Minister for Immigration & Citizenship* (2008) 233 CLR 601 at 619 [23] per Gleeson CJ, Gummow and Hayne JJ. Those words would be superfluous if a state parliament could not confer on a court or tribunal judicial power of the type in question.

168 *Coleman v Power & Others* (2004) 220 CLR 1 at [196].

169 *Coleman v Power & Others* (supra) at [196].

[157] If the first limb of the test propounded in *Lange v Australian Broadcasting Corporation*[170] is engaged by s 124A, the second limb, modified by *Coleman v Power*, is engaged for the reasons given by the President and because:

- Section 124A only incidentally restricts the subject freedom of communication;
- any such restriction is confined and controlled by s 124A(2);
- the implied freedom is not absolute or equivalent to licence, and laws which do no more than promote or protect (relevant) communications or those who participate in the prescribed system will not be impermissible.[171] As Deane J expressed it in *Cunliffe v The Commonwealth*,[172] "… the Constitution's implication of freedom of political communication and discussion is not an implication of an absolute or uncontrolled licence to say or write anything at all in the course of communication or discussion of political matters. It is an implication of freedom under the law of an ordered society".

Answers to the questions in the case stated

[158] I agree with the President that there is no useful purpose to be served by amending the case stated as requested by counsel for the first and second respondents and that the application for leave to amend should be refused.

[159] For the reasons given above, the questions in the case stated should be answered:

1. Unnecessary to decide.
2. Unnecessary to decide.
3. No.
4. It is unnecessary to read down s 124A in order to comply with the implied protections of freedom of political communication provided by the Commonwealth *Constitution*.
5. Depending on the circumstances, a bisexual person may have standing under s 134(1)(a) of the *Anti-Discrimination Act* to complain about vilification on the ground of homosexuality.

The first respondent's application for an extension of time within which to appeal against the decision of Douglas J and the second respondent's application to remove to this Court her appeal against the decision of the Anti-Discrimination Tribunal dismissing her complaint

[160] The second respondent, Ms Bruce, applies to have her appeal to the Supreme Court removed from the Trial Division to the Supreme Court under s 68(5) of the *Supreme Court of Queensland Act* 1991 which empowers the Court of Appeal to order that "a proceeding (whether by way of appeal or otherwise)" be removed into the Court of Appeal "if satisfied that special circumstances exist that make it desirable to do so".

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170 (1997) 189 CLR 520.

171 *Coleman v Power* (supra) per McHugh J at paras 98 and 99.

172 (1994) 182 CLR 272 at 336-7.

[161] It is submitted on the second respondent's behalf that the special circumstances are that the sole question of law raised by her appeal is question 5 of the case stated and that the appeal does not raise any substantive issues of law beyond those for consideration on the case stated.

[162] The applicant submitted that the second respondent's application should be dismissed as there "is no substantive utility in the appeal" and as the case stated is the only proceeding in which the Attorney-General has intervened. It does not appear to me that removal of the appeal into this Court would serve a useful purpose. The parties have participated in the adoption of the case stated procedure with a view to having determined those issues which were thought to possibly give rise to some impediment to QCAT's ability to re-hear the proceeding commenced before the Anti-Discrimination Tribunal. The answers to the case stated make it plain that QCAT is able to determine all relevant issues, including factual issues which this Court is not seized of on the case stated. Transferring the appeal into this Court is likely to be more productive of confusion than simplification.

[163] The first respondent seeks an extension of time within which to appeal against the orders of Douglas J "primarily in order to remove the possibility that, in the absence of an appeal from the decision…, that decision might give rise to an issue estoppel preventing [this Court] from considering the first question on the case stated". That question has now been decided without objection by any party. It was also contended that if the extension of time were to be granted and the appeal allowed, the need for the matter to be remitted to QCAT for further determination in accordance with the answers to the question posed by the case stated would be obviated. As the Attorney-General pointed out, the parties, by pursuing the case stated, have proceeded on the basis of an acceptance of Douglas J's orders. If an appeal against those orders were to be allowed, the basis for the case stated would be removed and this Court would not be in a position to determine the questions posed in the case stated.

[164] Douglas J did not determine the validity of or construe s 124A of the *Anti-Discrimination Act*. The sole issue determined by him was whether the Tribunal improperly attempted to exercise the judicial power of the Commonwealth. There can be no difficulty with an issue estoppel. The applicant participated in seeking to have QCAT state the case for determination by this Court and submitted, at least implicitly, that the proposed appeal did not raise any substantial issues of law beyond those involved in the case stated, which it was said by the applicant, "Is the best vehicle for the resolution of the issues before the Court". Furthermore, the applicant argued that there was "no substantiative utility in the appeal".

[165] The making of the order sought by the first respondent would lack utility. I would order that the application for an extension of time within which to appeal be refused.

Costs

[166] I can see no reason why the applicant should not be ordered to pay the respondents' costs of and incidental to the case stated. I would make no order for costs in respect of the applications of the first respondent and the second respondent. Their contributions to the overall costs of the case stated were negligible. However, as costs were not addressed in argument, it is appropriate that the Court receive submissions as to the costs of the appeal hearing in accordance with Practice Direction No 2 of 2010, para [52].