What are Courts of Law?

ENID CAMPBELL*

Within the Australian legal system, and other legal systems of the same family, there are some institutions of government which most people would, without question, recognise as courts of law. Yet within such a legal system there may also be some governmental institutions which although called courts cannot, by any legal test, be classified as courts of law. On the other hand there may be some governmental institutions which, although not officially designated as courts of law, must be regarded as courts of law, for some purposes if not for all.

Judges have emphasised that the name which a parliament gives to a body created by statute is not determinative of whether that body is, for any relevant legal purpose, a court of law or a non-court. '[S]ome bodies' it has been observed, 'are called courts but are not truly of that character, and some are called tribunals or commissions which ... are courts'.[1]

The question of whether a particular body is a court of law can arise in a number of different legal contexts. The criteria to be applied in determining that question may vary according to the legal context in which it arises.

The Commonwealth of Australia Constitution by its very terms, requires a distinction to be made between courts and non-courts. Section 71 of the Constitution declares that:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the [federal] Parliament creates, and in such other courts as it invests with federal jurisdiction.

Federal jurisdiction, in exercise of 'the judicial power of the Commonwealth' means the judicial jurisdictions in the several matters itemised in ss 75 and 76 of the Constitution.

---

* Emeritus Professor of Law, Monash University; OBE; LLB (Hons); BEc, LLD (Hon) (Tas); PhD (Duke).

1 *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173 at 207-8 per Mahoney JA. See also *Australian Postal Commission v Dao (No 2)* (1986) 69 ALR 125 at 143-4 per McHugh JA; *Attorney-General v British Broadcasting Corporation* [1981] AC 303 at 358 per Lord Scarman.

The judges of the federal courts created by the federal Parliament are (under s 72 of the Constitution) guaranteed security of tenure. However a body created by Act of the federal Parliament and described in that Act as a court is not necessarily a court even if its members are accorded tenure by the same Act in the same terms as s 72. That federally created body is not, constitutionally, a federal court unless the functions assigned to it are federal judicial powers.[2]

The other courts to which the federal Parliament may assign federal judicial powers are identified in s 77(iii) as 'any court of a State'. One of the first enactments of the federal Parliament was the *Judiciary Act* 1903 s 39(2) of which invested in '[t]he several Courts of the States ... within the limits of their several jurisdictions as to locality, subject-matter, or otherwise' federal jurisdiction in all the matters listed in ss 75 and 76 of the Constitution, save those which, under s 38 of the Act, were declared to be matters within the exclusive jurisdiction of the High Court.[3]

What can be regarded as courts of States for the purposes of ss 71 and 77 of the federal Constitution? Are they every State-created body which, under State legislation, has been designated as a court? Can State-created bodies which have not been designated by State legislation as courts, be recognised as courts of States for federal constitutional purposes and therefore bodies to which federal judicial powers can be assigned by enactments of the federal Parliament?

Similar issues can arise in relation to the ambit of the power invested in the federal Parliament. Section 51(xxiv) of the Constitution allows Parliament to make laws with respect to '[T]he service and execution throughout the Commonwealth of ... the judgments of the courts of the States'.[4]

Judicially developed common law also requires that a distinction be made between courts and non-courts. For example, common law rules concerning jurisdiction to deal with contempt of court draw distinctions between courts and non-courts, and also inferior and

---

2 But a court invested with judicial power cannot be invested with non-judicial powers other than those which are ancillary to the exercise of judicial power. See n ote 18 below.

3 Under s 77(ii) of the federal Constitution, the federal Parliament may make laws '[d]efining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States.'

4 The ambit of s 51(xxiv) is considered in Australian Law Reform Commission, *Service and Execution of Process* (Report No 40, 1987) Chapter 2.

superior courts. Inferior courts of record have been accorded an inherent jurisdiction to deal with criminal contempts of court committed in the face of the court. In contrast, superior courts have been accorded a much wider inherent jurisdiction to deal with contempts of court. This wider jurisdiction encompasses a jurisdiction for contempt of all inferior courts which are subject to the supervisory jurisdiction of the superior court. Questions can arise about what bodies qualify as inferior courts for this purpose.[5]

Whether a body is a court can also affect the ambit of the supervisory jurisdiction of a superior court, for if the body is a court its decisions will not be assailable merely because they are alleged to involve some error of law.[6]

The distinction between courts and non-courts may be relevant in some statutory contexts. The definition of the term 'tribunal' in s 2 of Victoria's *Administrative Law Act* 1978, for example, expressly excludes courts of law. Sometimes legislation on appeal costs funds makes it necessary to distinguish between courts and non-courts. If the decision which is reviewed on appeal is not a decision of a court, the respondent to the appeal may not be qualified to be indemnified from the fund in respect of the costs awarded against him or her.[7]

The criteria which have been (or might be) applied in determining what is a court of law for particular purposes are examined in the following parts of this article.

Courts under the Federal Constitution

There have been many occasions on which the High Court of Australia has had to decide whether the powers which the federal Parliament has invested in a body, are judicial powers of the Commonwealth.[8] Yet it has not been considered at any great length what are to be treated as courts of the States for constitutional purposes.

It is clear that a body may be a court of a State notwithstanding that its members, or some of them, do not enjoy the same security of tenure as is guaranteed by s 72 of the Constitution to judges of the federal courts. It is also clear that a body may be a court of a State even though some of the powers invested in it by State law are not

5 See below.

6 See below.

7 See below.

8 See Zines L, *The High Court and the Constitution* (4th ed 1997), Chapter 10.

judicial in character, for the federal Constitution does not preclude State Parliaments from investing non-judicial powers in those courts.

However in *Kable v Director of Public Prosecutions (NSW)*[9] a majority of the High Court held that the Constitution impliedly prohibits State parliaments from investing in the courts of the State powers which are incompatible with the exercise of federal jurisdiction. Precisely what non-judicial powers have been invested by State law in State courts remains to be determined. Committal proceedings before magistrates have been held not to involve exercise of judicial power;[10] nor does the issuing of search and other warrants, likewise.[11] These administrative powers have long been exercised by State courts and it is most unlikely that the High Court would now characterise them as ones which are incompatible with the exercise of federal judicial powers by State courts.

Kable's case did not require the Court to consider what characteristics a State created body has to possess to be recognised as a court for the purposes of s 77(iii) of the federal Constitution. The Supreme Court of New South Wales was clearly a court. It would seem to follow from the High Court's reasoning that for a State body to be regarded as a court of State, for federal constitutional purposes, the powers reposed in the body under State law must be *predominantly* judicial in character. However it may be that the High Court would insist the State body to which State judicial powers had been given should have been accorded independence from the executive branch of government. Further, it should also be required to exercise those judicial powers in a judicial manner.

The High Court has stressed that there is no simple formula which encapsulates the characteristics of judicial power.[12] Nevertheless it has accepted that judicial power centrally involves a power to decide with authority controversies between parties according to antecedent rules of law.[13] A power to decide authoritatively exists if

---

9 (1996) 70 ALJR 814.

10 *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355-7 per Griffith CJ, 378 per O'Connor J; *Lamb v Moss* (1983) 49 ALR 533 at 558-9.

11 *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 332-3; *Coco v The Queen* (1994) 179 CLR 427 at 444; *Grollo v Palmer* (1995) 184 CLR 348 at 359-60, 389; *Ousley v The Queen* (1997) 148 ALR 510.

12 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-9.

13 *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123

a decision is capable of being enforced immediately (subject to any rights of review) according to the processes of execution of judgments traditionally associated with courts of law. The High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*[14] makes it plain that a federally created body empowered to determine whether antecedent legal rules have been violated, and also to award remedies for violations, may exercise judicial power notwithstanding that the body lacks power to enforce its remedial orders. In *Brandy* the High Court held that the Commission had been invested unconstitutionally with judicial powers of the Commonwealth because its remedial awards, once filed in the Federal Court of Australia, were, by virtue of the relevant federal legislation, deemed to be orders of the Federal Court and thereby enforceable under the provisions of the *Federal Court of Australia Act* 1976 to do with enforcement of judgments. In the opinion of the High Court, it mattered not that the statutory scheme for enforcement of awards of the Commission allowed the party against whom an award was made an opportunity to seek judicial review of the determination of the Commission before the process of execution was set in train.

Under the laws of the States there are now many bodies, not formally designated courts, which have been authorised to resolve certain kinds of disputes, according to antecedent legal rules, and also to award remedies for infringement of those rules.[15] Many (perhaps most) of those bodies have not been invested with powers to enforce their remedial orders, but statutory provision has been made whereby, once a remedial award is filed in a designated court, the award is to be treated as if it were an order of that court and thus enforceable as a curial order.[16] The High Court's decision in *Brandy* indicates that the State bodies which operate under a statutory regime of this kind could be characterised as bodies invested with judicial powers and thus bodies which could be recognised as State courts for the purposes of s 77(iii) of the

---

CLR 361 at 374 per Kitto J; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 per Deane J.

14 (1995) 127 ALR 1.

15 Examples include anti-discrimination tribunals, small claims tribunals and tenancy tribunals.

16 See, for example, *Equal Opportunity Act* 1995 (Vic) s 140; *Small Claims Tribunals Act* 1973 (Vic) s 20.

Constitution.[17] The High Court's decision also signals to the Commonwealth a facility to make greater use of State tribunals as repositories of federal judicial powers, for example, by use of State anti-discrimination tribunals to adjudicate complaints of discrimination contrary to federal statutes.

The case in support of recognition of such bodies as courts of a State is enhanced if those bodies have been endowed with court-like trappings by statute. For example, a power to require the attendance of witnesses and the production of documents or a power to require the giving of testimony under oath or affirmation, and members of those bodies have been granted the same protections against legal liabilities as are accorded to members of a designated court of law, e.g. a Supreme Court. That case is also enhanced if the body is one which, by statute or by common law, is required to exercise its powers in accordance with principles of natural justice (procedural fairness).[18]

The case is not necessarily diminished by reason of elements in the governing statutory regime which mandate or authorise deviations from customary curial regimes. Those mandated or authorised deviations may include the following:

1. There is no requirement that persons appointed as members of the body possess prescribed legal qualifications;
2. Parties cannot be represented by legal practitioners except by leave of the body;
3. There is a statutory requirement that proceedings be conducted with as little formality and technicality, and with as much expedition, as the requirements of relevant enactments permit;
4. There is a statutory provision which states that the body is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks appropriate;
5. There is a statutory provision which requires proceedings to be conducted in private (in camera);

17 Subject to the qualifications mentioned in *Kable v DPP (NSW)* (1995) 70 ALJR 814.

18 The fact that a body is bound to act judicially in the sense of being bound by the principles of natural justice does not, however, mean that it is a body invested with judicial power.

6. The body has not been invested, by statute, with power to impose penalties for contempt.[19]

A power to impose penalties for contempt of a governmental institution has been identified as a power which is essentially judicial in character. Therefore under the Constitution, that power is exercisable only by those federally created bodies which are courts of law.[20] It is not a power which federal Parliament can validly grant to federally appointed royal commissioners, even to those commissioners who happen to be judges of federal or State courts.[21]

A number of Justices of the High Court of Australia have taken the view that, for the purposes of Chapter III of the federal Constitution, judicial power is to be defined not merely in terms of the content of the power. In their opinion judicial power involves also some essential attributes regarding the processes by which the power is to be exercised.[22] What these essential attributes are has not been determined definitively, though it has been suggested that they include procedural fairness. If judicial power involves matters of process as well as content, there are necessarily constitutional

---

19 In *Administrative Tribunals in Victoria* (1982) at pp 17-19 Robbins A suggested that the only real difference between courts and tribunals is that courts alone have power to punish for contempt.

20 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529.

21 Section 6O(2) of the *Royal Commissions Act* 1902 (Cth) is for this reason invalid.

22 See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 590 per Deane J; *Harris v Caladine* (1991) 172 CLR 84 at 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J; *Polyukhovich v Commonwealth* (1991) 172 CLR 507 at 607 per Deane J, at 703 per Gaudron J; *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ, at 486-7 per Deane and Toohey JJ, and at 502 per Gaudron J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 70 per Deane and Toohey JJ; *Dietrich v The Queen* (1992) 177 CLR 292 at 326 per Deane J and at 362 per Gaudron J; *Grollo v Palmer* (1995) 184 CLR 348 at 394 per Gummow J; *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 847 per McHugh JJ. See also Parker C, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 341; Winterton G, 'The Separation of Judicial Power and an Implied Bill of Rights' in Lindell G (ed), *Future Directions in Australian Constitutional Law* (1994) 185 at 199-200; Wheeler F, 'Original Intent and the Doctrine of Separation of Powers in Australia' (1996) 7 *PLR* 96 at 97; Mason A, 'Reflections on Law and Government' in Finn P (ed), *Essays on Law and Government*, Vol 2; *The Citizen and the State* (1996) 312; A Mason, 'A New Perspective on Separation of Powers' (1996) *Canberra Bulletin of Public Administration* (No 82) 1 at 8; Zines L, *The High Court and the Constitution* (4th ed 1997) 202-4; Wheeler F, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash Law Review* 248.

limitations on the power of the Commonwealth Parliament to enact legislation to regulate the procedures according to which the repositories of judicial powers of the Commonwealth are to exercise their functions. State parliaments are not subject to the same inhibitions, but it is possible that the High Court would now hold that a State created body cannot be recognised as a court of a State within the meaning of ss 71 and 77 of the federal Constitution, unless the procedures by which it exercises the judicial authority reposed in it by State law conform with 'the essential attributes of curial process.'[23]

The High Court has yet to rule on what can be regarded as courts of State for the purposes of s 51(xxiv) of the federal Constitution. This provision authorises the federal Parliament to make laws with respect to

> 'The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States.'

The Court has held that the word 'process' in s 51(xxiv) 'is not governed by the words "of the courts", those latter words referring only to "judgments"'.[24] For the purposes of s 51(xxiv), the civil and criminal processes of States may therefore encompass the processes of bodies which are not courts of States. In *Amman v Wegener*[25] the Court left open the question whether the words 'courts of the States', for the purposes of s 51(xxiv) 'include all bodies which are courts according to the law of the States, whether or not those bodies exercise judicial power'.[26] Mason J did indicate however that he favoured an interpretation of s 51(xxiv) which deferred to State laws. His Honour expressed the view that:[27]

> 'Apart from such special requirements as may be prescribed by Ch III of the federal Constitution respecting the federal judicature, there is no principle in law that confines courts to the exercise of judicial power in the strict sense of that expression. It is well known that State courts may exercise functions that are administrative in character. There is no warrant for reading the word "courts" in s 51(xxiv) otherwise than as a reference to the institutions of the States ordinarily described by that word.'

---

23 In the words of Deane J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 607.

24 *Amman v Wegener* (1972) 129 CLR 415 at 436.

25 (1972) 129 CLR 415.

26 Ibid at 436 per Gibbs J; Walsh and Stephen JJ concurred.

27 Id, at 442.

The phrase 'judgments of the courts of the States' in s 51(xxiv) may need to be interpreted consistently with s 73 of the federal Constitution. This section invests the High Court with jurisdiction 'to hear and determine appeals from all judgments, decrees, orders, and sentences' of designated courts, 'with such exceptions and subject to such regulations as the [federal] Parliament prescribes ... .' For the purposes of s 73, not every decision or ruling of a State body, designated by State legislation as a court, will be recognised as a judgment, etcetera.[28]

Part 6 of the *Service and Execution of Process Act* 1992 (Cth), ss 104-109; provides for enforcement of judgments. This term is defined at s 3(1) of the Act to include orders of certain State tribunals which are not courts. Section 3(1) states that the term 'judgment' includes-

> 'an order that:
>
> a) is made by a tribunal in connection with the performance of an adjudicative function; and
>
> b) is enforceable without an order of a court (whether or not the order made by the tribunal must be registered or filed in a court in order to be enforceable).'

The definition needs to be read in conjunction with the further definitions in s 3(1) of the terms 'tribunal' and 'adjudicative function'. The term tribunal is defined to mean -

> a) 'a person appointed by the Governor of a State, or by or under a law of a State; or
>
> b) a body established by or under a law of a State;
>
> and authorised by or under a law of a State to take evidence on oath or affirmation, but does not include:
>
> c) a court; or
>
> d) a person exercising a power conferred on the person as a judge, magistrate, coroner or officer of a court.'

The term 'adjudicative function' in relation to a tribunal is defined to mean -

> 'the function of determining the rights or liabilities of a person in a proceeding in which there are 2 or more parties, including the function of making a determination:

---

28 *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289. See also *Moses v Parker* [1896] AC 245; *Attorney-General of Gambia v N'Jie* [1961] AC 617 at 633; *R v Cornwall Quarter Sessions; Ex parte Kerley* [1956] 1 WLR 906; *Dean v District Auditor for Ashton-in-Makerfield* [1960] 1 QB 149.

a) altering those rights or liabilities;

b) relating to any matters of a kind mentioned in section 48.'

The matters mentioned in s 48 (which appears in Part 4 of the Act - Service of Process of Tribunals) are proceedings that concern:

a) 'real property within the State in which the tribunal is established; or

b) a contract, wherever made, for the supply of goods or the provision of services of any kind (including financial services) within that State; or

c) an act or omission within that State; or

d) the carrying on of a profession, trade or occupation within that State; or

e) a pension or benefit under a law of that State; or

f) the validity of an act or transaction under a law of that State.'

The overall effect of these provisions is that the orders of certain State bodies are enforceable throughout the Commonwealth even if those bodies are not called courts. The State bodies whose orders are so enforceable include bodies invested with State judicial power, and which for the purposes of s 51(xxiv) of the federal Constitution, can be regarded as courts of a State.

Contempt of Court

At common law, inferior courts have a limited inherent contempt jurisdiction. Those which are courts of record have power to try and punish only those contempts which are committed in the face of the court.[29] A superior court of record having a supervisory jurisdiction over an inferior court may, however, try and punish all forms of contempt in relation to such an inferior court.[30] For the purposes of this general rule inferior courts have been held to include magistrates' courts conducting committal proceedings,[31] courts

29 *Re Dunn; Re Aspinall* [1906] VLR 943; *Master Undertakers Association of New South Wales v Crockett* (1907) 5 CLR 389.

30 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351; *R v Wright (No 1)* [1968] VR 164; *Re Fellows* [1972] 2 NSWLR 317.

31 *R v Davies* [1906] 1 KB 32; *R v Clarke; Ex parte Crippen* (1910) 103 LT 630; *R v Evening Standard; Ex parte DPP* (1924) 40 TLR 833; *R v Daily Mirror; Ex parte Smith* [1927] 1 KB 845.

martial,[32] coroners' courts,[33] children's courts,[34] a consistory court,[35] a licensing court[36], and bodies appointed to determine claims for workers' compensation.[37] Bodies which have been held not to be inferior courts for this purpose have included a royal commission (even though it was constituted by a judge[38]) and an investigating committee appointed to consider whether there is a prima facie case of misconduct on the part of a medical practitioner.[39]

In *Attorney-General v British Broadcasting Corporation*[40] the House of Lords held that, for the purposes of the law of contempt of court, a body should not be recognised as an inferior court unless it has been invested with judicial powers and forms part of the judicial system.[41] It concluded that a local valuation court was not a court of law. That body was rather, a part of the administrative system of the state. The function of a local valuation court was simply to hear and determine objections to proposed alterations of lists of valuations of property for taxation purposes. Valuation officers were obliged to amend the lists in accordance with the court's directions, but the court did 'not determine the amount of the rate [payable] or impose a liability to pay it.'[42]

This case was decided before the enactment of the *Contempt of Court Act* 1981 (UK). Section 19 of the Act defines a court to include 'any tribunal or body exercising the judicial power of the state'.[43] Bodies which have been held to fall within the statutory definition have included industrial tribunals[44] and mental health review tribunals.[45] The latter have been regarded as courts because, in determining

---

32 *R v Daily Mail; Ex parte Farnsworth* [1921] 2 KB 733; *R v Gunn; Ex parte Attorney-General* [1954] Criminal Law Rev 53.

33 *Attorney-General v Mirror Newspapers Ltd* [1980] 1 NSWLR 374; *R v Surrey Coroner; Ex parte Campbell* [1982] 2 WLR 626; *R v West Yorkshire Coroner; Ex parte Smith (No 2)* [1985] QB 1096.

34 *Minister for Community Welfare v Keating* (1980) 25 SASR 313.

35 *R v Daily Herald; Ex parte Bishop of Norwich* [1932] 2 KB 402.

36 *Attorney-General v Soundy* (1938) 33 Tas LR 143.

37 *Bar Association of New South Wales v Muirhead* (1988) 14 NSWLR 173.

38 *Badry v DPP of Mauritius* [1983] 2 AC 297.

39 *X v Amalgamated Television Services Pty Ltd (No 2)* (1987) 9 NSWLR 575.

40 [1981] AC 330.

41 Id, at 359-60 per Lord Scarman.

42 Id, at 360 per Lord Scarman.

43 Section 20 of the Act extends the main provisions of the Act to tribunals of inquiry established under the *Tribunals of Inquiry (Evidence) Act* 1921.

44 *Peach Grey and Co (a firm) v Sommers* [1995] 2 All ER 513.

45 *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1990] 1 All ER 335.

whether involuntary patients are entitled to be released from detention, they are obliged to apply statutory criteria. The tribunals are also independent.[46]

Since *Attorney General v British Broadcasting Corporation*,[47] Australian courts have accepted that the jurisdiction of superior courts to protect other bodies against contempts does not extend to bodies other than inferior courts, at least at common law. They have also accepted in this context, that a body is not to be characterised as an inferior court for this purpose, unless it is invested with judicial power.[48] In *New South Wales Bar Association v Muirhead*[49] a majority of the New South Wales Court of Appeal[50] concluded that commissioners appointed under Part 8 of the State's *Workers Compensation Act* 1987 were an inferior court. They determined 'rights by reference to pre-existing norms' and did so 'in a controversy between conflicting parties'.[51] The functions they performed were essentially the same as those performed by judges of the Compensation Court. Additionally they enjoyed security of tenure, took a judicial oath, enjoyed an immunity from liability similar to that enjoyed by judges, could subpoena witnesses and require evidence to be given on oath or affirmation.[52]

There are good reasons for restricting the application of the common law of contempt of court (albeit modified by statute) to the operations of bodies exercising judicial power in the strict sense.[53] The object of that body of law is after all, to protect the operations of bodies invested with judicial authority. It is a restrictive body of law and its constraints would be infinitely extended if it were held to apply to the whole range of bodies subject to the supervisory jurisdiction of a superior court, or even if it were to apply to such bodies as are required to act judicially in the sense of being obliged to perform their functions in accordance with the principles of natural justice (procedural fairness). It must be conceded that there are many cases in which it is entirely appropriate for bodies which

46 Id, at 341.

47 [1981] AC 330.

48 *X v Amalgamated Television Services Pty Ltd (No 2)* (1987) 9 NSWLR 575.

49 (1988) 14 NSWLR 173.

50 Kirby P and Hope JA; Mahoney JA dissenting.

51 (1988) 14 NSWLR 173 at 191.

52 Id, at 185-92 per Kirby P and at 197-8 per Hope JA.

53 See *X v Amalgamated Television Services Pty Ltd (No 2)* (1987) 9 NSWLR 575 at 585-6.

are not courts of law to be given protections similar to those accorded to the courts of law by means of the law of contempt. However appropriate protections can be provided on a case by case basis by means of statutory provisions which create specific criminal offences.[54]

Appeal Costs Funds Legislation

In the context of legislation on appeal costs funds[55] the term 'court' has been interpreted widely to encompass bodies which, according to constitutional tests, would not or might not, be classified as bodies invested with judicial power. This wide interpretation conforms with the purpose of the legislation.

The legislation assumes the existence of a regime under which the losing party in litigation may be ordered by a court to pay the costs incurred by the successful party. It assumes also that, on appeal,[56] a decision may be reversed on the ground that the decision-maker made an error of law. The object of the legislation is to make it possible for the unsuccessful respondent to the appeal who is ordered to pay the costs of the successful appellant to be indemnified from a public fund in respect of the costs which are attributable to legal error on the part of the decision-maker whose decision has been reversed.[57]

Many of the decisions which are appealable to a court of law, particularly at State level, are decisions made by bodies which are not courts of law in the strict sense. Yet frequently the jurisdiction

---

54 There are, in fact, many statutes which create such offences, among them the Australian statutes on royal commissions: see Campbell E, *Contempt of Royal Commissions* (1984) Chapter 4.

55 The Australian statutes are, in order of their date of enactment, the following: *Suitors Fund Act* 1951 (NSW); *Appeal Costs Fund Act* 1964 (Vic); *Suitors' Fund Act* 1964 (WA); *Appeal Costs Fund Act* 1968 (Tas); *Appeal Costs Fund Act* 1973 (Q); *Federal Proceedings (Costs) Act* 1981 (Cth).

56 In this context proceedings by way of appeal include appeals by way of case stated, reservation of special cases on questions of law and applications for judicial review by a superior court in the exercise of a supervisory jurisdiction: see E Campbell, 'Award of Costs on Applications for Judicial Review' (1983) 10 *Sydney Law Review* 20 at 33.

57 The appeal costs legislation, it has been remarked: 'proceeds on the assumption that the law is known so that if error of law occurs in a court at first instance, or an inferior or appellate court, such error may ordinarily be attributed to a fault in the administration of justice rather than of the parties so that the cost of having the error rectified ought not ordinarily to be on the unsuccessful respondent to the appeal, but be paid from a fund contributed by all litigants.' *Acquilina v Dairy Farmers Co-operative Milk Co Ltd (No 2)* [1965] NSWR 772 at 773.

of the appeals courts to review decisions of those bodies will be confined to determining whether the decision-maker committed an error of law. That was the extent of the appeals jurisdiction conferred on the New South Wales Supreme Court in relation to decisions of the State's anti-discrimination tribunal. In *Australian Postal Commission v Dao (No 2)*[58] the State's Court of Appeal concluded that for the purposes of the *Suitors Fund Act* 1951, the tribunal was relevantly a court. The unsuccessful respondent to an appeal against the tribunal's decision was therefore qualified to be indemnified from the fund in respect of the appeals costs ordered to be paid by the respondent to the successful appellant.

The Court of Appeal was undoubtedly right in classifying the anti-discrimination tribunal as a court for the purposes of the *Suitors Fund Act* 1951, for the task of the tribunal was to determine complaints by individuals that the State's anti-discrimination laws had been violated, and also to award remedies for infringements of those laws. The Court of Appeal noted that the remedial awards of the tribunal were not enforceable unless they were filed in a designated court, but it considered that factor not a material one.[59]

The subsequent decision of the High Court in *Brandy*[60] vindicates the Court of Appeal's decision. Moreover it suggests that the anti-discrimination tribunals of the States must, even for purposes other than the appeal costs legislation, be classified as bodies invested with judicial powers.

Other New South Wales bodies which have been held to be courts for the purposes of the *Suitors Fund Act* 1951 include the Consumer Claims Tribunal[61] and the Government and Related Employees Appeal Tribunal.[62]

The Supreme Court of Victoria has held however, that an arbitrator appointed under s 569AA of the *Local Government Act* 1958 or under the *Retail Tenancies Act* 1986 is not a court within the meaning of s 13 of the *Appeal Costs Act* 1984.[63]

---

58 (1986) 69 ALR 125.

59 Id, at 141.

60 (1995) 127 ALR 1.

61 *Hughes v Clubb* (1987) 10 NSWLR 325.

62 *Reid v Sydney City Council* (1995) 35 NSWLR 719. Other cases in which attention has been given to what bodies are relevantly courts of law were mentioned in *Australian Postal Commission v Dao (No 2)* (1986) 69 ALR 125.

63 *Slapjums v City of Knox (No 3)* [1978] VR 552; *Deneys v Delafotis (No 2)* [1992] 2 VR 701. The decisions in these two cases were affected by the consideration that

Ambit of a Supervisory Jurisdiction

A supervisory jurisdiction is a jurisdiction invested in a superior court of law to review the actions and decisions of other officers and agencies of government, in order to determine whether those actions or decisions are within power or jurisdiction, or involve some error of law or breach of public duty. Traditionally, a distinction has been made between jurisdictional errors and errors of law within jurisdiction. Errors of law of the latter kind are reviewable by a court of supervisory jurisdiction only upon an application for certiorari and only if the suggested error is disclosed on the face of the record.[64] The distinction between jurisdictional errors and non-jurisdictional errors of law has proved to be elusive however.

A superior court's supervisory jurisdiction extends to inferior courts within the same judicial hierarchy.[65] Judicial supervision of the acts and decisions of inferior courts has tended to be less intensive than that of the acts and decisions of non-courts. Statutes conferring jurisdiction on inferior courts have, for example, often been interpreted as conferring on those courts a jurisdiction to make conclusive (and thus unreviewable) rulings on whether proceedings before the court have been brought within the prescribed time limit, or by a party with the requisite standing to sue.[66]

---

unless an arbitrator was classifiable as a court, the Victorian legislation was not apt to cover decisions made by single member bodies. The corresponding Tasmanian legislation, considered in *Stacey v Meagher* [1978] Tas SR 56 at 71 was therefore distinguishable because it covered appeals to the Supreme Court from some other court or 'a board *or person* from whose decision there is an appeal to a superior court on a question of law' (emphasis added). In *Harrison v Racing Penalties Appeal Tribunal* 30 May 1996 a Full Court of the Supreme Court of Western Australia held that the Tribunal is not a court for the purposes of the *Suitors Fund Act* 1964.

64 See Aronson M and Dyer B, *Judicial Review of Administrative Action* (1996), Chapter 4.

65 Under Australia's federal Constitution, the supervisory jurisdiction of the High Court of Australia extends to the Federal Court of Australia and other federally created superior courts whose jurisdiction is limited by the statutes from which they derive their jurisdiction.

66 See *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391-2 per Dixon J; *R v Judges of the Federal Court; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113; *R v Judges of the Federal Court; Ex parte Soul Pattinson (Laboratories) Pty Ltd* (1978) 142 CLR 113; *R v Central Sugar Cane Prices Board; Ex parte Pleystowe Sugar Mills Suppliers Committee* [1984] 2 Qd R 55. On the significance of the distinction made by Dixon J in the *Parisienne Basket Shoes* case see *Yaffe v City of Fitzroy* [1967] VR 376 at 383 per Menhennit J. See also

In England, the distinction between jurisdictional and non-jurisdictional errors of law has been almost obliterated by a series of decisions by the House of Lords so that error of law is, in most cases, a ground of judicial review.[67] The distinction has been maintained in relation to inferior courts, at least where a statute has made their decisions final and conclusive.[68] Lord Diplock has stated that -

> 'on any application for judicial review of a decision of an inferior court in a matter which involves, as many do, interrelated questions of fact, law and degree the superior court conducting the review should be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question it has to decide.'[69]

Some English judges, however, have suggested that no distinction should be drawn between inferior courts and administrative agencies for the purposes of judicial review. Futher, absent a privative clause, the decisions of both are reviewable on the ground of error of law, even if the error is not disclosed on the face of the record.[70]

In *Craig v South Australia*[71] in 1995, the High Court of Australia, on appeal from the Supreme Court of Australia, went some distance towards adopting the renovated English doctrine on the ambit of supervisory review jurisdictions. The High Court drew a distinction between inferior courts and other bodies subject to a supervisory jurisdiction. It seemed to be prepared to allow error of law as a general ground for judicial review of the acts and decisions of bodies other than courts.[72] At the same time it would allow inferior courts latitude to make unreviewable rulings on questions of law arising in

---

Manning v Thompson [1977] 2 NSWLR 249; and (1979) 53 ALJR 582 (on appeal to the Judicial Committee of the Privy Council).

67 The significant cases are *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and cases, in between, culminating in *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682.

68 *In Re Racal Communications* [1981] AC 374 at 383 per Lord Diplock; *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682 at 693 per Lord Griffiths.

69 *In Re Racal Communications* [1981] AC 374 at 383.

70 *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682 at 702 per Lord Browne-Wilkinson; *R v Bedwelly Justices; Ex parte Williams* [1996] 3 WLR 361 at 367 per Lord Cooke of Thorndon. See also *Martin v Ryan* [1981] 2 NZLR 209 at 225 per Fisher J.

71 (1995) 184 CLR 163.

72 Id, at 178-9.

the course of exercise of their jurisdiction. Such questions included 'identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence... .'[73] Furthermore, the Court said:

> '...a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such court upon some matter upon which, as a matter of law, it was not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.'[74]

The particular case was not one in which it was necessary for the High Court to enunciate criteria for distinguishing between courts and non-courts, for the body whose action had been the subject of the application for judicial review was, by any test, a court of law.[75]

The Court's reasons for opinion do not offer much by way of justification of the distinction made between courts and non-courts. There were but passing references to the fact that the members of inferior courts are usually professionally qualified lawyers and that inferior courts 'exercise jurisdiction as part of a hierarchical legal system entrusted with the administration of justice under the Commonwealth and State constitutions'.[76] No reference was made to the existence within the legal systems of the Australian States of a number of bodies in the nature of court substitutes which, according to constitutional tests, are recognisable as bodies endowed with judicial powers, and which may have been incorporated into a State's judicial system by means of statutory provisions which allow for appeals against their decisions to 'courts proper,' on merits or on questions of law only.[77]

Nor was any reference made to the fact that in the States' inferior courts have been invested not merely with truly judicial functions, but also with functions of a non-judicial character. These non-judicial functions may include determination of appeals against

---

73 Id, at 179-80.

74 Id, at 180. Cf *Re Bennett-Borlane; Ex parte Commissioner of Police* WA Supreme Court (Full Court) 20 July 1997.

75 The District Court of South Australia.

76 (1995) 184 CLR 163 at 176-7.

77 For critique of *Craig* see Aronson M and Dyer B, *Judicial Review of Administrative Action* (1996) 237-9, 260, 298-9. See also Finn C, 'Jurisdictional Error: *Craig v South Australia*' (1996) 3 *AJ Admin L* 177.

specified administrative decisions on the merits.[78] The Court made no mention of the fact that statutes constituting administrative tribunals may sometimes require certain members (e.g. presidential members) to have professional legal qualifications.

The High Court's decision in *Craig* will inevitably prompt arguments before superior courts about whether a particular body whose actions are the subject of an application for judicial review in a supervisory jurisdiction is or is not a court of law.

The question of what could be recognised as a court of law for the purposes of exercise of a superior court's supervisory jurisdiction was one which the Supreme Court of Victoria had to consider earlier by virtue of provisions in the State's *Administrative Law Act* 1978. At the time of its enactment the Act was generally regarded as a desirable reform. Its main purpose was to simplify the procedures by which the Supreme Court's supervisory jurisdiction could be enlivened, and to enable the Supreme Court to award whatever remedy was appropriate, regardless of the process by which its jurisdiction was invoked.[79] The Act is not the source of the Supreme Court's supervisory jurisdiction. That jurisdiction was immediately conferred by other State statutes, notably by s 85 of the *Constitution Act* 1975.[80]

The *Administrative Law Act* 1978 provides for a single process for initiating applications for judicial review of decisions of tribunals to the Supreme Court. It also prescribes time limits within which such applications have to be lodged.[81] The definitions section in the statute, section 2, defines the terms 'decision' and 'tribunal.' The definition of the latter excludes 'courts of law'. Section 8 of the Act imposes on 'tribunals' (as defined in s 2) an obligation to supply written reasons for decision upon request to persons who have standing to sue, according to the standing rule established by s 2 of the statute. Section 10 of the Act provides that the written reasons for decision by a tribunal, or an inferior court, are to be treated as part of the record. The effects of the Act are thus somewhat curious. Proceedings brought under the Act must be dismissed if the

78 See Campbell E, 'Appeals to Courts from Administrative Decisions: Restrictions on Further Review' (1997) 4 *AJ Admin L* 164 n 2.

79 A simplified procedure had also been introduced by amendments to Order 53 of the Rules of the Supreme Court in 1966.

80 The supervisory jurisdiction conferred by s 85 may be excluded or limited by statute.

81 Section 3.

decision sought to be reviewed is that of a court of law, even though the same decision is reviewable by the Supreme Court in the exercise of its supervisory jurisdiction, in proceedings instituted under Order 56 of the Court's General Rules of Procedure in Civil Proceedings. Whereas the Act creates a right to written reasons for decisions of tribunals, courts of law are exempted from this statutory duty.

There have been surprisingly few reported cases in which proceedings brought under the *Administrative Law Act* 1978 have been resisted on the ground that the decision sought to be reviewed was that of a court of law. In *Keller v Drainage Tribunal*[82] no objection appears to have been taken to proceedings under the Act in respect of a decision of the Drainage Tribunal, notwithstanding that by statute it had been given an exclusive jurisdiction to determine certain actions at common law.[83] In *Trevor Boiler Engineering Co Pty Ltd v Morley*[84] proceedings in respect of a decision of the Workers Compensation Board were dismissed on the ground that the Board was relevantly a court of law. Starke J identified several factors which, in combination, gave the Board the character of a court of law.[85] Its chairman was a judge of the County Court, sitting as a designated person, given exclusive jurisdiction to decide questions of law, though there was provision for the statement of case for the Full Court on any such question.[86] The Board was empowered to take evidence on oath and in contested proceedings it was, by implication, bound to apply curial rules of evidence. Its proceedings had to be conducted in public. Parties were permitted to appear by counsel and solicitor and cross-examination was allowed. The Board had power to award costs and order taxation and was also given powers in respect of contempt. Although the Board was directed to be 'guided by the real justice of the matter without legal forms and solemnities,' in determining claims to compensation, experience had shown that the law to be applied by it was 'hedged around with legal technicalities.' The statutory provision 'for execution of orders of the Board by registering the same in the County Court or in the Magistrates Court' appeared to Starke J 'to be entirely procedural' in that it took

82 [1980] VR 449.

83 The Drainage Tribunal has since been abolished and its jurisdiction transferred to the Administrative Appeals Tribunal: See *Water Act* 1989 ss 15, 16 and 19.

84 [1983] 1 VR 716.

85 Id, at 720.

86 Review on applications for prohibition and certiorari had been excluded.

'advantage of the existing procedures for execution in those Courts without setting up a similar procedure within the structure of the Workers Compensation Board'. The conclusion that the Board was a court of law was undoubtedly correct.[87]

Since the High Court's decision in *Craig v South Australia*,[88] the New South Wales Court of Appeal has had occasion to consider whether, for the purposes of supervisory judicial review, a State body which has some judicial powers is to be classified as a court even though it has also been invested with non-judicial powers. In particular the Court has had to consider whether, when exercising its non-judicial powers, such a body is to be regarded as a court. The body whose status was in issue was the Court of Coal Mines Regulation. Provision for the appointment of the Court is made in s 150 of the *Coal Mines Regulations Act 1982* (NSW). It states that those appointed to this Court must be Judges of the District Court. Under s 152(1) of the Act the Court is invested with jurisdiction to try, summarily, various offences created by the Act.[89] The exercise of this jurisdiction clearly involves exercise of judicial power, in the strict sense. In addition, s 152(1) in combination with other sections of the Act, gives the Court a number of functions which could not be characterised as judicial.[90] Among these non-judicial functions is the holding of investigations into accidents (their causes and circumstances) causing death or serious bodily injury at a mine, on the Minister's direction.[91] In the conduct of these investigations a Court of Coal Mines Regulation possesses a number of court-like powers. However the outcome of an investigation will be no more than a report to the Minister.[92]

In *Newcastle Wallsend Coal Company Pty Ltd v The Court of Coal Mines Regulation*,[93] the New South Wales Court of Appeal concluded that when a District Court Judge sits as a Court of Coal Mines Regulation to investigate and report on an accident at a mine, the Judge is to be regarded as sitting as a court of law 'for the purposes of the rules relating to the grant or refusal of relief which

87 The Coroner's Court has also been recognised to be a court *Erikson v Coroner*, Supreme Court 25 November 1980; but not the Planning Appeal Board *Shire of Sherbrooke v FL Byrne* [1987] VR 353 at 357.

88 (1995) 184 CLR 163.

89 Division 2 of Part 4.

90 See, e.g. Division 4 of Part 2, and ss 106, 116, 131 and 145E.

91 Section 95.

92 Sections 98 and 153.

93 Unreported 12 September 1997.

is prerogative in nature ...'[94] This is because a Court of Coal Mines Regulation has also been invested with judicial powers. 'It would,' Smart AJA observed, 'be anomalous to treat the Court as sometimes sitting as a Court and sometimes as a tribunal. It is far better to accept and classify it as a Court, albeit a specialist court, which has extended functions.'[95] In the opinion of the Court of Appeal, the alleged error on the part of the Judge conducting the investigation into an incident at the Gretley Colliery in 1996 was an error of law within jurisdiction.[96] The Supreme Court's jurisdiction to review on that ground had been ousted by s 152(5) of the *Coal Mines Regulation Act* 1982 which had provided that 'a determination or order of a court [i.e. a Court of Coal Mines Regulation] shall be final and conclusive and shall not be liable to appeal or review.'[97]

If the view of the New South Wales Court of Appeal is accepted, there could be a number of State created bodies which have judicial as well as non-judicial functions. For that reason they may be classifiable as courts and thus subject to a lesser degree of judicial supervision than bodies whose functions are solely non-judicial. State anti-discrimination tribunals for example, typically exercise both judicial functions and non-judicial functions: the judicial function of determination of complaints of unlawful discrimination and the non-judicial function of granting exemptions from the operation of particular provisions of the relevant anti-discrimination statute.[98] The members of the anti-discrimination tribunals are not judges, but that fact should not affect the question of whether a tribunal is to be recognised as a court in the context of supervisory judicial review.

---

94 Id, at 24 per Powell JA (Meagher JA concurring). Reference was made to *Craig v South Australia* (1995) 184 CLR 163.

95 Id, at 28.

96 Review had been sought of rulings by the Judges on whether certain statements made by employees and former employees of the Company were the subject of client legal privilege. The Judge expressly incorporated his reasons for these rulings in the record for the purpose of any application for an order in the nature of certiorari. He did so in the light of what had been said in *Craig v South Australia* (1995) 184 CLR 163 about what forms part of 'the record'.

97 Reference was made to *Houssein v Under Secretary, Department of Industrial Relations and Technology* (NSW) (1982) 148 CLR 88; *Hockey v Yelland* (1984) 157 CLR 124; *Public Service Association of South Australia v Federated Clerks Union of Australia, South Australian Branch* (1991) 173 CLR 132; *Walker v Industrial Court of New South Wales* (1994) 53 IR 121, and *Kriticos v New South Wales* (1996) 40 NSWLR 297.

98 See for example *Equal Opportunity Act* 1995 (Vic) Part 7, Div 7 (judicial powers) and s 83 (exemptions).

Whether in the context of supervisory judicial review it is desirable to make a distinction between inferior courts and non-courts is debateable. It is true that inferior courts 'exercise jurisdiction as part of a hierarchical legal system entrusted with the administration of justice ...,'[99] but they do so under the superintendence of a superior court and very often under statutory arrangements which allow parties to appeal to a higher court. The appeal to a higher court may be by way of rehearing, or it may be limited to questions of law. Decisions of administrative agencies of government may also be subject to court appeal. The appeal may be restricted to questions of law, though in the Australian States and the Commonwealth Territories the appeal can be by way of a *de novo* hearing on the merits. When a statute provides for court appeal against decisions on questions of law, the enacting parliament has clearly indicated that any error of law is reviewable by the court of appeal, regardless of the status of the tribunal.

A supervisory jurisdiction may, of course, be invoked before a tribunal has reached the point of making an appealable decision, for example, by application for a writ of prohibition, or an order in the nature thereof. In the case of *Craig*[100] it was the supervisory rather than the appellate jurisdiction of the Supreme Court of South Australia which was invoked to challenge a ruling made in the course of a criminal trial before an inferior court. Likewise in *Newcastle Wallsend Coal Company Pty Ltd v The Court of Coal Mines Regulation*,[101] it was the supervisory jurisdiction of the Supreme Court of New South Wales which was invoked to challenge rulings made in the course of an investigation by a judge, though not in the exercise of judicial power. Where statutory provision has been made for appeal to a court from the ultimate decisions on questions of law of a tribunal, it seems strange that the scope of supervisory judicial review of tribunal actions prior to ultimate decision should be affected by whether the tribunal happens to be a court or a non-court.

Other Legal Contexts

There are legal contexts other than those which have already been mentioned in which it may become necessary to decide whether a particular body is or is not a court of law. In the Victorian case of

99 Id, at 176.

100 (1995) 184 CLR 163.

101 NSW Supreme Court, unreported 12 September 1997.

Roads Corporation v *Melbourne Estates Finance Co Pty Ltd [No 2]*[102] the Supreme Court had to decide whether a Land Valuation Board of Review was a court for the purposes of ss 33 and 60 of the *Supreme Court Act* 1986. Section 60[103] provides for payment of interest, at a specified rate, in proceedings for debt or damages. Interest is calculated from the date on which the proceedings were commenced until the date of judgment. Section 33 states:

> 'Unless otherwise provided by this or any other Act, the rules enacted by Part 5 apply to all courts so far as the matters to which those rules relate are within the jurisdiction of those courts.'

The Land Valuation Boards of Review were established under the *Valuation of Land Act* 1960. Under this Act the Boards have jurisdiction to hear and determine disputes or objections with respect to the value of land, for rating and tax purposes. Under the *Land Acquisition and Compensation Act* 1986 the Boards also have a jurisdiction to determine the compensation payable for land which was acquired compulsorily. They have exclusive jurisdiction to determine compensation claims where the amount claimed does not exceed $50,000. Claims in excess of that amount are determinable either by a Board or the Supreme Court, at the claimant's option. The Boards also have a jurisdiction under the *Planning and Environment Act* 1987 to determine certain claims for compensation for loss. Melbourne Estates and Finance Co Pty Ltd had made a successful claim for compensation under this last mentioned Act.[104]

The question which then had to be decided by the Supreme Court was whether a Land Valuation Board of Review could be regarded as a court within the meaning of s 33 of the *Supreme Court Act* 1986 and therefore a body empowered to award interest, pursuant to s 60 of the same Act, on the compensation determined to be payable by the acquiring authority, the Roads Corporation. Gobbo J concluded that a Land Valuation Board of Review could not be characterised as a court for the purposes of s 33 of the *Supreme Court Act* 1986. In his decision he referred to a number of prior cases in which the distinction between courts and non-courts had been considered, and also cases in which the concept of judicial power had been

---

102 [1993] 2 VR 620.

103 Contained in Part 5 of the *Supreme Court Act 1986*, headed 'Miscellaneous Rules of Law.'

104 [1993] 2 VR 620.

explored.[105] The considerations which moved Gobbo J to conclude that a Land Valuation Board of Review, in determination of compensation claims, was not a court for the relevant purpose were these:[106]

1. 'The legislation providing for Land Valuation Boards of Review envisaged the creation of more than one body of that name, and membership of each such body as determined by a Minister.
2. There was no statutory requirement that the chairman of a Board be a judge, or indeed a qualified legal practitioner.
3. Provisions in the *Valuation of Land Act* 1960 to do with conduct of meetings of the Boards and who of their members were empowered to make decisions at such meetings, as a Board, were 'inconsistent with conventional notions of a court or the exercise of judicial power.'[107]
4. Section 33 of the *Supreme Court Act* 1986 substantially replicated section 58 in the State's *Judicature Act* 1883 and thus the word 'court' in the section had 'to be given its ordinary meaning.'[108]
5. '[T]here was evidence that some 80% of the work of Land Valuation Boards of Review ... [was] concerned with valuation objections, rather than with claims to entitlements to compensation.'[109] The predominant activity of the Boards was 'in the review of valuations, an area which has been treated as appropriate to an administrative tribunal, not a court.'[110]
6. A finding that a Land Valuation Board of Review 'was a court would sit oddly beside decisions which, by necessary implication, treated tribunals of a like nature as not being courts.'[111]

Towards the end of his opinion Gobbo J adverted to what he termed 'policy considerations against recognising Land Valuation Boards of Review as courts of law.' His Honour declared that -

> 'It is ... undesirable that the status of court be applied to a body which has no real security of tenure, can be presided over by a non-lawyer

105 For Example: *Attorney-General v British Broadcasting Corporation* [1981] AC 303; *Trevor Boiler Engineering Co Pty Ltd v Morley* [1983] 1 VR 716; *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497.

106 [1993] 2 VR 620 at 625-9.

107 Id, at 626.

108 Id, at 627.

109 Ibid.

110 Id, at 628.

111 Id, at 627.

> and can have its allocation to particular cases determined by the executive.'[112]

His Honour immediately went on to suggest that if a Land Valuation Board of Review were to be classified as a court for the purposes of ss 33 and 60 of the *Supreme Court Act* 1986, it 'would have to be treated as a court for a whole variety of purposes.'[113] Were it to be so classified, he explained, it would be 'difficult to see how a number of administrative tribunals would not also have to be recognised as being courts'. He referred specifically to the State's Administrative Appeals Tribunal, its Residential Tenancies Tribunal, the Crimes Compensation Tribunal, the Credit Tribunal and the Equal Opportunity Board,[114] each of which had been endowed by State statute with 'a power to decide a *lis* between parties by determination on legal rights and in most, if not all, cases to award monetary compensation.'[115]

In the recent case of *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[116] the High Court considered, albeit briefly, the status of the Residential Tenancies Tribunal of New South Wales. Some of the functions reposed in this Tribunal by statute are clearly of a judicial character. In this case a landlord who had leased residential premises to the Defence Housing Authority (a Commonwealth statutory body) had invoked the Tribunal's jurisdiction to make orders to authorise landlords to enter the premises leased by them, and orders to require tenants to deliver keys to the premises to landlords. That jurisdiction was clearly of a non-judicial character inasmuch as it involved exercise of a power to vary legal relationships. The Defence Housing Authority sought from the High Court a writ of prohibition to prevent the Residential Tenancies Tribunal from deciding the landlord's application. It did so on several grounds, amongst them constitutional grounds, and it was on these grounds that the High Court decided the case.[117] A majority of the Court[118] concluded that

---

112 Id, at 628.

113 Ibid.

114 Under the *Equal Opportunity Act* 1995 the Equal Opportunity Board has been replaced by the Anti-Discrimination Tribunal.

115 [1993] 2 VR 620 at 628-9.

116 (1997) 146 ALR 495.

117 The constitutional grounds relied upon were that the State legislation was inconsistent with federal legislation; that, under s 52(ii) of the federal Constitution, the Commonwealth Parliament had exclusive power to legislate in relation to housing of defence personnel; and that *Commonwealth v Cigamatic Pty*

the State legislation bound the Defence Housing Authority, as a matter of State law.

In the course of their opinions the Justices of the High Court did, however, comment on the argument by the respondents that the Defence Housing Authority was bound by the State legislation by virtue of s 64 of the Commonwealth's *Judiciary Act* 1903. This section removes Crown immunities from suit in matters of federal jurisdiction, those matters being the ones itemised in ss 75 and 76 of the Commonwealth of Australia Constitution. Section 64 of the *Judiciary Act* 1903 provides that:

> 'In any suit to which the Commonwealth or a State is a party, the rights of the parties shall, as nearly as possible, be the same, and any judgment may be given and costs awarded on either side, as in a suit between subject and subject.'

This section has been construed as one which applies only to civil suits before courts of law.[119] Those courts include courts of States invested with federal jurisdiction under federal legislation enacted under s 77 of the Constitution. Section 39 of the *Judiciary Act* 1903 (Cth) invests State courts of all levels with substantial jurisdiction in federal matters.

In *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[120] there was argument to the effect that the State Tribunal was a court of the State which was exercising a federal jurisdiction whenever the Commonwealth was a party in a suit before it. The Defence Housing Authority was, it was submitted, relevantly the Commonwealth, so the Commonwealth was to be regarded as a party to the landlord's proceeding in the Tribunal. It was submitted by the landlord that the State's legislation was the governing law by force of s 64 of the *Judiciary Act* 1903 (Cth). This argument was rejected, peremptorily, by all the Justices who dealt with it.

Dawson, Toohey and Gaudron JJ, in their joint opinion, expressed doubts about whether the proceedings before the Tribunal were ones involving the exercise of judicial power and ones which could be regarded as a suit for the purposes of s 64.[121] McHugh, Gummow and Kirby JJ asserted simply that the Tribunal was not a

---

Ltd (1962) 108 CLR 372 had established that State parliaments had no power to make laws binding the Commonwealth.

118 Kirby J dissenting, in reliance on s 52(ii) of the Constitution.

119 The term 'suit' is defined in s 3 of the *Judiciary Act* 1903.

120 (1997) 146 ALR 495.

121 Id, at 516.

court for these purposes.[122] All of these Justices were, however, focussing on the effects of s 64 of the *Judiciary Act* 1903 in relation to the case before them. Their observations cannot be construed as ones which are indicative of the views they might adopt in other legal contexts in which it may be necessary or desirable to draw distinctions between courts and other agencies of government.

Conclusions

Not every body designated a court under its constituent instrument is classifiable as a court of law. On the other hand some bodies which have not been designated as courts may be courts of law either for all purposes or for a particular statutory purpose.

In *Shell Co of Australia Ltd v Federal Commissioner of Taxation*[123] the Judicial Committee of the Privy Council enumerated 'some negative propositions.' They were:

1. 'A tribunal is not necessarily a court in this strict sense because it gives a final decision;
2. Nor because it hears witnesses on oath;
3. Nor because two or more contending parties appear before it between whom it has to decide;
4. Nor because it gives decisions which affect the rights of a subject;
5. Nor because there is an appeal to a court;
6. Nor because it is a body to which a matter is referred by another body.'[124]

To this list some further negative propositions may be added. A body is not necessarily a court of law because it has power to require the attendance of witnesses and the production of documents, or because its proceedings are absolutely privileged under the law of defamation,[125] or because its members are accorded judicial immunities from suit (whether by statute or by common law),[126] or because it has been accorded statutory protections akin to those afforded to courts by the law relating to contempt of court.

---

122 Id, at 525 per McHugh J, at 527 and 536 per Gummow J, at 567 per Kirby J.

123 [1931] AC 275.

124 Id, at 297.

125 Absolute privilege has been extended by both common law and statute to bodies which are not courts of law.

126 Judicial immunities have been extended by both common law and statutes to members of some bodies which are clearly not courts.

A key indicator that a body is a court of law is that it has been invested by statute with power to determine disputes according to antecedent rules of law and to award remedies for violations of those rules. Such a body may be a court of law even if it lacks authority to enforce its remedial orders;[127] or if its members are not required to possess prescribed legal qualifications; or if it has been exempted by statute from an obligation to comply with curial rules of evidence; and even if it is directed by statute to conduct its proceedings in an informal and non-technical fashion, it still may be a court of law.

In accordance with Australia's federal Constitution a court of a State is not denied that status merely because it has been invested, by State legislation, with powers which are non-judicial in character. The High Court of Australia has accepted that the federal Constitution does not absolutely preclude investiture of non-judicial powers in State courts. The Constitution does, however, impliedly prohibit the Parliaments of the States from investing in State courts non-judicial powers which are incompatible with the exercise of the federal judicial powers which may be conferred on State courts by the federal Parliament under s 77(iii) of the Constitution.[128] Some Justices of the High Court have suggested that the Constitution impliedly imposes other limitations on the powers of State Parliaments to reorganise State court systems. State Parliaments could not, it has been suggested, abolish all State courts and transfer their functions to non-courts.[129] At least one State court must be maintained which is capable of exercising the judicial powers of the Commonwealth.[130] There must be at least a State Supreme Court which stands at the apex of the State court system,[131] and the powers of the Supreme Court must be preeminently of a judicial character.[132]

Within the Australian States there exists a range of institutions called courts and which by any test are truly courts of law. There are in addition a variety of other institutions of government which have not been called courts but which could, at least for some purposes, be identified as courts of law. Who or what is to be classified as a

127 See above.

128 See above.

129 *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 844 per McHugh J.

130 Id, at 839 per Gaudron J.

131 Id, at 844 per McHugh J and at 860 per Gummow J.

132 Id, at 847-8 per McHugh J.

court of law must depend ultimately on what legal consequences will follow. And, as Lord Edmund-Davies observed in *Attorney-General v British Broadcasting Corporation*:[133]

> 'At the end of the day it has unfortunately has to be said that there emerges no sure guide, no unmistakable hall-mark by which a "court" ... may unerringly be identified. It is largely a matter of impression.'

Whether a particular body is to be regarded as a court of law is a question which will ultimately fall to be determined by a body indisputably a court of law. The question will often arise in a particular statutory context and will therefore have to be decided having regard to the purposes of the relevant legislation. Yet whether a body is to be recognised as a court of law also has significance in some non-statutory contexts, for example in the context of the law which enables superior courts to punish contempts of the inferior courts subject to their supervisory jurisdiction, and in the context of the ambit of a superior court's supervisory jurisdiction to review decisions and other actions of bodies subject to that jurisdiction.

The primary test which should be applied in determining whether a body is a court of law is whether the body has been invested with judicial power in the strict constitutional sense. At the same time it needs to be appreciated that, under Australian constitutional arrangements, it has been open to the State parliaments (and the legislatures of the Territories of the Commonwealth) to create institutions in which both non-judicial and judicial powers are reposed. Most of those institutions have specialised jurisdictions, though not jurisdictions exercised in complete isolation from the central, superior court - the Supreme Court - and, on appeal from the Supreme Court, the High Court of Australia.

133 [1981] AC 303 at 351.