Case Note

Burns v Corbett: Federal Jurisdiction, State Tribunals and Chapter III Courts

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Abstract

This case note examines the effect of the High Court of Australia decision in *Burns v Corbett* in which a majority of the Court identified an implied limitation in the *Australian Constitution* that prevents state legislatures from vesting state tribunals with jurisdiction to hear 'federal matters'. In this case note, I seek to highlight the practical and doctrinal impact of this decision on state adjudicative systems. In particular, I examine states' responses to the decision, as well as contemporary guidance on an issue that is central to the limitation — the identification of s 77(iii) courts.

I Introduction

> The Police Magistrate … whether he intended or not, or whether he knew it or not, was exercising Federal jurisdiction ...[1]

Federal jurisdiction — the 'authority to adjudicate that is derived from the *Constitution* or a Commonwealth law'[2] — is a vexed issue in Australian public law. Sir Anthony Mason has observed, for example, that '[t]he very mention of "federal jurisdiction" is enough to strike terror in the hearts and minds of Australian lawyers who do not fully understand its arcane mysteries.'[3] Adding to this complexity is the High Court of Australia's 2018 decision in *Burns v Corbett*, where a majority of the Court identified an implied limitation in the *Australian Constitution* that prevents state parliaments from vesting state jurisdiction over 'federal matters' in state non-court tribunals.[4]

In this case note, I consider the decision in *Burns v Corbett*, as well as the response by state legislatures and judicatures. As will be discussed, the limitation

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1 *Hume v Palmer* (1926) 38 CLR 441, 451 (Isaacs J) quoted in Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 144.

2 *Burns v Corbett* (2018) 265 CLR 304, 347 [71] (Gageler J) ('*Burns v Corbett*').

3 Sir Anthony Mason, 'Foreword' in Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) v, v.

4 *Burns v Corbett* (n 2) 325–6 [2] (Kiefel CJ, Bell and Keane JJ); 346 [68]–[69] (Gageler J).

identified in *Burns v Corbett* was by no means surprising.[5] Rather, the significance of the case lies largely in the practical impact that will follow for state tribunal systems. In Part II, I outline the federal judicial system, before discussing the decision in *Burns v Corbett*. In Part III, I then discuss the nature and function of state tribunal systems in Australia, the impact of *Burns v Corbett* on these systems, and the legislative responses that have been implemented or considered in response. Finally, in Part IV, I turn to consider the central concept of a 's 77(iii) court', as this has been developed in recent case law. As will be seen, despite the constitutional constraint identified in *Burns v Corbett*, state legislatures stand to benefit from a considerable body of Chapter III ('ch III') jurisprudence, which will clarify efforts to preserve existing state tribunal systems.

II The Federal Judicial System and *Burns v Corbett*

A *The Federal Judicial System*

Before turning to the decision in *Burns v Corbett* it will be necessary to briefly outline the federal judicial system, including the concept of federal jurisdiction.

The federal judiciary is established by ch III of the *Australian Constitution*. This judiciary is empowered to exercise federal jurisdiction, a distinctive jurisdiction comprised of nine subject matters (or 'heads of jurisdiction'[6]) outlined in ss 75 and 76 of the *Australian Constitution* ('federal matters'). These federal matters refer to 'particular claims, parties or a combination of both',[7] and together comprise the entire scope of federal jurisdiction. Section 76(i), for example, refers to matters 'arising under this Constitution', while s 76(ii) refers to matters 'arising under any laws made by the Parliament', and s 75(iii) to matters 'in which the Commonwealth … is a party'. Significantly, s 77 empowers the Commonwealth Parliament to vest federal jurisdiction in the High Court, federal courts, and state courts (subject to certain constraints). Relevant for the purposes of this case note, s 77 provides that '[w]ith respect to any of the matters mentioned in [ss 75 and 76] the Parliament may make laws:

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> (ii) defining 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 [s 77(ii)];
>
> (iii) investing any court of a State with federal jurisdiction [s 77(iii)].'

Section 77(ii) recognises that, at the time of Federation, jurisdiction over several of the matters listed in ss 75 and 76 was exercisable by the courts of the former colonies (now states).[8] The effect of section 77(ii) is to give the Commonwealth Parliament the power to override such jurisdiction, ensuring that

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5 Ibid 363–4 [118] (Gageler J).

6 Will Bateman, 'Federal Jurisdiction in State Courts: An Elaboration and Critique' (2012) 23(4) *Public Law Review* 246, 247.

7 Ibid.

8 *Burns v Corbett* (n 2) 393 [206] (Edelman J).

only federal courts (or state courts vested with federal jurisdiction under s 77(iii))[9] could exercise jurisdiction over federal matters. Section 77(iii) in turn gives Parliament the power to vest any 'court of a State' with federal jurisdiction, thus enabling the reinvestment of jurisdiction over federal matters (*qua* federal jurisdiction) into state courts, where colonial jurisdiction (and after that, state jurisdiction) had formerly operated.[10] Soon after Federation, Parliament exercised both of these powers by enacting ss 38, 39(1) and 39(2) of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). As such, by the operation of ss 75–7 of the *Australian Constitution* and ss 38–9 of the *Judiciary Act*, a federal judicial system was established, utilising state courts in the determination of federal matters.

Despite the technicality of the provisions enabling state courts to exercise federal jurisdiction, the simultaneous exclusion and reinvestment of jurisdiction has meant that the practical impact has historically been minimal for state courts. The formalism of ch III does, however, become problematic in its application for state tribunals. As can be seen from the provisions quoted above, though s 77(ii) empowers the Commonwealth Parliament to make federal jurisdiction exclusive of jurisdiction that belongs to or is invested in the *courts* of the states, it does not specifically address the position of state tribunals. On a strict textual reading, therefore, s 77(ii) would not appear to empower the Commonwealth Parliament to restrict the jurisdiction of state tribunals. Furthermore, as s 77(iii) only empowers the Parliament to vest *courts* of a state with federal jurisdiction, the Federal Parliament also appears to lack the legislative authority to vest this jurisdiction in non-court tribunals. An outcome of such a strict textual reading, therefore, would be that the state legislatures could continue to vest state tribunals with *state* jurisdiction to hear federal matters, and the Commonwealth legislature would be powerless to preclude this — either by direct exclusion under s 77(ii), or by inconsistency under ss 77(iii) and 109. While a number of lower courts had resolved this issue negatively,[11] *Burns v Corbett* represents the first occasion on which the High Court has authoritatively determined the matter.

B *Burns v Corbett*

The facts behind *Burns v Corbett* can be stated briefly. In 2013 and 2014 Mr Gary Burns, a resident of New South Wales ('NSW'), made separate complaints under the *Anti-Discrimination Act 1977* (NSW) to the Anti-Discrimination Board of NSW regarding certain comments made by Ms Therese Corbett and by Mr Bernard Gaynor, residents of Victoria and Queensland respectively. The proceedings were referred to the Administrative Decisions Tribunal of NSW (since superseded by the NSW Civil and Administrative Tribunal ('NCAT')), and the NCAT respectively. In the course of both proceedings an issue as to jurisdiction emerged — namely

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9 Note that this aspect of the constitutional scheme has only authoritatively been established since *Burns v Corbett*.

10 See *Burns v Corbett* (n 2) 347–8 [72] (Gageler J).

11 *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385, 395–6 [55]–[56]; *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148, 161–3 [53]–[62] (Perry J) ('*Qantas v Lustig*'); *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 136–8 [217]–[223] (Kenny J) ('*Cth v ADT*').

whether the NCAT had jurisdiction to hear and determine a dispute arising under the *Anti-Discrimination Act* between a resident of NSW and a resident of another state. The basis for this challenge was that the matter engaged the diversity jurisdiction (s 75(iv)) of the *Australian Constitution*, being a matter 'between residents of different States'. As neither party had challenged the assumption that the NCAT (i) was not a court, and (ii) *was* exercising judicial power in determining the complaint, the following constitutional issue was squarely raised: was the state legislation[12] that empowered the NCAT to hear and determine a federal matter invalid or inoperative to the extent that it purported to do so?

In both the NSW Court of Appeal ('NSWCA') and the High Court it was unanimously held that state parliaments do *not* have the power to vest such jurisdiction. While the decision was anticipated by a number of earlier appellate and federal court decisions,[13] and by academic writers,[14] it was notable that a number of different approaches were adopted by the Justices presiding over the proceedings. In the NSWCA, for example, Leeming JA (with whom Bathurst CJ and Beazley P agreed) held that nothing in the *Australian Constitution* directly removed the power from state parliaments.[15] Rather, it was the enactment of the *Judiciary Act* (a Commonwealth Act), which, by operation of s 109 of the *Australian Constitution*, would render any conferral of jurisdiction by state legislation inoperative. In short, Leeming JA's reasons were based on the view that Commonwealth statute, not constitutional implication, was the basis for limits on state legislative competence.

In the High Court, Nettle, Gordon and Edelman JJ (in separate judgments) adopted reasons substantially similar to that of Leeming JA, finding that the relevant provisions in state legislation were inoperative due to inconsistency with Commonwealth law.[16] By contrast, the majority (comprised of Kiefel CJ, Bell, Keane, and Gageler JJ) based their decision on a limitation implied in the *Australian Constitution*. In a joint judgment, Kiefel CJ, Bell and Keane JJ concluded that, even though sub-ss 77(ii)–(iii) merely *empowered* the Commonwealth Parliament to exclude and to vest federal jurisdiction, considerations of text, history and purpose led to the conclusion that 'adjudicative authority in respect of the matters listed in ss 75 and 76 of the *Constitution* may be exercised only as Ch III contemplates and not otherwise'.[17] That is, in contemplating that federal jurisdiction *may* be vested under s 77 of the *Australian Constitution*, inferentially, the *Constitution* also established that jurisdiction may *not* be vested otherwise.[18] In separate reasons,

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12 *Civil and Administrative Tribunal Act 2013* (NSW) ('*NCAT Act*').

13 See above n 11.

14 Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 311–4; Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20(2) *Public Law Review* 152; David Rowe, 'State Tribunals within and without the Integrated Federal Judicial System' (2014) 25(1) *Public Law Review* 48; Graeme Hill, 'State Administrative Tribunals and the Constitutional Definition of "Court"' (2006) 13(2) *Australian Journal of Administrative Law* 103. For a contrary view: Gim Del Villar and Felicity Nagorcka, '"Confusion Hath Now Made His Masterpiece": Federal Jurisdiction, State Tribunals and Constitutional Questions' (2014) 88(9) *Australian Law Journal* 648.

15 *Burns v Corbett* (2017) 96 NSWLR 247, 263 [63]–[64] (Leeming JA).

16 *Burns v Corbett* (n 2) 374 [145]–[146] (Nettle J); 391 [199] (Gordon J); 413 [259] (Edelman J).

17 Ibid 335 [43] (Kiefel CJ, Bell and Keane JJ).

18 Ibid 336–7 [45].

Gageler J held that an implied limitation arose by necessity. As will become relevant in later discussion, Gageler J noted that a particular feature of the 'autochthonous expedient'[19] was the contemplation that state courts exercising state jurisdiction would 'have and maintain the minimum characteristics of independence and impartiality required of a Ch III Court'.[20] His Honour reasoned that, if state parliaments retained the power to vest state tribunals with state jurisdiction over federal matters, the entire scheme of ch III could be easily bypassed 'by the simple expedient of conferring equivalent State jurisdiction on a State tribunal'.[21] As a consequence of the majority decision, state legislation that purported to vest state jurisdiction was invalid (rather than inoperative) to the extent that it attempted to so invest. In practical application, the jurisdiction-conferring sections of the *Civil and Administrative Tribunal Act 2013* (NSW) ('*NCAT Act*') were read down to exclude jurisdiction over matters engaging s 75(iv) of the *Australian Constitution.*

As a result of *Burns v Corbett*, it is now established that there exists an implied limitation in the *Australian Constitution*, which prevents state parliaments from investing State non-court tribunals with judicial power over matters identified in ss 75 and 76 of the *Australian Constitution* ('*Burns v Corbett* limitation').[22] In Part III, I turn to consider the immediate impact of the *Burns v Corbett* limitation, as well as its broader consequences for state adjudicative systems. In doing so, it is relevant to bear in mind that the outcome in *Burns v Corbett* was by no means controversial. Rather, as Lindell has noted most accurately, '[i]t is much easier to accept the disability… than it is to be clear about understanding the consequences that flow from that disability'.[23]

III State Tribunal Systems and the Impact of *Burns v Corbett*

A *The State Tribunal System*

As may be appreciated, the *Burns v Corbett* limitation has the potential to significantly impact state tribunal systems. Before considering this impact in greater detail, however, it is relevant first to outline briefly the state tribunal system, as well as the important role that this plays in Australia's broader dispute resolution framework.

Statutory tribunals exist at both the federal and state level, serving a range of different functions. At the state and territory level, there has been a consistent trend in the last 20 years for the amalgamation of specialist tribunals into 'super-

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19 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

20 *Burns v Corbett* (n 2) 356 [96].

21 Ibid 357 [99].

22 Note that Stellios has argued that it is likely that the *Burns v Corbett* limitation extends also to territory tribunals: James Stellios, *The Federal Judicature* (LexisNexis Butterworths, 2nd ed, 2020) 594.

23 Lindell (n 14) 314.

tribunals'.[24] With the exception of Tasmania,[25] all states and territories have established such a tribunal,[26] vested variously with jurisdiction over administrative, civil, professional disciplinary, human rights and guardianship matters.[27] Such developments have been said to reflect 'a reform agenda to provide cheaper, quicker and more efficient access to justice'.[28]

State tribunals play a useful 'court-substitute'[29] function in state systems, particularly due to the fact that no strict separation of powers applies at the state level.[30] As Bacon notes, 'the function of these tribunals is to resolve citizen-citizen disputes, many of which have personally significant implications for the parties involved'.[31] The advantage of vesting jurisdiction in tribunals is that such bodies are designed to facilitate the quick and cheap resolution of disputes. Legislation establishing the NCAT, for example, cites accessibility, efficiency, economy, fairness and accountability, as key aims of the Tribunal.[32] As Creyke has noted, this quasi-court function is made possible by a more flexible procedure than is typically vested in courts, citing three particular provisions in tribunal legislation that facilitate this:

> The first is that tribunals are not bound by the rules of evidence and can decide what procedure they will adopt at their discretion; the second is that tribunals are intended to be inquisitorial as appropriate in their conduct of matters; and the third requires that tribunals operate in a manner which is 'fair, just, economical, informal and quick'.[33]

Yet despite such informality, tribunals often approximate court processes and are bound by judicial norms including natural justice.[34] In so doing, they deliver a high standard of dispute resolution, in a manner that is more expeditious than the traditional court system.

The size of tribunals' caseloads is significant. In 2014, the Productivity Commission reported that tribunals in Australia collectively resolve 395,000 disputes per year.[35] In NSW alone, the NCAT finalised 67,833 applications in 2018–19, with

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24 Linda Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 161, 162; Rachel Bacon, *Amalgamating Tribunals: A Recipe for Optimal Reform* (PhD Thesis, University of Sydney, 2004) 5–7.

25 Though note that the Tasmanian Parliament passed the Tasmanian Civil and Administrative Tribunal Bill 2020 (Tas) on 15 October 2020, which provides that the Tasmanian Civil and Administrative Tribunal is established on 1 July 2021 (or a later day as fixed by proclamation): ss 4, 8. See also Tasmania, *Parliamentary Debates*, Legislative Council, 15 October 2020, 443.

26 Anna Olijnyk and Gabrielle Appleby, 'Constitutional Influences on State and Territory Lawmaking: An Empirical Analysis' (2018) 46(2) *Federal Law Review* 231, 250.

27 Robin Creyke, 'Tribunals and Merits Review' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 393, 403.

28 Stellios (n 22) 585.

29 Bacon (n 24) 15.

30 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89–90 [124]–[125] ('*Condon*').

31 Bacon (n 244) 46.

32 *NCAT Act* (n 12) s 3.

33 Creyke (n 27) 410.

34 Ibid.

35 Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) vol 1, 345 ('*Productivity Commission Report*').

54,474 of these being within the consumer and commercial division[36] — one of the key divisions exercising judicial functions.

In addition to the benefits of efficiency and volume, the utilisation of tribunals as court-substitute bodies has a number of other access-to-justice advantages. In particular, tribunals are designed to facilitate access for self-represented litigants. As the Productivity Commission noted:

> The inquisitorial powers of tribunal members are thought to assist self-represented litigants because members can ask questions and seek information that a self-represented litigant may not know to present. This can be used to address any imbalance of power between parties …[37]

This is further facilitated by limits to legal representation in some tribunals,[38] duties placed upon tribunals to assist self-represented litigants,[39] and limits on the award of costs.[40]

As can be seen therefore, considerations of simplicity, economy, efficiency, access and professionalism combine to make the state tribunal system a valuable forum for dispute resolution in Australia.

B *Impact of* Burns v Corbett

In light of the advantages of state tribunals vested with expansive powers, it is clear that governments have a strong interest in maintaining the effectiveness of this system. As discussed in Part II, however, the *Burns v Corbett* limitation imposes a restriction on state legislative power that is likely to affect a significant number of matters. The practical impact of the limitation may be appreciated, for example, by recognising that the NCAT alone will be barred from hearing hundreds of matters each year that engage the diversity jurisdiction (the jurisdiction in dispute in *Burns v Corbett*).[41] Yet this jurisdiction is only one species of federal matter — this impediment will be replicated across all state tribunal systems, and all federal matters.[42] Furthermore, while legislative intervention is possible to create avenues for the resolution of federal matters in state courts, this will necessarily involve adjudication in an alternative and more formal forum. In this regard (and noting the ostensibly protective function of s 75(iv) of the *Australian Constitution*), Basten JA has recently observed:

> There is some irony in the fact that an indirect effect of s 75(iv) of the *Constitution* may be to deprive the interstate resident of access to a tribunal

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36 NSW Civil and Administrative Tribunal ('NCAT'), *NCAT Annual Report 2018–2019* (2019) 27.

37 *Productivity Commission Report* (n 35) vol 1, 350.

38 Ibid vol 1, 352.

39 Ibid vol 1, 352–3.

40 Ibid vol 1, 352.

41 *Attorney-General (NSW) v Gatsby* (2018) 361 ALR 570, 627 [275] (Basten JA) ('*Gatsby*') citing *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45, [5].

42 Though, as Hill has recently observed, the matters most affected by the *Burns v Corbett* limitation are likely to be those arising under *Constitution* sub–ss 75(iii)–(iv) and sub–ss 76(i)–(ii): Graeme Hill, 'State Tribunals and the Federal Judicial System' in Greg Weeks and Matthew Groves (eds), *Administrative Redress in and out of the Courts* (Federation Press, 2019) 195, 204–12.

> more likely to provide a quick, cheap and just, but informal process, than a traditional court.[43]

This difficulty is further compounded by the fact that federal matters are not easily contained, and can arise at different points in litigation. Supporting this view, the Attorney-General of Queensland stated in submissions in *Burns v Corbett*:

> [T]he subject matters in ss 75 and 76 are not discrete topics for adjudication and resolution … Rather, they cut across and may arise in potentially any topic for adjudication. State legislatures cannot avoid them when conferring judicial powers on tribunals; they are a latent potentiality in the exercise of any judicial power in Australia.[44]

Case law shows, for example, that federal jurisdiction may arise where a defence is founded on Commonwealth law,[45] or where the Commonwealth is joined as a party.[46] Indeed, as Justice Leeming has observed extra-curially, '[i]n many cases, the parties, and for that matter the court, may be oblivious to the source of the court's authority to decide their dispute'.[47] Given the 'ubiquity of federal jurisdiction',[48] therefore, the *Burns v Corbett* limitation poses a significant technical challenge for existing state tribunals.

C *States' Responses*

In light of the above, a number of responses to the *Burns v Corbett* limitation have been canvassed in academic literature. These include, for example:

- to reconstitute state tribunals as courts or hybrid bodies capable of investment with federal jurisdiction;[49]
- to establish reference provisions for federal matters to be heard in state courts;[50] or
- to remove court registration provisions for tribunal orders made in federal matters, such that those orders will not constitute an exercise of judicial power.[51]

In many cases, the simplest and least disruptive approach is likely to be that adopted by the NSW legislature.[52] This solution involved the amendment of the NCAT's constitutive legislation to allow for the Local Court or District Court to hear

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43 *Gaynor v Local Court of New South Wales* (2020) 378 ALR 366, 390 [102] ('*Gaynor*').

44 Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening)', Submission in *Burns v Corbett*, Case No S183/2017, 24 August 2017, 10 [38] quoted in Anna Olijnyk and Stephen McDonald, 'State Tribunals, Judicial Power and the Constitution: Some Practical Responses' (2018) 29(2) *Public Law Review* 97, 106.

45 *Qantas v Lustig* (n 11).

46 *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196; *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361 ('*Meringnage*').

47 Leeming (n 1) 144.

48 Ibid.

49 Olijnyk and McDonald (n 44) 107–8, 109–10. Note that Hill has recently observed that states are more likely to wish to *avoid* establishing their super-tribunals as courts, due to the limitations imposed by the *Kable* principle: Hill (n 42) 203.

50 Olijnyk and McDonald (n 44) 109; Hill (n 42) 213–14.

51 Hill (n 42) 214–15; Lindell (n 14) 315.

52 See *NCAT Act* (n 12) pt 3A. See also similar provisions in *South Australian Civil and Administrative Tribunal Act 2013* (SA) pt 3A.

an application or appeal in circumstances where the Tribunal would otherwise have had jurisdiction *but for* the engagement of federal jurisdiction.[53] In determining whether federal jurisdiction has been engaged, the operative questions will be whether the subject matter of the dispute falls within ss 75 or 76 of the *Australian Constitution*, and, if so, whether the relevant power or function called upon involves the exercise of federal judicial power.[54] Where this is the case, state jurisdiction will have ceased to vest in the tribunal by virtue of the *Burns v Corbett* limitation, and federal jurisdiction will have vested in the relevant court by operation of s 39(2) of the *Judiciary Act*.[55]

In considering the utility of this approach, important questions will remain as to *which* powers and functions vested in a given tribunal will involve the exercise of judicial power.[56] Further, in certain matters, factual or legal arguments may arise as to whether the dispute can properly be characterised as a federal matter.[57] As Hill has noted, the proposed solution is also unlikely to provide assistance where specific rights and liabilities 'are inextricably bound up with the venue in which those rights and liabilities are enforced'.[58] On balance, however, the NSW legislature's response remains attractive for its apparent simplicity and capacity to preserve existing institutions and practices.

An issue that arises logically prior to any of the canvassed responses, however, is the more fundamental question of which state tribunals (if any) are 'courts' for the purposes of s 77(iii) of the *Australian Constitution* ('s 77(iii) courts'). In this regard, it is significant that a number of state supreme courts and courts of appeal have had occasion to consider this issue subsequent to the decision in *Burns v Corbett*. As a result, it is now reasonably settled that the super-tribunals for Victoria,[59] NSW,[60] WA,[61] and South Australia[62] are not s 77(iii) courts. These tribunals are not, therefore, subject to investment with federal jurisdiction. Based on an older decision in *Owen v Menzies*,[63] it is also established that the QCAT is a court for the purposes of s 77(iii).[64] In light of such recent activity, the remainder of this case note will consider the substantially uniform approach that now appears to be applicable to questions of this kind.

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53 See *NCAT Act* (n 12) s 34B(2).

54 On a tribunal's inherent power (and duty) to consider whether a claim exceeds its jurisdictional limitations, see *Gaynor* (n 43) 396–8 [129]–[136] (Leeming JA).

55 On this point, see *Gaynor* (n 43) 379–82 [41]–[57] (Bell P); 399–400 [143]–[144] (Leeming JA).

56 See *GS v MS* (2019) 344 FLR 386; *Attorney-General (SA) v Raschke* (2019) 133 SASR 215 ('*Raschke*').

57 See *Almahy v Jones* [2020] NSWCATAP 69.

58 Hill (n 42) 213.

59 *Meringnage* (n 46) 393 [98] (Tate, Niall and Emerton JJA).

60 *Gatsby* (n 41) 604 [192] (Bathurst CJ; Beazley P agreeing at 606 [197], McColl JA agreeing at 606 [198], Leeming JA agreeing at 627 [279]), 613 [228] (Basten JA, Leeming JA agreeing at 627 [279]).

61 *GS v MS* (n 56) 392 [23] (Quinlan CJ).

62 *Raschke v Firinauskas* [2018] SACAT 19, [89]; *Raschke* (n 56) 218 [7].

63 *Owen v Menzies* [2013] 2 Qd R 327 (Court of Appeal), 338 [20] (Chief Justice; Muir JA agreeing at 357 [101]), 346 [52] (McMurdo P).

64 Though note that this decision has been criticised in Hill (n 42) 203, and distinguished in *Meringnage* (n 46) 389–90 [86] (Tate, Niall and Emerton JJA) and *Gatsby* (n 41) 604 [191] (Bathurst CJ).

IV Tribunals as 'Courts of the States'

A *Context of the Inquiry*

As suggested, the identification of s 77(iii) courts is an essential component of the *Burns v Corbett* limitation — only those tribunals that are not courts will be subject to the prohibition. Though the process of identification is now substantially resolved for state super-tribunals, recent case law does provide helpful guidance as states continue to develop their tribunal systems. In this regard, it is necessary to first acknowledge that the meaning of the word 'court' does not transcend its context — its meaning 'in a statute depends upon the terms of the Act and its statutory context, including its subject-matter and purpose'.[65] Furthermore, in the constitutional context, Gummow, Hayne and Crennan JJ have held, '[i]t is neither possible nor profitable to attempt to make some all-embracing statement of the defining characteristics of a court'.[66] Necessarily, therefore, a methodology for identification must develop by way of accretion, as each tribunal is considered on its own terms.

The question of whether particular state tribunals were s 77(iii) courts arose on a number of occasions in the early 2000s. In determining this issue, lower courts placed varying emphases on particular institutional features of the tribunals in question, such variance leading a number of academic commentators to argue that competing methodologies had come to exist.[67] One approach, for example, involved the various features of a tribunal being balanced in terms of their propensity to support or deny the proposition that the tribunal was a court (a so-called 'balance sheet' approach).[68] By contrast, in *Trust Company of Australia Ltd v Skiwing Pty Ltd*, Spigelman CJ held that the integrated judicial system established under the *Australian Constitution* required that a s 77(iii) court must be characterised as a 'court of law'.[69] His Honour held that one aspect of such a court is that it 'is comprised, probably exclusively although it is sufficient to say predominantly, of judges'.[70]

The focus of this inquiry appears to have shifted, however, following the High Court's decision in *Forge v Australian Securities and Investments Commission*.[71] In that matter, an argument had been made that NSW legislation empowering the Governor to appoint acting judges to the NSW Supreme Court was invalid due to the limitation identified in *Kable v Director of Public Prosecutions (NSW)*.[72] In clarifying the *Kable* principle, a majority of the Court identified

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65 *Cth v ADT* (n 11) 139 [225] (Kenny J).

66 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [64] ('*Forge*').

67 See especially Hill (n 14) 104–5; Duncan Kerr, 'State Tribunals and Chapter III of the *Australian Constitution*' (2007) 31(2) *Melbourne University Law Review* 622, 625.

68 See, eg, *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282; *Commonwealth v Wood* (2006) 148 FCR 276.

69 *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77, 87 [52] (Hodgson and Bryson JJA agreeing).

70 Ibid.

71 *Forge* (n 66).

72 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ('*Kable*').

independence and impartiality as fundamental characteristics of a ch III court. Gummow, Hayne and Crennan JJ held, for example, that

> An important element … in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.[73]

Of significance to the present discussion is that, as Stellios has observed, the High Court's reasons in *Forge* identified the *Kable* principle primarily as an implication of the text (rather than the structure of ch III):

> While independence and impartiality had been seen in *North Australian Aboriginal Legal Services Inc v Bradley* as constitutionally required for State courts to exercise Commonwealth judicial power under Ch III, in *Forge* they were seen as essential characteristics of those State 'courts'. What seemed in *Kable* and *Bradley* to be anchored in a structural implication from Ch III, became in *Forge* anchored in the word 'court'.[74]

As will be seen below, this intersection of the *Kable* principle with the word 'court' in *Forge* has had important consequences for the identification of s 77(iii) courts in the context of state tribunals. In essence, the result is the recognition of 'minimum requirements'[75] according to which a tribunal's status will be weighed.

B *The Current Approach*

Subsequent to the High Court's decision in *Forge*, a number of courts have again considered the status of various state tribunals. Palpable in such cases has been the influence of *Forge*. In *Commonwealth v Anti-Discrimination Tribunal (Tas)*,[76] for example, Kenny J cited *Forge* for the proposition that 'independence and impartiality is the irreducible minimum for a court of a State within s 77(iii) of the *Constitution*'.[77] Most recently, these issues have again been considered in two separate matters brought before the NSWCA in *Attorney-General (NSW) v Gatsby*[78] and the Victorian Court of Appeal in *Meringnage v Interstate Enterprises Pty Ltd*.[79] In both matters, the Court unanimously determined that the NCAT and the Victorian Civil and Administrative Tribunal ('VCAT') (respectively) are not courts within the meaning of s 77(iii). Based on these judgments (and in light of *Forge*), the current approach for identifying s 77(iii) courts is outlined below.

The process of determining the constitutional status of an adjudicative body will involve the consideration of the body's organisational features in light of 'history, constitutional convention, and institutional and governmental relationships'.[80]

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73 *Forge* (n 66) 76 [64]. See also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

74 Stellios (n 22) 518.

75 *Forge* (n 66) 67 [41] (Gleeson CJ).

76 *Cth v ADT* (n 11).

77 Ibid 139 [227].

78 *Gatsby* (n 41).

79 *Meringnage* (n 46).

80 *Cth v ADT* (n 11) 143 [239], relied on in *Meringnage* (n 46) 387 [79].

Broadly, there will be three categories of features that the Court will be likely to consider:[81]

(1) whether the organisational features of the tribunal as a whole ensure a sufficient degree of impartiality and independence from the executive and the legislature;
(2) the intention of Parliament, as disclosed in the body's constitutive legislation; and
(3) the powers and functions vested in that body.

Each of these categories is considered in greater detail below.

(1) *Impartiality and Independence*

As has been suggested, independence and impartiality have emerged as the hallmarks of a s 77(iii) court. As Hayne, Crennan, Kiefel and Bell JJ have held, '[t]hey are notions that connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence'.[82] Yet, despite such a clear grounding in principle, no definitive threshold exists to identify whether a body is sufficiently independent and impartial to be classified as a s 77(iii) court. As Kenny J held in *Cth v ADT*:

> Whether or not particular institutional arrangements will ensure the requirements for independence and impartiality are met will depend on the interrelationship of numerous provisions, constitutional conventions, and the history that attaches to them.[83]

Notwithstanding such inherent uncertainty, however, impartiality and independence have frequently been considered by reference to a number of key indicia relating, primarily, to the provisions for tribunal membership. These include:

- the security of tenure of tribunal members (including the procedures for their removal or reappointment);[84]
- the security of remuneration of tribunal members;[85]
- whether tribunal members are engaged on a full- or part-time basis;[86] and

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81 For a slightly different list, see Hill (n 42) 200.

82 *Condon* (n 30) 89 [125].

83 *Cth v ADT* (n 11) 140 [229]. Note that one issue that arguably has not received sufficient attention is Gummow, Hayne, and Crennan JJ's observation that '[h]istory reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court.': *Forge* (n 66) 82 [84]. In particular, their Honours noted that independence and impartiality in inferior courts was 'for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases': *Forge* (n 66) 82–3 [84]. This would appear to indicate that, should a more historical analysis be employed in determining the constitutional status of tribunals, a broader range of considerations would arise. See, however, Stellios (n 22) 578–81.

84 *Gatsby* (n 41) 603 [187]; *Cth v ADT* (n 11) 141 [233] (Kenny J); *Director of Housing v Sudi* (2011) 33 VR 559, 594 [201] (Weinberg JA); *Meringnage* (n 46) 387–8 [80]–[81] (Tate, Niall and Emerton JJA).

85 *Cth v ADT* (n 11) 145 [246].

86 *Meringnage* (n 46) 390 [88].

- the proportion of tribunal members who also hold judicial offices.[87]

In *Gatsby*, for example, Bathurst CJ referred to the fact that the NCAT is not composed 'predominantly'[88] of judges, and that tribunal members do not enjoy security of tenure 'comparable to that held by judges under the *Act of Settlement 1701* (UK)'.[89] Similarly, in *Meringnage*, the Court considered that the most significant feature counting against the VCAT's status as a court was the lack of security of tenure of tribunal members, arising due to a prevalence of fixed-term appointments, combined with a procedure for reappointment conditional entirely on executive discretion.[90]

(2) *Intention of Parliament*

The intention of Parliament, as disclosed in a tribunal's constitutive legislation, has also frequently been cited by courts in determining the constitutional status of tribunals. Most significant in this regard is the designation as a 'court of record'.[91] In *Owen v Menzies*, for example, this feature was principally relied upon by the Chief Justice in finding that the QCAT was a court.[92] This was so, despite the fact that tribunal members could be removed with relative ease by the executive.[93]

Relevant also in this regard have been provisions that preclude a tribunal from making a determination that is inconsistent with an opinion of the Supreme Court in response to a question of law referred by that tribunal.[94] As Leeming JA suggested in *Gatsby*, such a provision implies that the tribunal in question is not a Court, because the provision would otherwise be otiose by virtue of the rules of precedent, which bind lower courts in the curial hierarchy.[95] Similarly, Leeming JA also held in *Gatsby* that state legislation that was designed to accommodate the *Burns v Corbett* limitation by vesting diversity jurisdiction in an 'authorised court' constitutes 'the clearest legislative statement that NCAT is not a court for the purposes of s 77(iii)'.[96] Significantly, therefore, it can be seen that the course adopted by the NSW legislature enabled a clear determination of the issue of whether the

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87 *Gatsby* (n 41) 603 [186] (Bathurst CJ); *Meringnage* (n 46) 389 [86] (Tate, Niall and Emerton JJA).
88 *Gatsby* (n 41) 603 [186].
89 Ibid 603 [187].
90 *Meringnage* (n 46) 387–8 [80]–[81].
91 See *Gatsby* (n 41) 603 [185]. The consequence of such a designation is that a tribunal will have the power to punish for contempt, and that its records will be conclusive evidence of what is recorded therein: *Lane v Morrison* (2009) 239 CLR 230, 243 [32] (French CJ and Gummow J). See also Enid Campbell, 'Inferior and Superior Courts and Courts of Record' (1997) 6(4) *Journal of Judicial Administration* 249, 254–7.
92 *Owen v Menzies* (n 63) 334 [10], 338 [19].
93 Lindell (n 14) 278. See also Kirby J in *K-Generation Pty Ltd v Liquor Licensing Court*, suggesting that such a designation 'warrants this Court's taking the State Parliament's description at face value': (2009) 237 CLR 501, 562 [219] ('*K-Generation*'). Note, however, the particular features of the tribunal in question in *K-Generation* (as discussed in *Meringnage* (n 46) 390 [87]) that further supported its status as a court.
94 See, eg, *NCAT Act* (n 12) s 54(4).
95 *Gatsby* (n 41) 630 [292], endorsed in *Meringnage* (n 46) 393 [97].
96 *Gatsby* (n 41) 631 [299].

tribunal was a court, while, at the same time, providing a practical solution to the *Burns v Corbett* limitation.

(3) *Powers and Functions*

The powers and functions vested in a given tribunal have also been held to be of some limited relevance to the question of the tribunal's constitutional status. In *Meringnage*, for example, the Court suggested that 'a primary function of substantial merits review' in its review jurisdiction was inconsistent with the proposition that the VCAT was a state court.[97] Significantly, however, reference to the powers of a tribunal are of limited utility for two reasons. First, as no strict separation of powers exists at state level, the nature of the powers vested in a given tribunal are unlikely to necessarily be indicative of its status.[98] Second, in some cases it may be that the very classification of a given power (as judicial or non-judicial) will turn on the nature of the tribunal itself.[99]

C *One Issue of Principle*

Notwithstanding the assistance provided by *Forge*, one of the conceptual difficulties with the present approach to identifying s 77(iii) courts is its intersection with the *Kable* doctrine. As Stellios has observed, complications may arise where independence and impartiality are taken *both* to limit State legislatures' capacity to confer powers on their courts *and*, at the same time, to define the very existence of those courts as such.[100] To the extent that certain tribunals exist close to the threshold of a s 77(iii) court, therefore, their status and functions are apt to remain inherently unstable.

In response to this difficulty, Stellios has referred to the High Court's decision in *K-Generation Pty Ltd v Liquor Licensing Court*,[101] where the status and functions of the Licensing Court of South Australia came into question. There, Gummow, Hayne, Heydon, Crennan and Kiefel JJ identified that 'the nature of the jurisdiction conferred upon the Licensing Court… is a matter conceptually distinct from [its] structure and organisation'.[102] As Stellios suggests, this distinction may be utilised to reconcile the competing roles played by independence and impartiality in respect of s 77(iii) courts.[103] That is, although the powers and functions of an adjudicative body cannot be disregarded entirely, an emphasis on structure, rather than function, may be appropriate in identifying s 77(iii) courts. As can be seen, this approach effectively makes explicit the reasoning reflected in the case law and accommodates the two limitations involved when considering a tribunal's powers,

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97 *Meringnage* (n 46) 393 [96] (Tate, Niall and Emerton JJA). See also *Qantas v Lustig* (n 11) 165 [70] (Perry J).

98 See *Gatsby* (n 41) 632 [306] (Leeming JA); Hill (n 42) 200.

99 *R v Davison* (1954) 90 CLR 353, 368–9 (Dixon CJ and McTiernan J). See *Gatsby* (n 41) 587 [95] where Bathurst CJ suggested that it may be more logical to assess the status of a tribunal before determining the nature of a power in question.

100 Stellios (n 22) 520–1. See Rowe (n 14) 62–3 for helpful discussion on this point.

101 *K-Generation* (n 93).

102 Ibid 539 [132].

103 Stellios (n 22) 521.

as discussed above. Such an emphasis may also have the benefit of insulating courts from considerations that could otherwise entrench a more robust separation of powers in the states.

V Conclusion

In this case note I have considered the issues that the constitutional limitation identified in *Burns v Corbett* might pose for state tribunal systems. As has been argued, states' responses to the High Court's decision have been, and will continue to be, important in ensuring that state tribunals function effectively and within their constitutional constraints. In this regard, it is fortunate that state legislatures stand to benefit from a considerable body of ch III jurisprudence to guide legislative choice. The discussion above has demonstrated the extent to which this is true for determining the status of a given tribunal. Though constitutional constraints may be unavoidable, it is hoped that further clarity of principle may, at least, serve to facilitate the continued development of states' tribunal systems.