THE HIGH COURT'S DECISION IN *BURNS V CORBETT*: CONSEQUENCES, AND WAYS FORWARD, FOR STATE TRIBUNALS

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The High Court's 2018 decision in *Burns v Corbett*[1] establishes that State tribunals that are not courts cannot exercise judicial power in matters of the kinds identified in ss 75 and 76 of the *Constitution*. While not unexpected,[2] the decision has the potential to cause widespread disruption to the work of State tribunals. This article explains the consequences of *Burns v Corbett* for State tribunals and considers seven options States may wish to pursue in response to the decision.

It is convenient, at the outset, to clarify some terms that will be used throughout this article. The first two have an established technical meaning. 'Federal jurisdiction' is authority to exercise judicial power conferred by the *Constitution* or by Commonwealth laws. With the exception of the High Court's appellate jurisdiction,[3] federal jurisdiction is limited to the classes of matters identified in ss 75 and 76 of the *Constitution*. 'State jurisdiction' is the authority to decide conferred by State laws.[4] The next two terms are non-technical phrases adopted in this article for convenience. We use the term 'federal matters' to refer to matters of the kinds identified in ss 75 and 76, irrespective of the source of jurisdiction. Finally, we will use the term 'non-judicial tribunal' to refer to a tribunal that is not a court.

Burns v Corbett was *not* about the exercise of federal jurisdiction by State non-judicial tribunals. It is clearly unconstitutional for a non-judicial tribunal to exercise federal jurisdiction.[5] The issue in *Burns v Corbett* was whether a State non-judicial tribunal could exercise *State* jurisdiction in a federal matter. The High Court held it could not.

This article examines the reasoning of the Court in *Burns v Corbett* and then explains the consequences of the decision for the States. Finally, it identifies some possible reform options for State governments.

The decision in *Burns v Corbett*

In *Burns v Corbett*, the High Court unanimously held that State tribunals that are not State courts cannot exercise judicial power with respect to any of the classes of matters listed in ss 75 and 76 of the *Constitution*.

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A majority of the Court, comprising Kiefel CJ and Bell, Gageler and Keane JJ, held that Ch III of the Commonwealth *Constitution* contains an implied limit on State legislative power: State parliaments have *no power* to confer judicial power with respect to the matters in ss 75 and 76 on non-court State tribunals.

The joint judgment of Kiefel CJ and Bell and Keane JJ emphasised the exhaustive nature of Ch III of the *Constitution* in various respects and the negative implications that had been held to arise from it. The majority acknowledged that s 77(ii) itself 'recognises the possibility that, absent Commonwealth legislation excluding the adjudicative authority that otherwise belongs to the State courts, that authority may continue to be exercised by those courts'.[6] However, the same was not true of non-court State *tribunals*.

Their Honours considered that:

> the approach to the interpretation of Ch III, whereby the statement of what may be done is taken to deny that it may be done otherwise, is also apt to deny the possibility that any matter referred to in ss 75 and 76 might be adjudicated by an organ of government, federal or State, other than a court referred to in Ch III.[7]

Chapter III expressly contemplates the exercise of adjudicative authority with respect to federal matters by:

- the High Court, exercising the (federal) jurisdiction conferred on it by the Constitution (s 75);
- the High Court, exercising the (federal) jurisdiction conferred on it by laws of the Commonwealth Parliament (s 76);
- other federal courts created by the Parliament, exercising the (federal) jurisdiction conferred on them by laws of the Commonwealth Parliament (s 77(i));
- the courts of the States, exercising the (State) jurisdiction that otherwise belongs to them under the laws of the States (s 77(ii)); and
- the courts of the States, exercising the (federal) jurisdiction invested in them by the Commonwealth Parliament.

Kiefel CJ and Bell and Keane JJ considered that Ch III must be taken to be an exhaustive statement not only of the adjudicative authority of State *courts* but also of *any* organ of government, federal or State. An important structural consideration supporting this conclusion was the scheme of appeals from State courts exercising federal jurisdiction, subject only to exceptions and regulations prescribed by the Commonwealth Parliament.[8] That scheme would be undermined if States could invest judicial power in tribunals from which no appeal necessarily lay to a State court.

Kiefel CJ and Bell and Keane JJ held that they did not need to consider the s 109 inconsistency issue, because the question of whether an implication was to be drawn from Ch III was 'logically anterior to any question as to the power of the Commonwealth Parliament to override such a conferral of adjudicative authority by a State Parliament'.[9]

Justice Gageler expressed general agreement with the conclusions of Kiefel CJ and Bell and Keane JJ and 'substantial' agreement with their Honours' reasoning.[10] In contrast to the joint judgment, however, Gageler J explicitly considered the s 109 inconsistency argument first. Justice Gageler explained that, in order for an inconsistency to arise between s 39(2) of the *Judiciary Act 1903* (Cth) and a State law conferring jurisdiction over federal matters on a non-court State tribunal, the Commonwealth law must first be taken to legislate exhaustively within a particular 'universe'. Whether it could do so depended upon the scope of the legislative power conferred on the Commonwealth Parliament.

Justice Gageler held that s 39(2) of the Judiciary Act could not have a 'negative penumbra' excluding jurisdiction from non-court State tribunals, because s 39(2) was enacted pursuant to s 77(iii) of the *Constitution* and s 77(ii) and (iii) referred only to State courts.[11] Nor could the incidental power, in s 51(xxxix) of the *Constitution*, support a law excluding the jurisdiction of State tribunals.[12] His Honour thus concluded that the Commonwealth Parliament had no power 'to exclude the adjudicative authority of non-court State tribunals'.[13]

For Gageler J, this conclusion strengthened the structural considerations in support of the Ch III implication, because it meant that 'that question falls to be considered against the background of an absence of Commonwealth legislative power to achieve the same result'.[14] If the Ch III implication were not drawn, there would be 'a hole in the structure of Ch III' and '[t]he Commonwealth Parliament would have no capacity to plug it'.[15] If the Commonwealth Parliament had had power to exclude the jurisdiction of non-court State tribunals then it might be said that the Ch III implication was unnecessary because — consistently with the apparent purpose of s 77(ii) and not inconsistently with the structure of appeals to the High Court under s 73 being subject to exceptions prescribed by the Commonwealth Parliament — the Commonwealth Parliament retained control over the organs capable of exercising judicial power in federal matters.[16]

The remaining justices — Nettle, Gordon and Edelman JJ — each held that, while State parliaments did not lack legislative power to confer such jurisdiction on non-court State tribunals, the operation of State laws which purported to do so was excluded by a law of the Commonwealth Parliament — s 39(2) of the *Judiciary Act 1903* (Cth) — which invests federal jurisdiction in State courts.[17] The minority held that the Commonwealth Parliament, by enacting s 39(2), had evinced an intention that the only bodies capable of exercising judicial power in matters of the kinds listed in ss 75 and 76 of the *Constitution* should be federal courts and State courts. For Nettle and Gordon JJ, a State law which conferred judicial power on non-court State tribunals in respect of matters of those kinds was inconsistent with the Commonwealth law and so was invalid by operation of s 109 of the *Constitution*.[18] For Edelman J, ss 38 and 39 of the Judiciary Act operated directly to exclude the jurisdiction of State courts.[19]

The consequences of *Burns v Corbett* for State tribunals

After *Burns v Corbett*, it is clear that a constitutional implication exists, according to which a State tribunal lacks jurisdiction to determine a matter in the following circumstances:

- the matter falls within one of the descriptions in ss 75 and 76; and
- the tribunal exercises judicial power in the determination of the matter; and
- the tribunal is not a court.

Each of these elements requires elaboration.

Federal matters

Matters affected by *Burns v Corbett* are those identified in ss 75 and 76 of the *Constitution*. Section 75 confers original jurisdiction on the High Court in all matters:

> (i) arising under any treaty;
>
> (ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Section 76 empowers the Commonwealth Parliament to confer original jurisdiction on the High Court in matters:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

The matters in ss 75 and 76 — 'federal matters' — include some matters in respect of which State jurisdiction has never existed; for example, s 75(v).[20] But, equally clearly, State jurisdiction could exist in some classes of 'federal matter' — for example, s 75(iv).

The cases in which the constitutional issue in *Burns v Corbett* has arisen show how easy it is for federal matters to arise in State tribunals.

Perhaps the most obvious possibility is the so-called diversity jurisdiction in s 75(iv), which includes matters between residents of different States. Residential tenancies disputes, for example, between a local tenant and an interstate landlord are not unusual in State tribunals. *Burns v Corbett* itself involved a complaint, in a tribunal's anti-discrimination jurisdiction, by a resident of New South Wales against residents of Queensland and Victoria. Matters in diversity jurisdiction may account for a significant proportion of the caseload of some tribunals. However, there are several important limits on the diversity jurisdiction. The jurisdiction does not catch matters between a resident of a State and a *corporation* in another State[21] or, indeed, any matter in which an artificial person is a party.[22] Nor is the jurisdiction attracted when at least one party on either side of a dispute comes from the same State, even if residents of other States are also parties.[23]

Slightly more unusual, but clearly possible, is a matter arising under a law made by the federal Parliament and therefore falling within s 76(ii). State tribunals, of course, exercise jurisdiction under State legislation. But there may be cases in which a State tribunal, in the exercise of those powers, is required to apply Commonwealth legislation. An example is *Qantas Airways Ltd v Lustig*.[24] Mr Lustig commenced proceedings against Qantas in the civil claims division of the Victorian Civil and Administrative Tribunal (VCAT) seeking various orders including damages, an apology and 10 million frequent flyer points. Mr Lustig's grievance arose out of an altercation that occurred when he was boarding a plane some six years earlier. Qantas invoked provisions of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth), which effectively created a limitation period of two years. In this way the VCAT proceedings became a matter arising under a law of the Commonwealth Parliament, thus answering the description in s 76(ii).

A further possibility is that a State tribunal might hear a matter to which the Commonwealth is a party, bringing it within the description in s 75(iii). An example is *Commonwealth v Anti-Discrimination Tribunal*.[25] A man visited a Centrelink office in Hobart and was told he

had no alternative but to stand in a queue if he wished to consult a staff member — this despite the physical discomfort he was experiencing due to a medical condition. He commenced proceedings in Tasmania's Anti-Discrimination Tribunal, claiming to have experienced discrimination on the ground of disability. The other party was Centrelink, a Commonwealth agency, bringing this matter within the scope of s 75(iii).

Perhaps surprisingly, a State tribunal may find itself adjudicating a dispute involving the interpretation of the *Constitution*. This issue has arisen again in anti-discrimination proceedings, with persons against whom a complaint of vilification has been made arguing that the legislation making such vilification unlawful is in breach of the constitutional implied freedom of political communication.[26] It is possible to imagine other instances of constitutional issues arising in tribunal proceedings: for example, it might be argued that a charge imposed by the State was an excise or that there had been an infringement of the freedom of interstate trade in s 92 of the *Constitution* or that State legislation was inconsistent with Commonwealth legislation under s 109.

In short, there is much potential for 'federal matters' to come before State tribunals, often in unexpected ways. 'Federal matters' can arise across a wide range of powers and subject matters. As the submissions for the Attorney-General of Queensland, intervening in *Burns v Corbett*, pointed out:

> [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 power on tribunals; they are a latent potentiality in the exercise of any judicial power in Australia.[27]

Judicial power

The *Burns v Corbett* limitation will only apply when a State tribunal is exercising judicial power. Tribunals are more commonly associated with the exercise of administrative power. But it is not uncommon for State tribunals to exercise judicial power. This is particularly common for civil and administrative tribunals, which often have substantial civil jurisdiction.

The question of whether a decision-making power is 'judicial power' is one of the more conceptually contested questions in Australian constitutional law. Judicial power is a concept that seems 'to defy, perhaps it were better to say transcend, purely abstract conceptual analysis'.[28] Whether a power is 'judicial' turns on the analysis of a range of related features.[29] This includes whether the power determines existing rights of the parties;[30] involves the application of legal standards;[31] is binding and authoritative;[32] and is exercised in accordance with the judicial process.[33] History is sometimes significant: the fact that a power that has been exercised by courts in the past supports a conclusion that the power is judicial power.[34]

Moreover, the evaluative judgment involved in determining whether a particular function involves the exercise of judicial power is made more difficult by the recognition that there are some functions which may be performed in the exercise of either administrative or judicial power and which may 'take their colour' or character from the nature of the tribunal upon which they are conferred.[35] This is most likely to be the case for functions that might, of their nature, be thought to be administrative but which are analogous to functions historically performed by courts,[36] or to adjudicative powers which, when conferred on a court, will be conclusive and enforceable but which, when conferred on an administrative tribunal without the machinery for enforcement, can be characterised as not involving judicial power.[37]

Some jurisdictions conferred on civil and administrative tribunals appear readily to answer the description of 'judicial power'. Residential tenancies disputes, small claims and consumer law matters, for example, generally involve resolving an *inter partes* dispute by application of the law to determine the parties' existing legal rights, including under contract.[38]

The enforceability of the tribunal's decisions will at least sometimes be decisive. In *Brandy v Human Rights and Equal Opportunity Commission*,[39] the arrangement under which a determination of the Tribunal could be registered in the Federal Court and thereby take effect as a judgment of the Court was the determinative factor marking the Tribunal out as exercising judicial power. Several State tribunals have a similar enforcement mechanism, indicating that these tribunals are likely to be found to exercise judicial power in at least some matters.[40]

Other enforcement mechanisms may also indicate the existence of judicial power. In both New South Wales and South Australia, residential tenancies legislation provides for orders of the relevant tribunal to be enforced by a sheriff's officer (in New South Wales)[41] or bailiff (in South Australia).[42] The power of the Tribunal to make orders terminating a residential tenancy agreement (in New South Wales) and for vacant possession (in South Australia) have been held to be judicial power.[43]

A growing body of case law considers whether particular powers conferred on tribunals amount to judicial power. The power of the New South Wales Civil and Administrative Tribunal (NCAT) under the *Residential Tenancies Act 2010* (NSW) to make an order for the termination of a residential tenancy has been held to be judicial power.[44] So too has the power of the South Australian Civil and Administrative Tribunal (SACAT) to make an order for vacant possession of property upon the termination of a residential tenancy.[45] While these cases may provide some guidance in analogous situations, the characterisation of a power as judicial or non-judicial will always necessitate a detailed examination of the nature of the specific power. In the wake of *Burns v Corbett*, a slew of litigation about whether key areas of tribunal jurisdiction involve judicial power appears inevitable.

A court?

The limitation identified in *Burns v Corbett* is only engaged if the tribunal is not a court. There is no prohibition on State courts exercising judicial power in federal matters. In the case of a State court, any jurisdiction exercised in such matters will, in fact, be federal jurisdiction by virtue of s 39 of the *Judiciary Act 1903* (Cth).

When is a tribunal a 'court'? Some tribunals are established as courts. For example, s 164 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) designates the Queensland Civil and Administrative Tribunal (QCAT) as a court of record. When the legislation creating a tribunal contains no such express provision, determining whether a body is a Ch III court involves the application of an evaluative, multi-factorial test. Some factors that have been considered in the authorities include whether the body is described, in legislation, as a 'court';[46] the presence, or absence, of legislative designation as a 'court of record';[47] whether the tribunal exercises judicial power or predominantly exercises judicial power;[48] whether the tribunal is composed predominantly by judges;[49] whether it is independent and impartial;[50] whether it has powers traditionally possessed by courts;[51] and whether it carries out its functions in a judicial manner.[52] Whether all the members of the tribunal can properly be called 'judges' is often a particularly important factor[53] and one closely intertwined with the question of independence and impartiality. The resolution of these questions may require examination of, *inter alia*, the manner in which tribunal members are appointed;[54] whether members have Act of Settlement tenure;[55] the length of

the term of appointment and possibility of renewal;[56] whether members must be legally qualified;[57] and the circumstances in which they may be removed from office.[58]

This may often be a difficult evaluative judgment to make. This is illustrated by the conflicting decisions, in first half of 2018, on the issue of whether NCAT is a court. In *Johnson v Dibbin*,[59] the Appeal Panel of NCAT held that NCAT is a court. But, in *Zistis v Zistis*,[60] a single judge of the Supreme Court of New South Wales reached the opposite conclusion. In November 2018, the New South Wales Court of Appeal confirmed that NCAT is *not* a court.[61]

The questions of whether tribunals exercise judicial power in particular instances, and whether a tribunal is a court, are complex and technical. But they are, happily, questions to which clear answers may be given in the fullness of time. We have already seen litigation on whether the residential tenancies jurisdictions of the South Australian[62] and New South Wales[63] civil and administrative tribunals involves the exercise of judicial power and whether the respective tribunals are courts. It may be that, after a flurry of litigation, the questions of judicial power and whether a tribunal is a court become settled — at least until State parliaments substantially amend the legislation establishing tribunals or confer new jurisdiction or powers on existing tribunals.

Possible responses to *Burns v Corbett*

The balance of this article considers how States might respond to *Burns v Corbett* in a way that preserves, to the greatest extent possible, the ability of State tribunals to deliver accessible, efficient justice. Seven design options are discussed. Several jurisdictions have already implemented some of these changes; these are also discussed in this section.

Some of the redesign options would clearly avoid constitutional difficulty in future cases. But these options would involve some compromise in the ability of tribunals to perform their functions. Other redesign options suggested in this article raise some new constitutional questions but offer the States more flexibility in the operation of their tribunals. Elsewhere, Gabrielle Appleby and Anna Olijnyk have argued that, when governments are developing policy in areas of constitutional uncertainty, constitutional validity ought to be one factor in a holistic assessment of the risks and benefits of proposed legislation.[64] Where genuine uncertainty about the constitutional position exists, a government should not necessarily adopt an option that is certain to be constitutionally valid if it does not meet the policy objectives. Governments should also consider options that pose a greater constitutional risk but better meet the needs of the community. The option that is chosen should be the outcome of a well-informed deliberative process that balances risks and benefits and considers available alternatives.

Business as usual

One possibility is for State tribunals to continue operating as they always have. That is, those State tribunals that currently exercise judicial power could continue to do so, accepting that, whenever a federal matter came before the tribunal, the tribunal would lack jurisdiction.

This option has several drawbacks. The parties to federal matters would certainly be inconvenienced. They would have to find an alternative way of resolving their dispute: court proceedings (if Parliament has conferred relevant jurisdiction on a court), alternative dispute resolution, or taking no action. If a matter had been on foot for some time before it was identified as a federal matter, the parties and tribunal would have wasted resources on a matter that cannot be decided. There is also the potential for manipulation of the

tribunal's jurisdiction. A party who wishes to avoid the tribunal's jurisdiction may be able to convert a dispute into a federal matter by raising a non-colourable federal issue.[65] Such a party could, for example, raise an arguable constitutional issue or invoke Commonwealth law. Those who avail themselves of this technique are likely to be those with access to legal advice — and, therefore, who are well-resourced. They are also more likely to be respondents (who wish to avoid a claim against them) than claimants (who have themselves invoked the tribunal's jurisdiction).

Express exception to jurisdiction

As a variation on the 'business as usual' model, the jurisdiction of tribunals could be made subject to an express exception for federal matters. This could be achieved by inserting a provision into the legislation establishing the tribunal.

This option would remove some of the inconvenience caused by *Burns v Corbett* by preventing matters that were, from their inception, obviously federal matters from proceeding before a non-judicial tribunal in the exercise of judicial power. The option has the advantage of alerting potential tribunal users to the limits of the tribunal's jurisdiction before proceedings are commenced. But, of course, not all tribunal users will read the legislation. In practice, the burden of identifying federal matters might fall on registry staff (to the extent that the federal nature of the matter is apparent from the originating documents) or on tribunal members.

Moreover, like the first option, this approach leaves open the possibility that a matter may progress for some time before it is identified as a federal matter. For example, a party might not raise an issue arising under the *Constitution* or under Commonwealth law until the issues in the dispute had been fleshed out through the early stages of tribunal proceedings. This will create considerable inconvenience in these matters.

Clearly, there are practical difficulties with the first two options. However, some State governments may form the view that these difficulties are a reasonable price to pay for preserving a tribunal system that is functioning effectively in its current form.

No judicial power for tribunals

States could completely avoid the *Burns v Corbett* problem by ensuring that their tribunals do not exercise judicial power. There is no impediment to a non-judicial body determining a federal matter in the exercise of non-judicial power. This solution, therefore, would have the advantage of certainty and clarity. There would be no need to sift federal from non-federal matters; no part-heard proceedings would have to be abandoned.

There is some policy downside to this option. It deprives tribunal users of a binding, authoritative decision that can be enforced using the machinery of judicial power. There are some areas of tribunal jurisdiction in which the enforceability of decisions is critical to their utility. In a residential tenancies matter where a landlord seeks vacant possession, for example, anything short of an immediately enforceable decision made in the exercise of judicial power may be insufficient.

It may not always be easy to determine whether a power is judicial or non-judicial. While the nature of enforcement mechanisms will be decisive in some cases, in others it will be less relevant. The question of whether a power is judicial is not susceptible of a universal answer in respect of all powers conferred on a particular tribunal. It is necessary to consider whether each power or jurisdiction involves the exercise of judicial power. This is

the case both for powers already conferred on tribunals and for any powers States may wish to confer on their tribunals in future.

Therefore, while the solution of conferring only non-judicial power on tribunals is relatively attractive and apparently neat, it brings its own uncertainty and practical difficulties.

Tribunals as courts

There is a second way of avoiding the fragmentation of proceedings that might be caused by *Burns v Corbett*: turning State tribunals into courts for the purposes of Ch III of the *Constitution*. As noted above, some State tribunals are already courts. Turning tribunals into courts would mean they could continue to exercise judicial power, even in federal matters. There is, of course, no constitutional prohibition on State courts exercising judicial power in federal matters. On the contrary: ss 71 and 77(iii) of the *Constitution* contemplate the exercise of federal jurisdiction by State courts. Section 39 of the *Judiciary Act 1903* (Cth) vests all State courts with jurisdiction in federal matters (with limited exceptions).

There is a further consequence of being a State court which may be regarded as desirable in some respects but less convenient for State governments and legislatures. State courts are subject to the so-called *Kable* principle.[66] This principle prohibits State legislatures from substantially impairing the 'institutional integrity' of State courts.[67] The High Court has applied the *Kable* principle to strike down laws authorising a court to order the 'preventive' detention of a named individual;[68] requiring a court to make a control order against a person who was a member of a criminal organisation;[69] relieving a judge, acting *persona designata*, from the obligation to give reasons for a decision;[70] and requiring a court to hear certain applications *ex parte* on the application of the executive.[71] Application of the *Kable* principle requires, in each case, a careful consideration of the legislative circumstances, and it is difficult to generalise about what will, or will not, infringe the principle.[72] Relevant matters are likely to include the closeness of any connection between the executive and the court; any interference with the judicial process; and the extent to which the court retains its impartiality and independence.

While a State tribunal might be a court for the purposes of Ch III, many of the features that make tribunals useful are distinctly un-court-like. Tribunals are, typically, designed to be more flexible and agile than courts. For example, tribunal members do not have the security of tenure enjoyed by judges. In many tribunals, members may be reappointed. Tribunal members are not necessarily legally educated; people from diverse sectors of the community make a valuable contribution to tribunal decision-making. Procedure in tribunals is generally less formal than in courts, and lawyers are often excluded, with many parties appearing in person. The functions conferred on tribunals are wide-ranging, some being purely administrative, with varying degrees of connection to the executive government.

The existing case law makes it difficult to predict whether characteristics of this kind would, in particular circumstances, infringe the *Kable* principle. All that can be said with certainty is that there is uncertainty in this area. At the least, State governments who turn their tribunals into courts will need to exercise caution when conferring adventurous new powers on tribunals or when reforming the institutional features of tribunals.

Federal matters to be referred to a State court

The next two options in this article would allow State tribunals to continue exercising judicial power without being converted into courts.

The first of these is to have a mechanism for a federal matter in a non-judicial State tribunal to be transferred to a State court. Under this arrangement, applicants could still commence proceedings in a State tribunal, but, if it became apparent that a matter was a federal matter, it could be transferred to a court. Some jurisdictions already have provision for a matter to be transferred from a tribunal to a court.[73]

Burns v Corbett has prompted other jurisdictions to create a mechanism specifically for federal matters to be transferred to courts. In New South Wales, a new Pt 3A was inserted into the *Civil and Administrative Tribunal Act 2013* (NSW)[74] allowing the District Court or Local Court, on application by a party, to hear a federal matter that has been commenced in the Tribunal. If the Court grants leave for the application to be made to the Court, the Court has all the functions and jurisdiction the Tribunal would have had if it could exercise jurisdiction in the matter,[75] with certain exceptions that seem to be aimed at striking a balance between traditional standards of court procedure and the flexibility associated with tribunal proceedings. For example, the Local Court's rules of practice and procedure generally apply to proceedings transferred from the Tribunal,[76] but a person who is not a legal practitioner may represent a party in the Court if they would have been able to do so in the Tribunal;[77] and the Court may choose not to apply the rules of evidence if they would not have been required to be applied in the Tribunal.[78]

The Parliament of South Australia acted swiftly in the wake of *Burns v Corbett* (and a decision of SACAT applying *Burns v Corbett*)[79] to introduce a similar mechanism. Under the new Pt 3A of the *South Australian Civil and Administrative Tribunal Act 2013* (SA),[80] the Tribunal may order that proceedings be transferred to the Magistrates Court if the Tribunal considers that 'it does not have, or there is some doubt as to whether it has, jurisdiction to determine the application because its determination may involve the exercise of' the jurisdiction referred to in s 75(iii) or (iv) of the *Constitution*:[81] that is, diversity jurisdiction or matters in which the Commonwealth is a party. As in New South Wales, the Court has all the powers and functions the Tribunal would have had.[82] While the New South Wales legislation leaves procedure to be governed largely by the Court rules, the South Australian model provides that the Court is to follow the procedures that would have been applicable in the Tribunal, unless the Court determines otherwise.[83] These legislative changes are to be supplemented by the appointment of a Tribunal member as an auxiliary magistrate, with the intention that proceedings transferred from SACAT to the Magistrates Court will be heard by this auxiliary magistrate at SACAT's premises, thus minimising the disruption for the parties.[84]

Such arrangements for transferring proceedings from a tribunal to a court allow tribunals to continue exercising judicial power in non-federal matters. As with the options outlined above, they may create some fragmentation of proceedings if a matter has proceeded for some time before the federal element is identified. However, the procedure for transferring from a tribunal to a court is likely simpler than the 'business as usual' alternative, which would require the parties in a federal matter to abandon tribunal proceedings and file a fresh application in a court of competent jurisdiction.

There remains room for different views about the best design for these mechanisms. For example, Gabrielle Appleby has argued that the New South Wales model inappropriately places the onus of determining whether federal matters are engaged, and whether to apply to a court, on the applicant.[85] From this perspective, the South Australian model may be thought preferable because it gives the Tribunal the power and discretion to decide when to transfer proceedings. On the other hand, the South Australian legislation applies only to matters falling within s 75(iii) and (iv) of the *Constitution*, leaving no recourse for the (admittedly rare, but hardly unforeseeable) matters within other classes of jurisdiction described in ss 75 and 76 that may come before the Tribunal.

An exception to judicial power

Legislation conferring judicial power on a State tribunal could provide that, in federal matters, the tribunal could only exercise non-judicial power. Alternatively, this could be achieved through a provision in the legislation establishing the tribunal. Under this option, the tribunal could exercise judicial power in most matters. But, if it became apparent that a matter was a federal matter, the tribunal would switch to exercising non-judicial power. This would potentially mean the tribunal could still determine federal matters, just not in the exercise of judicial power. It would therefore avoid the inconvenience and fragmentation associated with some of the other options discussed in this article.

However, this may be easier said than done. As explained earlier, it is not always easy to determine whether a particular power conferred on a tribunal is judicial power, so there may not be a failsafe way of rendering a power *non*-judicial.

In some cases, provision for the order of a tribunal to be registered in a court will be determinative of the question of judicial power.[86] In such instances, it would be relatively simple to provide that registration is not available in federal matters. This would mean that the tribunal could decide federal and non-federal matters in substantially the same way. The tribunal's orders in non-federal matters could, upon registration, be enforced as orders of a court; orders in federal matters could not be so enforced. Conceptually, this solution is not entirely satisfactory and raises further questions: can a single provision really simultaneously confer both judicial and non-judicial power on a tribunal? Moreover, the solution may create practical difficulties if a matter is not identified as a federal matter until *after* the tribunal has made an order. Has the tribunal already (purportedly) exercised judicial power, making the order invalid?

Could the *Burns v Corbett* problem be fixed by the consent of the parties? Of course, parties to a matter could not consent to the tribunal acting unconstitutionally. But, if it became apparent that a federal matter had arisen and the tribunal lacked jurisdiction, could the parties agree between themselves to be bound by the tribunal's decision? The tribunal's decision would then derive its legal force from the agreement of the parties rather than from sovereign authority and would thus, at least arguably, not be an exercise of judicial power.[87] The tribunal would, in such cases, effectively act as an arbitrator. This solution would enable part-heard proceedings to continue smoothly. But, again, this solution is not foolproof. A respondent who did not wish to be subject to a potential adverse decision might decline to assent to being bound by the tribunal's decision. It is possible that a court would view the 'agreement' of the parties as a charade to mask a real exercise of judicial power. The reality of the consent of the parties may also be open to question, especially if a party was self-represented. Can such a party be taken to understand the consequences of agreeing to abide by the decision of a 'tribunal', now acting as a private adjudicator?

Hybrid tribunal

The option of carving out an exception to judicial power of federal matters would allow State tribunals to determine federal matters but not in the exercise of judicial power. The final option outlined in this article would allow State tribunals to exercise judicial power in federal matters and would also preserve much of the institutional flexibility tribunals enjoy when they are not courts.

This solution requires a tribunal to comprise two parts: a 'judicial section' that is a Ch III court; and a 'non-judicial section' that is not a court. This structure is not unprecedented. Until 2016, the New South Wales Industrial Commission could sit in Court Session as the

Industrial Court of New South Wales.[88] South Australia's recently established South Australian Employment Tribunal has a similar structure.[89] Under both of these models, judicial power was conferred on the tribunal in court session, while the non-judicial section of the tribunal exercised only non-judicial power.

This structure could potentially be adapted to overcome some of the difficulties States face after *Burns v Corbett*. The non-judicial section of the tribunal could exercise judicial power; there is no general prohibition on the exercise of judicial power by State tribunals. But if a federal matter arose in the non-judicial section of the tribunal, the matter could be transferred to the judicial section of the tribunal.

This solution has already been adopted in the South Australian Employment Tribunal, in legislation introduced after *Burns v Corbett*.[90] Under a new s 6AB of the *South Australian Employment Tribunal Act 2014* (SA), the South Australian Employment Court (that is, in effect, the judicial division of the institution) must hear proceedings that involve, or that the Tribunal considers may involve, the exercise of the jurisdiction described in s 75(iii) and (iv) of the *Constitution* (diversity jurisdiction and matters in which the Commonwealth is a party). If proceedings are referred to the Court by the Tribunal when already underway, steps taken in the Tribunal are treated as if they had been taken in the Court.[91]

A practical advantage of this option is that, if a matter is part-heard before it becomes apparent that it is a federal matter, the tribunal could be reconstituted as the judicial section. The legislation creating the tribunal could provide for evidence or other material already before the tribunal to be treated as being before the judicial section in this situation. If the member who had been hearing the matter was also a member of the judicial section, the hearing could continue with minimal disruption.

This structure would have further practical advantages in that the judicial and non-judicial sections of the tribunal could share premises, infrastructure and staff. There could be substantial overlap in the membership of the judicial and non-judicial sections. Members with a suitable level of legal experience and/or status — and, perhaps, a higher level of statutory independence — could be members of both sections. The non-judicial section could also include members who brought valuable non-legal attributes to the tribunal and members appointed on more flexible conditions.

However, these kinds of 'hybrid' tribunals are not without their own difficulties. For example, it may often be difficult for parties, or even tribunal members themselves, to be certain what part of the tribunal is hearing a particular matter. Experience suggests that, in practice, this question may not be addressed at all until it becomes apparent that the answer is important. At that point the potential benefits of enabling a tribunal to act either as an administrative tribunal or as a court may have been lost if the matter was in fact heard by the wrong part of the tribunal or if the issue is one that may itself be the subject of doubt and dispute.

This proposal is relatively novel. Guidance on the design of such a tribunal can be drawn from the New South Wales and South Australian examples, but the answers to several practical and constitutional questions remain uncertain.

First, a practical question: who would be responsible for identifying federal matters? One of the great advantages of tribunals over courts is that it is usually possible for individuals to present their case effectively without legal assistance. It seems unlikely that many unrepresented parties will be aware of the constitutional limits on a tribunal's jurisdiction. This would place the onus on the tribunal to identify federal matters. What follows is an initial outline of how the process might work.

Applicants could simply file their application in the tribunal, without nominating whether the matter was to be heard by the judicial or the non-judicial section. An initial check could be performed by registry staff to see whether the matter is a federal matter. In some cases, this will be apparent from the initiating documents — for example, whether the parties are residents of different States or whether one or more of the parties is a State or Commonwealth government entity. Registry staff would then allocate the matter to either the non-judicial section or (if the matter had been identified as a federal matter) to the judicial section. The tribunal member before whom each new matter came could then perform an additional check and, if necessary, transfer the matter to the judicial section at that stage. The tribunal member would need to remain alert to the possibility of a federal matter arising when the matter was part-heard. Undoubtedly, this system would place an extra burden on tribunal members and staff; this is something for State governments to consider when crafting a response to *Burns v Corbett*. But this is simply an aspect of the 'first duty' of any tribunal to satisfy itself that it has jurisdiction.

Now for some of the constitutional questions that this institutional arrangement might raise.

If a part-heard matter was reallocated to the judicial section of the tribunal, could any evidence before the non-judicial section be treated as evidence before the judicial section, without any further procedure? This would amount to outsourcing a large part of the fact-finding function to a non-judicial body. Would this infringe the *Kable* principle? Could any problems be cured by making the consent of the parties a precondition to the transfer of a matter to the judicial section? If so, could this be exploited by a party who wished to avoid the tribunal's jurisdiction?

For the purposes of the *Kable* principle, can the judicial section of a tribunal be insulated from the non-judicial section? Are the institutional characteristics of, or functions conferred on, the non-judicial section capable of affecting the institutional integrity of the judicial section?[92] If this is the case, does the State lose the advantage of flexibility in the non-judicial section — in which case, why not just make the whole tribunal a court?

We do not know the answers to these questions. Because the arrangement is novel, so too are the constitutional questions.

Conclusion

Burns v Corbett clarified the limits on the States' power to confer judicial power in federal matters on their non-judicial tribunals. But the application of this constitutional limit raises many fresh questions, the answers to which are unclear. Litigation in each State will give us the answers to some questions: which tribunals are 'courts'? Which jurisdictions involve the exercise of judicial power?

Meanwhile, State governments must work to develop responses to *Burns v Corbett*. This article has suggested a range of options for reform. These options could be placed along a spectrum from the constitutionally conservative (such as turning all State tribunals into courts) to the constitutionally adventurous (such as the split-tribunal idea). But the reform options must also be evaluated by reference to their operational efficacy and responsiveness to the needs of the community. It is for each State to weigh its appetite for constitutional risk against the desirability of particular policy goals.

Endnotes

1 (2018) 92 ALJR 423.

[2] The issue in *Burns v Corbett* had been the subject of a series of intermediate appellate court decisions: see, for example, *A-G (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62; *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85; *Sunol v Collier* (2012) 81 NSWLR 619; *Owen v Menzies* [2013] 2 Qd R 327; *Qantas Airways Ltd v Lustig* (2015) 228 FCR 128.

[3] Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 5–6.

[4] *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1141; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 570 [3]; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339, 349 [24]; *Burns v Corbett* (2018) 92 ALJR 423, 442 [71] (Gageler J).

[5] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[6] (2018) 92 ALJR 423, 435 [41].

[7] Ibid 436 [45].

[8] Ibid 432 [19], 437 [49], 441 [68], [70], 447 [97]–[98].

[9] Ibid 430 [4].

[10] Ibid 441 [69].

[11] Ibid 446 [92].

[12] Ibid 446 [93].

[13] Ibid 443 [79].

[14] Ibid 446 [95].

[15] Ibid 447 [95].

[16] Cf *Burns v Corbett* (2018) 92 ALJR 423, 464 [184] (Gordon J): 'Logically, that concern [fragmentation of an exclusive scheme for the exercise of judicial power over ss 75 and 76 matters, pursued by the exercise of Commonwealth legislative power in ss 77(ii) and (iii)] could only provide support for [the Ch III implication] if there were no other way in which such circumvention could be prevented once the powers were exercised.'

[17] (2018) 92 ALJR 423, 456–7 [142]–[145] (Nettle J); 457–8 [150], 465–6 [192]–[193] (Gordon J); 478–9 [255]–[257] (Edelman J).

[18] Justice Nettle held that the power in s 77(iii), to invest the courts of the States with federal jurisdiction over ss 75 and 76 matters carried with it an implied incidental power to exclude the jurisdiction of State tribunals: *Burns v Corbett* (2018) 92 ALJR 423, 455–6 [139]–[141]. Justice Gordon regarded s 77(ii) *and* s 77(iii) *together* as supporting a law which provided, in effect, that only one or more of the courts identified in Ch III could deal with s 75 or s 76 matters (or some such matters): 466 [195]. Her Honour also placed reliance upon the express incidental power in s 51(xxxix): 466 [196]–[198].

[19] *Burns v Corbett* (2018) 92 ALJR 423, 471 [219]–[223]. Accordingly, for Edelman J, there was no need to invoke s 109 of the *Constitution*: 468 [208], 478 [254].

[20] *Ex parte Goldring* (1903) 3 SR (NSW) 260; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 621 [30] (Gleeson CJ, Gummow and Hayne JJ).

[21] *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290; *Cox v Journeaux* (1934) 52 CLR 282.

[22] *British American Tobacco Australia Ltd v WA* (2003) 217 CLR 30. A suit between a State and a resident of another State is, of course, expressly within diversity jurisdiction as defined.

[23] *Watson and Godfrey v Cameron* (1928) 40 CLR 446.

[24] (2015) 228 FCR 148.

[25] (2008) 169 FCR 85.

[26] *Owen v Menzies* [2013] 2 Qd R 327; *Sunol v Collier* (2012) 81 NSWLR 619; *A-G (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62.

[27] Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening)', Submission in *Burns v Corbett*, S183/2017, *Burns v Gaynor*, S185/2017, *A-G (NSW) v Burns,* S186/2017, *A-G (NSW) v Burns*, S187/2017, *New South Wales v Burns*, S188/2017, 24 August 2017, [38].

[28] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J).

[29] For classic descriptions of judicial power, see *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

[30] See *Australian Boot Trade Employees Federation v Whybrow and Co* (1910) 10 CLR 266, 318 (Isaacs J).

[31] *R v Davison* (1954) 90 CLR 353, 366–7 (Dixon CJ and McTiernan J); *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1, 18 (Aickin J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 376–8 (Kitto J); 400 (Windeyer J); 411 (Walsh J); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, [153], [168] (Crennan and Kiefel JJ).

[32] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

[33] See *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 607 (Deane J).

[34] See *R v Davison* (1954) 90 CLR 353.

[35] See, for example, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ, Brennan and Toohey JJ); *Thomas v Mowbray* (2008) 233 CLR 307, 413 [303], 426–7 [339]–[344] (Kirby J, diss), 473 [461] (Hayne J, diss).

[36] See, for example, *Thomas v Mowbray* (2007) 233 CLR 307, 327–9 (Gleeson CJ), 356–7 (Gummow and Crennan JJ); James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 264–5.

[37] See *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 543.
[38] See *Attorney-General (NSW) v Gatsby* [2018] NSWCA 254 [125]–[128]; *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) 67 CLR 1, 9 (Latham CJ), 21 (Starke J).
[39] (1995) 183 CLR 245.
[40] See, for example, *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 121–122; *State Administrative Tribunal Act 2004* (WA) ss 85, 86.
[41] *Residential Tenancies Act 2010* (NSW) s 121.
[42] The bailiff may enforce the tribunal's orders by, *inter alia*, entering premises and using reasonable force: *Residential Tenancies Act 1995* (SA) s 99.
[43] *A-G (NSW) v Gatsby* (2018) 361 ALR 570; *Zistis v Zistis* [2018] NSWSC 722; *Raschke v Firinauskas* [2018] SACAT 19.
[44] *A-G (NSW) v Gatsby* (2018) 361 ALR 570; *Zistis v Zistis* [2018] NSWSC 722.
[45] *Raschke v Firinauskas* [2018] SACAT 19.
[46] See, for example, *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148, 165 [70] (Perry J).
[47] See, for example, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 [85] (French CJ); *Owen v Menzies* (2012) 265 FLR 392; cf *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603 [185] (Bathurst CJ).
[48] See, for example, *Owen v Menzies* (2012) 265 FLR 392, 400.
[49] See for example, *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 71, 87 (Spigelman CJ); *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603 [186] (Bathurst CJ).
[50] See, for example, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29].
[51] See, for example, *Lane v Morrison* (2009) 239 CLR 230, 243 [32]–[33] (French CJ and Gummow J).
[52] See, for example, *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71 [67] (French CJ); *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 291 [49]–[50].
[53] *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 71, 87 [49] (Spigelman CJ).
[54] See *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 290–1 [42].
[55] See *Forge v ASIC* (2006) 228 CLR 45, 79 [73] (Gummow, Hayne and Crennan JJ); *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603 [187] (Bathurst CJ), 607 [203] (McColl JA).
[56] See, for example, *Director of Housing v Sudi* (2011) 33 VR 559, 594 [201] (Weinberg JA); *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 613 [226] (Basten JA).
[57] See *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 291 [43].
[58] See, for example, *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 291 [48]; *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603–4 [189] (Bathurst CJ).
[59] [2018] NSWCATAP 45.
[60] [2018] NSWSC 722.
[61] *A-G (NSW) v Gatsby* (2018) 361 ALR 570.
[62] *Raschke v Firinauskas* [2018] SACAT 19.
[63] *A-G (NSW) v Gatsby* (2018) 361 ALR 570.
[64] Gabrielle Appleby and Anna Olijnyk, 'Parliamentary Deliberation on Constitutional Limits in the Legislative Process' (2017) 40 *University of New South Wales Law Journal* 976.
[65] A claim that a federal issue arises is 'colourable' if it is 'made for the improper purpose of "fabricating" federal jurisdiction': *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212.
[66] From *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[67] See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 593–5 [39]–[40] (French CJ, Kiefel and Bell JJ).
[68] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[69] *South Australia v Totani* (2010) 242 CLR 1.
[70] *Wainohu v New South Wales* (2011) 243 CLR 181.
[71] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.
[72] See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 618 [104] (Gummow J).
[73] See, for example, *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 83; *Northern Territory Civil and Administrative Tribunal Act* (NT) s 99A.
[74] The first version of Pt 3A, which applied only to proceedings in federal diversity jurisdiction, was enacted before the High Court's decision in *Burns v Corbett* but in reaction to the New South Wales Court of Appeal's decision in that matter: *Justice Legislation Amendment Act (No 2) 2017* (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 September 2017, 2–3 (Mark Speakman, Attorney-General). The provisions have subsequently been amended to apply to all federal matters: *Justice Legislation Amendment Act (No 3) 2018* (NSW).
[75] *Civil and Administrative Tribunal Act 2013* (NSW) s 34C(3).
[76] Ibid s 34C(4)(e).
[77] Ibid s 34C(4)(e)(ii).
[78] Ibid s 34C(4)(e)(i).
[79] *Raschke v Firinauskas* [2018] SACAT 19.
[80] Inserted by the *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Act 2018* (SA).
[81] *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 38B(2).
[82] Ibid s 38C(3).
[83] Ibid s 38C(4).
[84] South Australia, *Parliamentary Debates*, Legislative Council, 5 July 2018, 743 (Rob Lucas).

[85] Gabrielle Appleby, 'The 2018 High Court Constitutional Term: The Court in its Inter-Institutional Context' (Paper presented at Gilbert + Tobin Constitutional Law Conference, Sydney, 15 February 2019).
[86] See the discussion of *Brandy v HREOC* (1995) 183 CLR 245 above.
[87] Cf *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).
[88] *Industrial Relations Act 1996* (NSW) Ch 4 Pt 3 (prior to 7 December 2016, when it was repealed by *Industrial Relations Amendment (Industrial Court) Act 2016* (NSW)).
[89] See *South Australian Employment Tribunal Act 2014* (SA) s 5(2).
[90] *South Australian Employment Tribunal (Miscellaneous) Amendment Act 2018* (SA).
[91] *South Australian Employment Tribunal Act 2014* (SA) s 6AB(4).
[92] See *Wainohu v New South Wales* (2011) 243 CLR 181, in which a function conferred on a judge *persona designata* was held to affect the institutional integrity of the court of which the judge was a member.