The Constitution and State Tribunals[1]

The Honourable Justice Robert Beech-Jones[2]

Introduction

This lecture commemorates the late Professor Harry Whitmore. Of his many contributions to administrative law, one of the most significant was his participation in the Kerr Committee which established the groundwork for merits and judicial review at a federal level from 1975 onwards.

One of the Kerr Committee's most cherished progeny was the Administrative Appeal Tribunal ("AAT"). The AAT is currently the subject of a review. I am not intending to address anything of relevance to that review. The reason I mention it is to note a prescient comment by Professor Whitmore in a commentary that was published in the Federal Law Review in 1981 which addressed the first years of the AAT's operations.[3] In that commentary, Professor Whitmore expressed concern about an early trend on the part of the AAT to adopt an adversarial, rather than inquisitorial, approach. He said:

> "Finally, may I say that over many years I have examined tribunals operating in Australia and it has been my experience that most administrative tribunals, not all again, but most administrative tribunals operating in Australia, have struggled hard and long to turn themselves into courts."[4]

As the balance of this address will outline, the irony of this comment is that in some cases the Constitution effectively mandates that State tribunals be turned into courts. I think this development would have surprised and disappointed Professor Whitmore.

Someone who was very disappointed, at least at one point, was the former Chief Justice of South Australia, the Honourable John Doyle AC KC. Around the time of his retirement in 2012, he published an article titled, "Imagining the Past, Remembering the Future: The

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[3] Harry Whitmore, "Commentaries" (1981) 12(1) *Federal Law Review* 117.

[4] Ibid 119.

Demise of Civil Litigation".[5] The article was a rather gloomy rumination on the future of most civil litigation in the courts as we know it. He identified various distinctive features of civil litigation, including what he described as "party autonomy".[6] By that phrase he meant a method by which the parties, and not the judge, identify the issues in dispute and present evidence with the judge then arbitrating on those issues.[7] Mr Doyle said that various factors had destroyed the efficacy of civil litigation, especially delay along with high and disproportionate costs. Mr Doyle stated:

> "I believe that the system of civil litigation is simply not working … Because of the role we assign to the judge; because of the consequences of party autonomy; because of the use of a system that moves disputes through a pre-trial stage to a trial, taking time with high cost, [and] only a small percentage of the disputes ever goes to trial".[8]

Mr Doyle's conclusion was that the "existing system has been a good one, but its time is coming to an end".[9]

Adjudicative Tribunals

When I first read Mr Doyle's article in 2012, I had just been appointed to the Supreme Court of NSW sitting in its Common Law Division. As a barrister, I had spent many years appearing in cases involving judicial review mostly in the federal sphere. At the federal level, there is no tribunal performing an adjudicative role of deciding disputes between citizens or between citizens and the States about existing legal rights. As I will come to, such a federal tribunal is constitutionally impermissible. The various federal tribunals that existed, many of which were later rolled into the AAT, were mostly administrative review tribunals, that is, bodies undertaking merits review of government decisions. One feature of the federal sphere that developed in the decades that I practiced was the distinctively inquisitorial flavour of some of the specialist tribunals, particularly immigration tribunals. The applicants in those tribunals had no contradictor. There was no party autonomy.

[5] (2012) 86(4) *Australian Law Journal* 240.
[6] Ibid 241−243.
[7] Ibid 241.
[8] Ibid 245.
[9] Ibid 247.

Instead, there was reposed in the tribunal member the function of identifying and resolving the issues in dispute.[10]

One thing that I noticed upon my appointment to the Common Law Division was the breath of judicial review work that judges in the Division undertook. This included hearing applications seeking what was, in effect, certiorari directed to the inferior courts and tribunals of the State. I realised that a wide variety of adjudicative functions are performed by State tribunals, that is, deciding cases between parties and not just undertaking merits review of government decisions. Bodies like NCAT or its predecessors had heard cases under the *Anti-Discrimination Act 1977* (NSW) and tenancy disputes for many years. However, by the time of my appointment, administrative schemes to determine damages claims for personal injury arising out of motor vehicle accidents[11] and claims for workers compensation[12] were in full flight. NCAT also had acquired jurisdiction in respect of retail tenancy cases which are often very substantial commercial disputes. Personal injury, workers compensation and retail tenancy disputes were for a substantial period the very lifeblood of civil litigation in the courts. They were the civil cases in which young barristers cut their teeth. The use of administrative bodies for determining disputes on those topics seemed to vindicate much of Mr Doyle's pessimism. Parliament had passed judgment on civil litigation in the courts on those topics and found it wanting. It had chosen other forums and other methods to resolve these disputes. The Supreme Court's role in relation to those schemes was supervisory.

Much has been written about so called "super tribunals" at the State and Territory level. My present focus is not the size of these tribunals but their adjudicative function; that is, their role in deciding the rights of the parties, or to put it another way, to decide "matters" and not just review government action.

Chapter III of the Constitution

So, what does the Constitution have to say about any of this? In short, Chapter III of the Constitution is a very significant constraint on the capacity of State tribunals to determine disputes about legal rights. It is also a significant limitation on the capacity of State

[10] See *Abebe v Commonwealth* (1999) 197 CLR 510; [1999] HCA 14 at [187] per Gummow and Hayne JJ ("*Abebe*").
[11] See, for example, *Motor Accidents Compensation Act 1999* (NSW) Pt 4.4, Div 2.
[12] See, for example, *Workers Compensation Act 1987* (NSW) s 142B.

Parliaments to legislate for cheap and informal means of resolving small disputes about such rights.

The explanation for those observations is somewhat dry and the footpath it runs upon is a bit long. The footpath commences with four relatively brief sections of the Constitution all located within Chapter III. Section 71 provides that the judicial power of the Commonwealth shall be vested in the High Court, in such other federal courts as the Parliament creates, and in such other courts as the Parliament invests with federal jurisdiction, that is, State courts (or to be more precise, the "court[s] of a State"). Section 75 confers original jurisdiction on the High Court in respect of five types of "matter". Section 76 empowers the Commonwealth Parliament to make laws conferring additional original jurisdiction on the High Court in respect of a further four types of "matter". Then there is s 77, which, in relation to the nine types of "matter" referred to in ss 75 and 76, confers on the Commonwealth Parliament the power to make laws (i) firstly, defining the jurisdiction of any federal court other than the High Court; (ii) secondly, 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; and (iii) thirdly, investing any "court of a State" with federal jurisdiction. Any "court of a State" that is invested with federal jurisdiction is taken to be a "component part" of the federal judicature.[13]

Shortly after Federation, Parliament took up the invitation offered by s 77 when it enacted the *Judiciary Act 1903* (Cth), and in particular ss 38 and 39. Section 38 identifies five of the nine types of federal "matter" referred to in ss 75 and 76. Subject to certain exceptions,[14] s 38 specifies that the High Court has exclusive jurisdiction in respect of them. Subsection 39(1) provides that all other forms of federal jurisdiction exercisable by the High Court are exclusive of the jurisdiction of the courts of the States. However, s 39(2) revests the jurisdiction taken away by s 39(1) in the courts of the States subject to certain conditions such as locality.[15] Other provisions deal with the jurisdiction of the federal courts in terms that are not necessary to describe at this point.

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[13] *Rizeq v Western Australia* (2017) 262 CLR 1; [2017] HCA 23 at [45] per Bell, Gageler, Keane, Nettle and Gordon JJ; *Burns v Corbett* (2018) 25 CLR 304; [2018] HCA 15 at [22] per Kiefel CJ, Bell and Keane JJ ("*Burns v Corbett*").
[14] See *Judiciary Act 1903* (Cth) ss 39B and 44.
[15] *Burns v Corbett* at [24]−[26].

Within those provisions can I just remind you of three constitutional concepts, the first being “matter”, the second being the nine types of “matter” referred to in ss 75 and 76, and the third being a “court of a State” referred to in s 77(iii).

I have already touched upon the concept of “matter”. I will drift back to it throughout this paper. For the moment it suffices to state that the concept of “matter” is very much bound up with the exercise of judicial power. It is best described as “a concrete controversy about legal rights existing independently of the forum in which that controversy might be adjudicated”.[16] It can usefully be contrasted with an inquiry into whether a right or permission should be granted or conferred, as opposed to whether it exists.

Of the nine types of federal matter in ss 75 and 76 of the Constitution, I note three that commonly arise in litigation, sometimes in the most unexpected ways, being matters between residents of different States[17], matters arising under the Constitution or involving its interpretation,[18] and matters arising under any law made by the Commonwealth Parliament.[19]

The concept of a “court of a State” is something I will return to, but at this point it suffices to state that it denotes a body that “must be capable of exercising judicial power and must meet critical minimum characteristics of independence and impartiality”.[20]

There is much about the sections I referred to and the rest of Chapter III that may not be first apparent to the naked eye. Like the dialogue in the television series “Succession”, Chapter III is riddled with negative implications. I mention the two most fundamental implications which were either established by, or at least reiterated in, *R v Kirby; Ex parte Boilermakers’ Society of Australia* (“Boilermakers”).[21] First, it is beyond the competence of the Commonwealth Parliament to vest the judicial power of the Commonwealth in a body that is not a Chapter III court; that is, the High Court, a federal court or a court of a State.[22] Second, Chapter III precludes the vesting of a non-judicial power, or a power that is not

[16] *Burns v Corbett* at [70]; see also *Fencott v Muller* (1983) 152 CLR 570; [1983] HCA 12 at 603; *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16; (2022) 96 ALJR 476 at [31] (“*Citta*”).
[17] *Australian Constitution* s 75(iii).
[18] Ibid s 76(i).
[19] Ibid s 76(ii).
[20] *Burns v Corbett* at [70].
[21] (1956) 94 CLR 254; [1956] HCA 10.
[22] Ibid 270.

ancillary or incidental to judicial power, in a federal court created under Chapter III.[23] By way of shorthand, I will call them "*Boilermakers* 1" and "*Boilermakers* 2".

One consequence of those propositions is what I mentioned earlier, namely, there cannot be created some type of federal "super tribunal" to decide disputes about existing rights under federal law between citizens or citizens and the state.[24] The federal tribunals are generally confined to undertaking merits reviews of government or administrative decisions. Those cases do not involve the exercise of judicial power and are not "matters"; broadly, they involve a determination of whether a right or permission should be granted and not a binding determination about existing rights.[25]

There was a time when the federal Human Rights and Equal Opportunity Commission embarked on what looked like the final determination of discrimination complaints with its decisions being registered in the Federal Court and purportedly made enforceable as orders of that Court. That all came to an end with the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission* ("Brandy").[26] One consequence of *Brandy* is that the approach of registering tribunal orders in a court to allow them to be enforced will not avoid the conclusion that a tribunal exercises judicial power.

State Courts and Chapter III

So, what does this have to do with the States?

I remember a time when it was assumed that Chapter III had very little to say, if anything, about the integrity, structure or functions of State courts, "state judicial power", and nothing about the capacity of State Parliaments to legislate on those topics. Those assumptions

[23] Ibid 272; 296.
[24] I am leaving aside the position of appeals to a Board or tribunal from taxation assessments: see James Stellios, *Zines and Stellios's The High Court and the Constitution* (7th ed, 2022, The Federation Press) at 239−243.
[25] See *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; [1983] HCA 36 at 290 per Mason, Brennan and Deane JJ; *Abebe* at 570−571 per Gummow and Hayne JJ; *Attorney General for New South Wales v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254 at [233]−[235] per Basten JA ("*Gatsby*").
[26] (1995) 183 CLR 245; [1995] HCA 10.

were very much upset by the decisions in *Kable v Director of Public Prosecutions (NSW)* ("Kable")[27] and *Kirk v Industrial Court of New South Wales* ("Kirk").[28]

Kable held that, since the Constitution establishes an integrated court system and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is incompatible with its role as a repository of federal jurisdiction, is invalid.[29] This principle extends to all the courts of a State that exercise federal jurisdiction,[30] although what functions are incompatible will vary depending on the court in question.

The High Court's judgment in *Forge v ASIC* confirmed that it is a requirement of Chapter III that there be a body that answers the description the "Supreme Court of a State" which must have minimum characteristics of independence impartiality.[31] *Kirk* held that such a Court cannot be deprived of its supervisory jurisdiction to police the jurisdictional limits on the exercise of State executive and judicial power.[32]

Kable and the cases that followed[33] have been much criticised as a "guard dog that only barked once",[34] but it does impose some restraints on the types of functions that can be conferred on State courts that are repositories of federal jurisdiction and the manner of their exercise. *Kable* and the decisions that have applied it amount to a form of "*Boilermakers* 2 lite"; they establish that there are restrictions on the vesting by State parliaments of *certain* non-judicial functions or powers in Supreme Courts and other State courts. That said, there are very significant differences between the functions that may not be conferred on federal courts created under Chapter III of the Constitution and functions

[27] (1996) 189 CLR 51; [1996] HCA 24.
[28] (2010) 239 CLR 531; [2010] HCA 1.
[29] See *Kable* at 106−107 per Gaudron J; 115−116 per McHugh J; 127−128 per Gummow J.
[30] *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [2006] HCA 44 at [63] ("*Forge v ASIC*").
[31] Ibid at [63].
[32] *Kirk* at [99] per Gummow, Hayne and Crennan JJ (Gleeson CJ agreeing at [4]; Callinan J agreeing at [237]; Heydon J agreeing at [278]).
[33] See, for example, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; [2004] HCA 46; *South Australia v Totani* (2010) 242 CLR 1; [2010] HCA 39; *Wainohu v New South Wales* (2011) 243 CLR 181; [2011] HCA 24; *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34.
[34] See, for example, Marilyn Warren, "The Dog that Restrained its Bark: A New Era of Administrative Justice in the Australian States" (Speech, Australian Institute of Administrative Law Conference, 23 July 2010).

that are incompatible with a particular State court's role as a repository of federal jurisdiction.

The balance of this talk principally concerns another development in this process, being the relatively recent confirmation of an analogous form of "*Boilermakers* 1 lite" applying to the States. These cases are *not* concerned with the limits on State legislatures conferring certain non-judicial functions or powers on State courts, but the limits on conferring certain judicial functions or powers on State bodies that are not courts, specifically tribunals.

State Parliaments can legislate to have matters that are wholly within State jurisdiction determined by a State tribunal or decision-maker that is not a court of law.[35] However, what about State tribunals and federal jurisdiction?

Burns and Citta

This brings us to *Burns v Corbett*.[36]

Burns v Corbett concerned the jurisdiction of NCAT to hear two complaints of vilification on the basis of a person's homosexuality.[37] The complaint raised a "matter" as it was a claim between parties for a legal remedy for a breach of a legal standard.[38] The complainant and the respondents were residents of different States. It was contended that the proceeding involved a matter within federal jurisdiction which could not be determined by NCAT because it was neither a federal court created under Chapter III nor a "court of a State" vested with federal jurisdiction.

In addressing this issue, both the New South Wales Court of Appeal and the High Court assumed that NCAT was not a "court of a State".[39] The minority of the High Court and the

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[35] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [2009] HCA 4 at [153] ("*K-Generation*").
[36] (2018) 265 CLR 305; [2018] HCA 1.
[37] *Anti-Discrimination Act 1977* (NSW) s 49ZT.
[38] In *Gatsby*, Basten JA in dissent reasoned that it was essential to the existence of a "matter" that it be capable of determination by a "court", and hence if NCAT is not a court it is not deciding a "matter" (at [246]−[248]). This was rejected by the Victorian Court of Appeal in *Meringnage v Interstate Enterprises Pty Ltd (t/as Tecside Group)* (2020) 60 VR 361; [2020] VSCA 30 at [139]−[147] ("*Meringnage*"). In *Citta*, Edelman J referred to *Meringnage* with approval (at [85]). The plurality's description of "matter" in *Citta* did not suggest that it required resolution by a particular forum: *Citta* at [31].
[39] *Burns v Corbett* at [39] per Kiefel CJ, Bell and Keane JJ; [119] per Gageler J; [183] per Gordon J; *Burns v Corbett* (2017) 96 NSWLR 247; [2017] NSWCA 3 at [29] per Leeming JA (Bathurst CJ agreeing at [1]; Beazley P agreeing at [2]).

Court of Appeal found there was no constitutional implication to be derived from Chapter III which invalidated the State legislation empowering NCAT to determine a matter between residents of different States.[40] However, they found that, to the extent the legislation had that effect, it was inconsistent with the *Judiciary Act* and was rendered inoperative by s 109 of the Constitution.[41] The minority's approach would enable the Commonwealth Parliament to amend the *Judiciary Act* to permit State tribunals that are not courts of a state to determine matters of the kind referred to in ss 75 and 76 of the Constitution.

However, the majority in *Burns v Corbett*, Kiefel CJ, Bell and Keane JJ (with whom Gageler J writing separately agreed), held that it was a necessary implication from Chapter III, especially s 77, that a State legislature could not confer "State adjudicative authority" or to adopt the phrase used by Gageler J, "State judicial power", with respect to subject matters identified in ss 75 and 76 of the Constitution on a body that is not a "court of a State".[42]

I will come to a number of the decisions of intermediate appellate courts that followed *Burns v Corbett* as to what constitutes federal jurisdiction and a "court of a State" in the context of State tribunals shortly. However, to gauge the consequences of *Burns v Corbett* for State tribunals, it is also necessary to refer to the High Court's recent decision in *Citta*.[43]

In *Citta*, the Tasmanian Anti-Discrimination Tribunal dismissed a discrimination claim on the basis of disability for lack of jurisdiction. The respondent contended that the relevant parts of the *Anti-Discrimination Act 1998* (Tas) were rendered inoperative by s 109 of the Constitution because they were inconsistent with the *Disability Discrimination Act 1992* (Cth).[44] The Tribunal found that the claim raised a "matter" within federal jurisdiction. Applying *Burns v Corbett*, the Tribunal found it had no jurisdiction to hear the entire dispute. The Full Court of the Supreme Court of Tasmania allowed an appeal against the

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[40] *Burns v Corbett* at [137] per Nettle J; [176] per Gordon J; [212]−[215] per Edelman J; *Burns v Corbett* (2017) 96 NSWLR 247; [2017] NSWCA 3 at [65] per Leeming JA (Bathurst CJ agreeing at [1]; Beazley P agreeing at [2]).
[41] *Burns v Corbett* at [145] per Nettle J; [199] per Gordon J; [256]−[257] per Edelman J; *Burns v Corbett* (2017) 96 NSWLR 247; [2017] NSWCA 3 at [75], [78] and [95] per Leeming JA (Bathurst CJ agreeing at [1]; Beazley P agreeing at [2]).
[42] *Burns v Corbett* at [55] per Kiefel CJ, Bell and Keane JJ; [119] per Gageler J.
[43] [2022] HCA 16; (2022) 96 ALJR 476.
[44] See also the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) made under the *Disability Discrimination Act 1992* (Cth).

Tribunal's decision.[45] That Court addressed and rejected the substance of the contention about the *Disability Discrimination Act* and s 109 of the Constitution.

The High Court in *Citta* reversed the Full Court. The plurality referred to the concept of "matter" and noted that "a matter arising under" a law made by the Commonwealth Parliament includes the circumstance where the Commonwealth law "is relied on as the source of the claim or a defence that is *asserted* in the course of the controversy" (emphasis added).[46] The only limitation is that the assertion "be genuinely raised and not incapable on its face of legal argument".[47] Once such an assertion is made, then the entire controversy between the parties is a matter within federal jurisdiction, "even where the claim is resolved in the exercise of judicial power or even withdrawn".[48] I emphasise the width of that last statement. Much like certain diseases, once you acquire federal jurisdiction you cannot get rid of it.[49]

In *Citta*, this meant that just because the Full Court of the Supreme Court of Tasmania rejected the defence raising a claim of inconsistency under s 109 of the Constitution did not mean that the problem with the Tasmanian Tribunal's jurisdiction was resolved. The raising of the claim was enough to deny the Tribunal of jurisdiction. The High Court found that the Full Court of the Supreme Court of Tasmania erred in addressing the merits of the defence asserting an inconsistency between the *Anti-Discrimination Act* (Tas) and *Disability Discrimination Act* (Cth).[50] The High Court held that it was not "necessary or appropriate" for it to address the merits of that argument either.[51] This was so because resolving the merits of the asserted inconsistency did not determine whether the proceedings before the State tribunal involved a purported exercise of federal jurisdiction. The mere raising of the assertion before the Tribunal was sufficient to bring the matter within federal jurisdiction.

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[45] *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15; (2020) 364 FLR 110 at [26]−[28] per Blow CJ (Wood J agreeing at [29]); [93]−[95] per Estcourt J.
[46] *Citta* at [31] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.
[47] Ibid [35].
[48] Ibid [31]. That is so even if the federal claim is struck out: *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481; [1993] FCA 605 at 481−482.
[49] See James Allsop, "Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002" (2002) 23 *Australian Bar Review* 29 at 45 ("Federal Jurisdiction and the Jurisdiction of the Federal Court".
[50] *Citta* at [8]−[9] and [40]−[42] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.
[51] *Citta* at [7]−[9] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.

The outcome in *Citta* was, if I might respectfully say so, the logical result of applying the accepted understanding of a "matter arising under a law of the Parliament" to the outcome in *Burns v Corbett*. However, at this point, I will digress to compare *Citta* with two very similar looking cases decided by the High Court in the early 1980s.

Viskauskas and Metwally

In *Viskauskas v Niland* ("Viskauskas"), the High Court held that that s 19 of the *Anti-Discrimination Act 1977* (NSW) was inconsistent with the *Racial Discrimination Act 1975* (Cth) and rendered inoperative by s 109 of the Constitution.[52]

By the time *Viskauskas* was published, the *Anti-Discrimination Act* had been amended so that contested claims under that Act were determined by the Equal Opportunity Tribunal (the "EOT"). The composition[53] and functions of that tribunal were not relevantly different to those of the Tasmanian Tribunal as considered in *Citta* and NCAT as considered in *Burns v Corbett*, save that an order by the EOT awarding compensation was recoverable as a debt due in a court of competent jurisdiction rather than registrable as a judgment of a court.[54]

At the time *Viskauskas* was published, the EOT had reserved its decision on a claim of racial discrimination made by a Mr Metwally against the University of Wollongong. The EOT ultimately published a decision upholding Mr Metwally's claim and awarded him compensation.[55] The EOT's reasons reveal that, for a time while its judgment was

[52] (1983) 153 CLR 280; [1983] HCA 15 at 293−295.
[53] The Equal Opportunity Tribunal was required to consist of not fewer than five part-time members and not more than 10 part-time members appointed by the Governor where at least four, and at most six, members could not be "judicial members". A judicial member was a judge of the District Court, a member of the Workers Compensation Commission, or a person qualified for appointment as such (*Anti-Discrimination Act 1977* (NSW) ss 69C and 69E). Judicial members could only be removed in the same manner as a District Court judge. However, non-judicial members could be removed by the Governor "for any cause which seems to him sufficient" (s 69G). The Tribunal was constituted by a judicial member and two non-judicial members (s 69M). The procedure at a hearing was determined by a judicial member (s 69N(1)). Otherwise, each member had a deliberative vote (s 69N(3)).
[54] The conduct of a hearing before the Equal Opportunity Tribunal and determination of a complaint was governed by former Div 3 of Pt IX of the *Anti-Discrimination Act 1977* (NSW). The Tribunal was empowered to make an order dismissing the complaint or finding the complaint substantiated and ordering a respondent to pay damages, grant an order enjoining the respondent from continuing any conduct rendered unlawful by the Act, make redress or declaring void in whole or in part some agreement or contract made in contravention of the Act (s 113). An amount ordered to be paid could be registered as a judgment debt in a court of competent jurisdiction (s 115) and it was otherwise an offence to fail to comply with an order under s 113 (s 116).
[55] On 23 November 1983: *Metwally v University of Wollongong* [1984] EOC 92-030 at 75,553.

reserved, it considered there was "uncertainty" about the application of the *Anti-Discrimination Act* (NSW) because of *Viskauskas*.[56] That uncertainty was not resolved until the passage of an amendment to the *Racial Discrimination Act* (Cth),[57] which inserted a provision stating that it was not the Commonwealth's intention to "cover the field" and exclude the operation of State anti-discrimination laws.[58] The EOT's reasons reveal that, upon the passage of that amendment, oral submissions in Mr Metwally's case resumed. In terms of *Citta*, this meant that an issue under a law of the Commonwealth had arisen in the proceedings before the EOT. The provisions concerning the appointment of EOT members meant that it did not constitute a "court of a State".[59] It seems likely that, when it made an order for compensation, it was exercising judicial power.[60]

The University of Wollongong appealed the Tribunal's judgment to the New South Wales Court of Appeal. One of its grounds of appeal concerned whether the amendment to the *Racial Discrimination Act* (Cth) that addressed *Viskauskas* was valid to the extent that it had retrospective effect.[61] So much of the cause that raised that ground was then removed into the High Court under s 40 of the *Judiciary Act*.[62] The High Court held that the amendment did not have validly have that effect; i.e. it did not in reverse the effect of *Viskauskis* so far as concerns the period prior the amendment coming into force.[63] This meant that the Tribunal did not have jurisdiction over Mr Metwally's case as the relevant part of the *Anti-Discrimination Act* (NSW) was still rendered inoperative by s 109 of the Constitution. However, an application of *Citta* would have led to that conclusion by a different pathway. The fact that an issue concerning the effect of the amendment to the *Racial Discrimination Act* (Cth) arose before the EOT meant that it was likely to be exercising judicial power to determine a matter arising under a law of the Commonwealth; that is, exercising federal jurisdiction. In that event, it follows from *Burns v Corbett* and *Citta* that, in *Metwally*, the EOT had no jurisdiction to hear Mr Metwally's case. Perhaps of more significance is that if one applies the reasoning in *Citta*, then on an appeal from the

[56] Ibid 75,553.
[57] *Commonwealth Racial Discrimination Amendment Act 1983* (Cth).
[58] *Racial Discrimination Act 1975* (Cth) s 6A.
[59] See above (n 53).
[60] See above (n 54). On an action to recover the statutory debt created by the Tribunal's judgment, it seems unlikely that a party could relitigate the claim before the EOT. Thus there is much less scope to challenge the enforceability of the debt compared to the form of review in the Federal Court of a HREOC determination considered in *Brandy* at 261 to 263 and at 270. Hill infra (n 97) is of the contrary view.
[61] *University of Wollongong v Metwally* (1984) 158 CLR 447; [1984] HCA 74 at 448 and 467
[62] See *University of Wollongong v Metwally* (1984) 158 CLR 447; [1984] HCA 74 at 448.
[63] Ibid 457−458 per Gibbs CJ; 466 per Mason J; 469−470 per Murphy J; 471−472 per Wilson J; 474−475 per Brennan J; 479 per Deane J; 483−484 per Dawson J.

EOT, which was the cause in respect of which part was removed into the High Court in *Metwally* , it was not "necessary or appropriate" for the High Court to determine the validity or effect of the amendment to the *Racial Discrimination Act* (Cth). However that is exactly what the High Court in *Metwally* did.

I do not raise *Metwally* simply to point out a potential inconsistency between the course of proceedings in that case and *Citta*. All courts, including the High Court, decide the issues presented to them. In *Metwally*, it does not appear to have occurred to anyone that there was any question about whether the EOT was purporting to exercise judicial power to determine a matter within federal jurisdiction and whether it had the authority to do so. Instead, I raise this contrast between *Metwally* and *Citta* as an example of how the tide of constitutional law, in this case a Chapter III tide, can ebb and flow over time. Put another way, the constitutional radars at the time of *Metwally* were not tuned in to any potential jurisdictional problem under Chapter III arising from an issue under a law of the Commonwealth coming before a State tribunal, even though everyone involved in that case had a very deep understanding of the concept of "matter" and judicial power. The potential problem with the EOT's jurisdiction was simply not leaping out to those looking at *Metwally*, and I doubt it was leaping out to those who were drafting State legislation at that time. Past understandings do not bear much on current constitutional issues.[64] However, the practical reality is that much of the State legislation that is currently in force was drafted at a time when different constitutional understandings were to the fore.

Court of a State and Legislative Responses

I return to the effect of *Burns v Corbett* and *Citta* moving forward.

Two issues arise if one seeks to ascertain the consequences of those decisions for State tribunals and policymakers. The first is what is a "court of a State" and, specifically, whether a particular State tribunal meets that definition. The second is the scope of federal jurisdiction. I will briefly deal with each.

Prior to *Burns v Corbett*, there had been a number of decisions of the High Court, and decisions of intermediate Courts of Appeal, that considered what constituted a "court of a

[64] See *Burns v Corbett* at [110] per Gageler J.

State" for the purposes of s 77(iii) of the Constitution.[65] Unlike *Burns v Corbett*, most of those cases concerned whether Commonwealth legislation, not State legislation, validly conferred jurisdiction on a State tribunal as a "court of a State" in conformity with s 77(iii).[66] As I said earlier, the effect of those decisions was that to be a "court of a State" such a body had to, inter alia, "satisfy minimum requirements of independence and impartiality".[67] State legislatures are conferred with "room for legitimate choice" about how to secure such independence,[68] although such a body must principally be constituted by judges with some security of tenure.[69] Different minimum levels of tenure apply to "courts at different levels".[70]

In the aftermath of *Burns v Corbett*, there were challenges to the jurisdiction of various State tribunals to determine matters that fell within one of the heads of federal jurisdiction I referred to earlier, mostly on the basis that the tribunals were not the courts of a state. The NSW Court of Appeal held that NCAT was not a "court of a State" principally because of the lack of institutional independence and impartiality afforded to its members by NCAT's empowering statute.[71] Similar conclusions were reached by the Victorian Court of Appeal[72] and the Chief Justice of Western Australia, sitting at first instance, about those States' respective "super tribunals".[73] The same position appears to apply in South Australia.[74] Prior to *Burns v Corbett*, the Queensland Court of Appeal held that QCAT was a "court of a State" largely because its governing legislation declared it to be a "court of record",[75] although that approach has not commended itself to courts of other States[76] or academic writers.[77]

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[65] See, for example, *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49; [1982] HCA 13; *Forge v ASIC*; *Trust Company of Australia Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd (t/as Caf Tiffany's)* (2006) 66 NSWLR 77; [2006] NSWCA 185 ("*Skiwing*"); *Owen v Menzies* [2012] QCA 170; (2012) 265 FLR 392 ("*Owen v Menzies*").
[66] Eg *Skiwing*. *Owens v Menzies* was similar to *Citt*a and concerned whether QCAT could determine a constitutional issue.
[67] *Forge v ASIC* at [41].
[68] Ibid at [37].
[69] *K-Generation* at [115]−[116]; *Forge v ASIC* at [73]; *Skiwing* at [52].
[70] *Forge v ASIC* at [84].
[71] *Gatsby* at [184]−[192] per Bathurst CJ (Beazley P agreeing at [197]; McColl JA agreeing at [198]; Leeming JA agreeing at [279]); [226]−[228] per Basten JA (Leeming JA agreeing at [279]).
[72] *Meringnage* at [88]−[92].
[73] *GS v MS* (2019) 344 FLR 386; [2019] WASC 255 at [23].
[74] See *Attorney-General (SA) v Raschke* (2019) 133 SASR 214; [2019] SASCFC 83 at [89]−[96] and [101] per Kourakis CJ (Kelly J agreeing at [103]; Hinton J agreeing at [104]).
[75] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164; *Owen v Menzies* at [48]−[49].
[76] *Meringnage* at [95].
[77] See, for example, Graeme Hill, "State Tribunals and the Federal Judicial System", in Greg Weeks and Matthew Groves (eds), *Administrative Redress In and Out of the Courts: Essays in Honour of*

The various judgments in these cases approached the determination of whether a tribunal is a "court of a State" from different perspectives. Some judgments looked at whether Parliament intended the body to be a "court of a State",[78] others looked at the degree of structural impartiality and independence including the type of tenure that was afforded by the legislature to tribunal members,[79] some considered whether the powers and processes of the body said to be a court were judicial in nature,[80] other judgments considered whether the body included non-judicial members,[81] especially those without legal training.[82] The mere exercise of judicial power was considered insufficient to make a body a court.[83] However, at the risk of generalisation, the critical factor in most of the judgments was the tenure of tribunal members and the independence and impartiality of their decision-making. While that does not have to correspond with what is required of judges of federal courts, it is nevertheless consistent with the spread of a "lite" version of Chapter III to the States.

Independence and impartiality in those who decide cases is undoubtedly a good thing. However, for policymakers, security of tenure has accompanying costs in terms of the capacity to respond to increases and decreases in caseloads. Much as I might sometimes wish for it, a spike in the murder rate does not mean we can suddenly get more judges in the Supreme Court whom we can shed when peace breaks out. Such an idea is nonsense at a Supreme Court level. However, it can be a serious issue for those addressing an increase in tenancy disputes during, say, a very tight rental market.

There was a legislative response on the part of some States to *Burns v Corbett.* In NSW, NCAT's enabling legislation was amended so that an affected party, who could otherwise file proceedings in its general jurisdiction or bring an external appeal, could apply for leave to commence proceedings in either the District Court or Local Court if they could satisfy that Court that the determination of their matter would involve the exercise of federal

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Robyn Creyke and John McMillan (The Federation Press, 2019) ("State Tribunals and the Federal Judicial System").

[78] *Gatsby* at [191] per Bathurst CJ; [199] per Bathurst CJ; [299] per Leeming JA; *Owen v Menzies*.

[79] *Gatsby* at [191] per Bathurst CJ; *Commonwealth v Anti-Discrimination Tribunal* (Tas) (2008) 169 FCR 85; [2008] FCAFC 104 at [239]; *Meringnage* at [81]−[93].

[80] *K-Generation* at [134] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

[81] *Skiwing* at [52]; *Qantas Airways v Lustig* (2015) 228 FCR 148; [2015] FCA 253 at [75] ("*Lustig*"); *Meringnage* at [83].

[82] *Skiwing* at [27]; *Meringnage* at [91].

[83] *Skiwing* at [21]; *Lustig* at [66]−[67]; see also Callum Christodoulou, "*Burns v Corbett*: Federal Jurisdiction, State Tribunals and Chapter III Courts" (2020) 42(3) *Sydney Law Review* 353 at 366; Rebecca Ananian-Welsh, "Cats, Courts and the Constitution: The Place of Super-Tribunals in the National Judicial System" (2020) 43(3) *Melbourne University Law Review* 852 at 891.

jurisdiction.[84] For those cases heard in the Local Court, there is some modification of its practices to accord with NCAT practices concerning the representation of parties and application of the rules of evidence,[85] although there is no equivalent for the District Court. Like provisions enable the bringing of workers compensation and motor accident compensation claims in the District Court[86] with the District Court's mode of practice and procedure made applicable.[87] A similar approach was adopted in Victoria with VCAT[88] and, to an extent, in South Australia with SACAT.[89]

I do not have any different solutions to offer to these approaches. At one level they might be seen as a fix, but at another level, they are a major retreat. They add a significant layer of complexity in the identification of a forum which undermines the statutory intention to have certain types of disputes resolved cheaper and faster. Your average tenant, landlord, injured employee or passenger in a car might not be au fait with the finer aspects of federal jurisdiction and nor might their lawyer, if they have one. Minds can reasonably differ over whether federal jurisdiction is invoked in a particular case.

More importantly, you might recall Professor Whitmore and Mr Doyle's comments that I referred to earlier. These disputes are being driven out of the tribunals and into the courts. You do not have to share Mr Doyle's gloom to see that outcome as suboptimal. The Local and Magistrate Courts are the workhorses of the Australian judicial system. In some respects, the Local Court operates informally. However, fundamentally it is a generalist court. Most of the "super" State tribunals are the result of an amalgamation of specialist tribunals, and many of them carried over their specialist members and methods to resolve particular types of cases, residential tenancy disputes being an obvious example. Local and District Courts are not of that character. Without being too blunt about it, they have other cases which they must prioritise and which their members must develop expertise in, specifically, crime, child protection, domestic violence, family law and ordinary civil claims.

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[84] *Civil and Administrative Tribunal Act 2013* (NSW) Pt 3A; see especially s 34B. A challenge to the constitutional validity of Pt 3A was rejected in *Gaynor v Attorney General for New South Wales* (2020) 102 NSWLR 123; [2020] NSWCA 48.
[85] Ibid s 34C(4).
[86] *Personal Injury Commission Act 2020* (NSW) Div 3.2.
[87] Ibid s 28(1)(c).
[88] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) Pt 3A; see especially s 57C(2).
[89] But only concerning matters that would otherwise fall within s 75(iii) and (iv) of the Constitution; see *South Australian Civil and Administrative Tribunal Act 2013* (SA) Pt 3A.

Earlier, I mentioned Professor Whitmore's lament about the AAT not adopting a more inquisitorial approach. You will recall that Mr Doyle identified "party autonomy" as one of the features of civil litigation in the courts which in his view had contributed to its impending demise. To varying degrees, the legislation governing many State tribunals seeks to overcome this by facilitating the conduct of proceedings in a more interventionist and arguably inquisitorial manner. Thus, NCAT is empowered to inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.[90] Recently, an NCAT Appeal Panel described the default form of procedure adopted by the Tribunal as adversarial but noted that an inquisitorial approach may be adopted in a particular case or class of case.[91] For example, parties in residential tenancy disputes are generally not represented, and it is common for the Tribunal in such cases to formulate the issues to be determined. The *Anti-Discrimination Act* contains a provision enabling the appointment of a member of staff of the Anti-Discrimination Board to assist NCAT and be "subject to the control and direction of the Tribunal".[92] In the past, this person has been able to brief counsel to appear. This provision appears to contemplate the staff member having a much greater role in the conduct of the proceedings than what would occur with an appointed contradictor or intervention by an amicus curiae and to exercise that role under the control and direction of the Tribunal

The debate about the respective merits of inquisitorial and adversarial forms of decision-making, and the usefulness of that dichotomy, can be very arid. The point is that empowering legislation commonly affords to various tribunals great flexibility to mould their procedures, including the power to intervene and adopt something akin to an inquisitorial role. Examples include small disputes in a specialised area involving unrepresented people and disputes where there is self-evidently an imbalance of resources between the parties. However, there are significant questions about: (i) whether this procedural flexibility is transferred to the courts by the legislative fixes I referred to; (ii) whether the courts will take advantage of that flexibility; and (iii) whether there is some constitutional restraint on the courts of a State having that flexibility.

On that last point, I note that in *Forge v ASIC*, Gummow, Hayne and Crennan JJ stated:[93]

[90] *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).
[91] *McKerlie v Leeser* [2023] NSWCATAP 112 at [81].
[92] *Anti-Discrimination Act 1977* (NSW) s 99.
[93] *Forge v ASIC* at [95]

> "It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. *An important element, however, 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*." (Emphasis added)

This statement would appear to cast some doubt on the validity of any attempt to vest a "court of a State" with powers that enable it to take a more inquisitorial approach in a particular case, such as that which may be currently adopted by some State tribunals exercising State judicial power where no federal jurisdiction is involved.

Scope of Federal Jurisdiction

The extent to which any of this may be a problem in the real world depends on the scope of federal jurisdiction and its potential to arise in proceedings before State tribunals.

State Judicial Power and Matter

I referred earlier to the constitutional concept of "matter" being a controversy about legal rights existing independently of the forum in which that controversy might be adjudicated. A number of cases I have either referred to or cited have looked at a closely related question of whether the relevant tribunal was exercising judicial power or to use the phrase referred to by Gageler J, "State judicial power",[94] to determine a particular type of "matter". Broadly, that inquiry involves looking at whether the tribunal is determining a "matter" and *how* it is determining the "matter", that is, whether the tribunal is empowered to make an order binding on the parties as to their rights.[95] Often the orders of a tribunal can be registered with a court and become binding as such.[96] As I said, *Brandy* held that it is sufficient to amount to an exercise of judicial power.[97]

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[94] *Burns v Corbett* at [119].

[95] *Gatsby* at [123]−[128] per Bathurst CJ (Beazley P agreeing at [197]; McColl JA agreeing at [198]; Leeming JA agreeing at [279]): "settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation", citing *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361; [1970] HCA 8 at 374; see also "State Tribunals and the Federal Judicial System" (n 75) at 199.

[96] *Civil and Administrative Tribunal Act 2013* (NSW) s 78(1)−(3).

[97] *Brandy* at 259−260 and 264 per Mason CJ, Brennan and Toohey JJ; 270−271 per Deane, Dawson, Gaudron and McHugh JJ; Hill suggests that the effect of *Burns v Corbett* can be avoided by not having tribunal orders registered in a court but instead providing that the amount payable under an order can be recovered in a court of competent jurisdiction and otherwise making it an offence to contravene an

Drawing the distinction between whether a tribunal is exercising judicial power and determining a matter, on the one hand, or determining some other form of dispute and only exercising administrative power, on the other hand, can be difficult.

A practical illustration of how this distinction operates upon State legislation can be derived from contrasting the NSW Court of Appeal's decision in *Gatsby,* which found that NCAT was not a "court of a State", with a 1997 High Court decision concerning a predecessor to the *Residential Tenancies Act 2010* (the "2010 Act"), namely, *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* ("Residential Tenancies Tribunal").[98]

Gatsby held that NCAT's determination of an application under the 2010 Act for an order terminating a residential tenancy agreement and issuing of an order compensating a landlord for the costs of cleaning and repairing premises involved the exercise of judicial power (and by extension involved the determination of a "matter").[99] In *Residential Tenancies Tribunal*, an order had been sought under the 1987 version of the 2010 Act[100] authorising a landlord to enter premises[101] and obtain a key to the premises from the tenant.[102] Those "orders" only took effect as terms of the residential tenancy agreement and were enforceable via prosecutions in a court for breaches of the Act.[103] An application for those orders was found by the High Court not to invoke a judicial proceedings[104] or involve a suit between parties in a court.[105] It would follow that they did not involve the exercise of judicial power to determine a "matter".

The statutory provisions considered in *Residential Tenancies Tribunal*[106] were carried over into the 2010 Act and still exist today.[107] What this means is that some applications to NCAT under the 2010 Act involve the exercise of judicial power and the determination

order of the tribunal: "State Tribunals and the Federal Judicial System" (n 75) at 215. As for the former suggestion see (n 60).

[98] (1997) 190 CLR 410; [1997] HCA 36.

[99] *Gatsby* at [124]−[137] per Bathurst CJ (Beazley P agreeing at [197]; McColl JA agreeing at [198]; Leeming JA agreeing at [279]). The South Australian Court of Appeal reached a similar conclusion in relation to the power granted by VCAT to grant possession of premises which could be suspended if such possession would cause severe hardship: *Attorney-General (SA) v Raschke* (2019) 133 SASR 215; [2019] SASCFC 83.

[100] *Residential Tenancies Act 1987* (NSW).

[101] Ibid s 24(1)(h).

[102] Ibid s 29(1)(c).

[103] Ibid s 125.

[104] *Residential Tenancies Tribunal* at 448 per Dawson, Toohey and Gaudron JJ; 474 per Gummow J.

[105] Ibid 460−461 per McHugh J.

[106] Other than those which created the offence.

[107] *Residential Tenancies Act 2010* (NSW) ss 55(1)(e), 59 and 72(1)(b).

of a "matter", and some do not. In practical terms, if you are an interstate landlord, you can apply to NCAT to have your NSW tenant provide you with a key but you must go the Local Court for an order for possession.

The necessity to have a State tribunal exercising judicial power before *Burns v Corbett* is engaged might be a reason why any concern about that decision's effect on the operation of State tribunals is overstated.[108] However, that may be a matter of perspective, one being that of litigants. I have already commented on the position of a hypothetical tenant and landlord and their imputed knowledge of federal jurisdiction; it seems that knowledge must extend to an understanding of what is judicial power, what is a "matter" and what is not. In some cases that may be clear cut but in others it will not, especially when those who drafted the legislation were not tuned into the significance of the distinction.

Matter Arising Under a Law of the Parliament

So that is "matter" and judicial power, but what about the types of matters arising in federal jurisdiction? I referred to them earlier, but I will address "a matter arising under a law of the Commonwealth Parliament".

A series of decisions over a century have reinforced the width and strength of that concept. I have already noted the effect of some of those cases so that, for example, a "matter" can "arise" under the law of the Commonwealth Parliament if the law is relied on as the source of a claim or a defence asserted in a legal controversy,[109] once such an assertion is raised the whole "matter" or controversy is federal.[110] Once federal jurisdiction arises, it never goes away.[111]

The present significance of this type of federal jurisdiction is that it corresponds with a head of original jurisdiction conferred on the Federal Court.[112] This means that it is solely within the power of the Commonwealth Parliament to expand or contract the scope of this type of "matter" and that the primary court tasked with interpreting the phrase is the Federal Court as it determines the scope of its own jurisdiction. Post *Burns v Corbett*, this

[108] See, for example, *Searle v McGregor* [2022] NSWCA 213 at [10]−[13].
[109] *Citta* at [31].
[110] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [2001] HCA 1 at [7].
[111] "Federal Jurisdiction and the Jurisdiction of the Federal Court" (n 49) at 45.
[112] *Judiciary Act 1903* (Cth) s 39B(1A)(c), other than in respect of criminal matters.

occurs in circumstances where every expansion of federal jurisdiction reduces the jurisdiction of State tribunals.

I referred earlier to the different wavelengths that the various constitutional radars were tuned into when *Metwally* was decided. Many of the authoritative statements concerning the nature and scope of federal jurisdiction were uttered at a time when it was not seen that a determination that something fell within federal jurisdiction necessarily had a destructive effect on any repository of state power. Courts are generally not shy in determining their own jurisdiction and the federal courts are no exception. In the past, a decision by a federal court that it had jurisdiction over a particular subject matter was not generally seen as having any negative implications. However, post *Burns v Corbett,* decisions on the scope of federal jurisdiction have become a zero-sum game. An asymmetry exists with federal courts deciding their own jurisdiction such that when it expands, the jurisdiction of State tribunals is diminished. To paraphrase Dylan,[113] every time a little bit of federal jurisdiction is busy being born, some part of the jurisdiction of State tribunals is busy dying.

The most extreme example of this phenomenon appears to have been cut off at the pass. A number of Federal Court judgments suggested that any proceeding involving a corporation constituted a matter arising under the *Corporations Act 2001* (Cth), being a law of the Commonwealth Parliament.[114] After much consideration, the Victorian Court of Appeal rejected that contention,[115] and the NSW Court of Appeal recently agreed.[116] If the contention had been upheld, then the jurisdiction of many State tribunals would have been significantly reduced.

Conclusion

The outcome in *Burns v Corbett* was not a surprise to all, and perhaps should have been anticipated by many. That said, *Burns v Corbett* appears to necessitate a recalibration, or

[113] Bob Dylan, "It's Alright, Ma (I'm Only Bleeding)" (1965).
[114] *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583 at [16]; *Mulley v Hayes* (2021) 286 FCR 360; [2021] FCA 1111 at [55]; *Hafertepen v Network Ten Pty Ltd* [2020] FCA 1456 at [44] per Katzmann J.
[115] *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226.
[116] *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2023] NSWCA 56 at [13] per Leeming JA (Mitchelmore JA agreeing at [70]). The Federal Court has also rejected it: *DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission (No 3)* [2021] FCA 1041 at [16].

at least a revised consciousness, on the part of various stakeholders. I have already mentioned litigants and those who draft State legislation. In addition, policymakers and those responsible for State court and tribunals are faced with the potential for either a trickle or a large flow of cases from State tribunals to the courts in circumstances where the Commonwealth largely controls the tap. If the number of cases proves significant, how will the courts respond? Will there be an attempt to vest them with more flexible means of determining these cases and, if there is, will *Kable* prevent that happening? Will this have any effect on the approach of the Commonwealth? The potential for the Commonwealth Parliament to legislate on a series of subject matters that will result in many cases currently before State tribunals falling within federal jurisdiction is considerable. Any ordinary personal injury compensation case or claim for compensation for breaches of State anti-discrimination laws has the potential to raise an issue concerning taxation, social security, the NDIS or workplace relations. Does the Commonwealth have a policy interest in how and where such claims are determined within the State systems?

Once the discussion turns to those who draft legislation, to those responsible for implementing it, and to those who evaluate whether it works, then it means that it is time for me to stop talking.

To return to Professor Whitmore's observation, turning tribunals into courts has such renewed vigour that it now appears to be a constitutional imperative. Contrary to Mr Doyle's prediction, civil litigation in the federal and state courts is very much here to stay.

Thank you for attending.

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