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The High Court's decision in *Burns v Corbett*

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The effect of *Burns v Corbett*

- ” Which tribunals are affected?
 - . **State** tribunals that exercise **judicial power** and that are **not courts**.
- ” What is the effect?
 - . A State tribunal that is not a court cannot exercise judicial power in matters of the kinds identified in ss 75 and 76 of the Constitution.

Are Territory tribunals affected?

“ First possibility:

- . All Territory judicial power is federal judicial power.
- . Therefore non-judicial Territory tribunals cannot exercise judicial power.
- . Therefore *Burns v Corbett* does not affect Territory tribunals.

“ Second possibility:

- . Territory tribunals were not considered in *Burns v Corbett*.
- . Territory tribunals may be in some special, different position.

Are Territory tribunals affected?

” Third possibility:

- . Territory tribunals *can* exercise judicial power.
- . *Burns v Corbett* applies to Territory tribunals in the same way as to State tribunals.
- . This is because *Burns v Corbett* establishes that judicial power in ss 75/76 matters cannot be exercised by *any* non-judicial body.

Some terminology

- “ *Federal jurisdiction* = the authority to decide conferred by the Constitution or by Commonwealth laws.
- “ *State jurisdiction* = the authority to decide conferred by State laws.
- “ ‘*Federal matters*’ = matters of the kinds identified in ss 75 and 76, irrespective of the source of jurisdiction.
- “ ‘*Non-judicial tribunal*’ = a tribunal that is not a court.

The effect of *Burns v Corbett*

- ” A State tribunal that is not a court cannot exercise judicial power in ‘federal matters’.
- ” Technical elements:
 - . ‘Federal matters’
 - . Judicial power
 - . Not a court



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‘Federal matters’

Constitution s 75

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:

the High Court shall have original jurisdiction.

Constitution s 76

The Parliament may make laws conferring original jurisdiction on the High Court in any matter

- (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.

Section 75(iv)

Matters ... between residents of different States...

“Eg Burns v Corbett

*“Note: a corporation is not a ‘resident’ of a State:
Australasian Temperance and General Mutual Life
Assurance Society Ltd v Howe (1922) 31 CLR 290.*

Section 76(ii)

Matters arising under any laws made by the Parliament

“Qantas Airways Ltd v Lustig (2015) 228 FCR 148

Section 75(iii)

Matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party

“Commonwealth v Anti-Discrimination Tribunal (2008)
169 FCR 85

Section 76(i)

Matters arising under this Constitution, or involving its interpretation

"Owen v Menzies [2013] 2 Qd R 327

"Sunol v Collier (2012) 81 NSWLR 619



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Judicial power

Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330

” Griffith CJ at 357:

[T]he words ‘judicial power’ as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

Tribunals and judicial power

- “ Many powers conferred on tribunals are ‘chameleon powers’.
- “ Enforcement mechanism whereby tribunal orders are registered in a court may indicate judicial power: see *Brandy v HREOC* (1995) 183 CLR 245.
- “ A recent case: *Zistis v Zistis* [2018] NSWSC 722.



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Courts

Some non-exhaustive relevant factors

- “ Whether the body is designated as a ‘court of record’
- “ Whether it is constituted by judges (and the related question of how the independence and impartiality of its members are protected)
- “ Whether it exercises judicial power
- “ Whether it has powers commonly possessed by courts

Compare *Johnson v Dibbin* [2018] NSWCATAP 45 and *Zistis v Zistis* [2018] NSWSC 722



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Options for State tribunals after *Burns v Corbett*

Option 1: Business as usual

- “ State non-judicial tribunals can continue exercising judicial power, but will lack jurisdiction in ‘federal matters’.

Option 2: Express exception to jurisdiction

- “ Legislation conferring jurisdiction on a tribunal could carve out an exception for ‘federal matters’.

Option 3: No judicial power for tribunals

Option 4: Tribunals become courts

- “ Every State court is vested with federal jurisdiction:
Judiciary Act 1903 (Cth) s 39.
- “ State courts are subject to the principle from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

Option 5: Federal matters to be referred to a State court

- “ A State non-judicial tribunal could continue to exercise judicial power.
- “ Any federal matters that came before the tribunal could be referred to a State court.

Option 6: Exception to judicial power

- “ A non-judicial tribunal may continue to exercise judicial power, *except* in federal matters.
- “ In federal matters, the tribunal exercises only non-judicial power.

Option 7: Hybrid tribunal

- “ A tribunal could have a judicial and a non-judicial section.
- “ See, eg, the former New South Wales Industrial Commission/Industrial Court of New South Wales; and the South Australian Employment Tribunal.
- “ The non-judicial section could exercise judicial power.
- “ Federal matters would be determined by the judicial section.
- “ Part-heard federal matters in the non-judicial section could be transferred to the judicial section.