

***BURNS V CORBETT* (2018) 353 ALR 386
TRIBUNALS AND TRIBULATIONS: EXAMINING
THE CONSTITUTIONAL LIMITS ON THE
JURISDICTION OF STATE TRIBUNALS**

I INTRODUCTION

In *Burns v Corbett*,¹ the High Court had the opportunity to address an issue which has been on the horizon for some time: the limits on the powers of state tribunals.²

The question before the Court — whether state tribunals could exercise jurisdiction in ‘federal matters’ of the kind in ss 75 and 76 of the *Constitution*³ — was answered in the negative. It was found that the Civil and Administrative Tribunal of New South Wales (‘NCAT’)⁴ did not have jurisdiction over matters between residents of different states (‘diversity jurisdiction’).⁵ Aside from providing much-needed clarity on a vexed constitutional question, the decision has broader implications for state tribunals, impacting a range of areas involving ‘federal matters’, including residential tenancy, anti-discrimination disputes, and other civil claims.

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¹ (2018) 353 ALR 386.

² See, eg, *A-G (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62; *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77; *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85; *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148.

³ Section 77(iii) of the *Constitution* enables Parliament to invest state courts with federal jurisdiction with respect to any of the matters in ss 75 and 76. Section 75 includes matters arising under any treaty, in which the Commonwealth is a party, between residents of different states, and in which a prerogative writ is sought against an officer of the Commonwealth. Section 76 includes any matter arising under the Constitution, arising under any laws made by the Parliament, of Admiralty and maritime jurisdiction, and relating to the same subject-matter claimed under the laws of different States.

⁴ Previously known as the NSW Administrative Decisions Tribunal (‘ADT’): *Burns v Corbett* (n 1) 393 [9]. However, the ADT was abolished on 1 January 2014 by the *Civil and Administrative Tribunal Act 2013* (NSW) sch 1 cl 3, and NCAT was established by s 7 of that Act.

⁵ See *Constitution* s 75(iv).

II FACTS

In 2013, Therese Corbett (a political aspirant residing in Victoria) made a number of controversial statements which were published on the front page of the *Hamilton Spectator*. This included allegations that people ‘should be able to discriminate’ and that she wanted no ‘gays, lesbians or paedophiles working in [her] kindergarten’.⁶ Senate Candidate Bernard Gaynor (a Queensland resident) publicly endorsed the statements.⁷ Gary Burns, an anti-discrimination activist residing in New South Wales, complained that the statements were public acts vilifying homosexuals contrary to s 49ZT of the *Anti-Discrimination Act 1977* (NSW).⁸ Both Ms Corbett and Mr Gaynor contended that NCAT did not have jurisdiction to determine the disputes.⁹

III PROCEEDINGS IN THE COURT OF APPEAL

The threshold issue before the New South Wales Court of Appeal was whether NCAT had jurisdiction to hear and determine a dispute arising under New South Wales legislation, between residents of different states.¹⁰ The Court of Appeal found no constitutional implication preventing state Parliaments from conferring diversity jurisdiction on state tribunals.¹¹ However, the Court held that any state law purporting to have that effect would be inconsistent with s 39(2) of the *Judiciary Act 1903* (Cth) (*‘Judiciary Act’*), and therefore invalid by operation of s 109 of the *Constitution*.¹²

Mr Burns, the State of New South Wales and the Attorney-General for New South Wales each appealed by special leave to the High Court.¹³ The Attorneys-General of Queensland, Tasmania, Victoria and Western Australia also intervened in support of New South Wales.¹⁴

⁶ *Burns v Corbett* [2013] NSWADT 227, [17]–[19].

⁷ Bridget Judd, ‘Former KAP Candidate Tess Corbett Faces Contempt of Court Over Comments Vilifying Homosexuals’, *ABC News* (online, 19 January 2016) <<https://www.abc.net.au/news/2016-01-19/former-kap-candidate-tess-corbett-faces-contempt-court/7098838>>.

⁸ *Burns v Corbett* (n 1) 392 [6].

⁹ *Ibid* 393 [12]–[13], 430 [155].

¹⁰ *Burns v Corbett* (2017) 96 NSWLR 247, 250 [3] (Leeming JA).

¹¹ *Ibid* 262 [58].

¹² *Ibid* 270 [95]–[97].

¹³ Transcript of Proceedings, *Burns v Gaynor* [2017] HCATrans 136.

¹⁴ *Burns v Corbett* (n 1) 397 [33].

IV ISSUES

On appeal, it fell to the High Court to determine two issues:

- (1) the **implication issue** — whether the *Constitution* precludes state Parliaments from conferring diversity jurisdiction on a state tribunal; and
- (2) the **inconsistency issue** — in the alternative, whether a state law purporting to confer such jurisdiction on a tribunal is rendered inoperative by s 109 of the *Constitution*, for inconsistency with s 39 of the *Judiciary Act*.¹⁵

V DECISION OF THE HIGH COURT

The High Court (Kiefel CJ, Bell and Keane JJ; Gageler J agreeing on the implication issue; and Nettle J, Gordon J and Edelman J agreeing with the result in separate judgments) unanimously dismissed the appeals. Four of the seven judges held that there is an implied limitation under Ch III of the *Constitution*, which prevents a state law from conferring diversity jurisdiction on state tribunals.¹⁶ The resulting judgments have been described as a ‘smorgasbord of diverging constitutional reasoning’.¹⁷

A *The Majority Position*

1 *Joint Judgment*

Chief Justice Kiefel and Bell and Keane JJ held that the implication issue had to be decided affirmatively, and that it was therefore unnecessary to resolve the inconsistency issue.¹⁸

Their Honours began by canvassing the negative implications of Ch III of the *Constitution*,¹⁹ acknowledging the ‘autochthonous expedient’ which allows the use of state courts as repositories of federal jurisdiction.²⁰ As Ch III restricts the scope of adjudicative authority that the Commonwealth Parliament may confer in relation

¹⁵ Ibid 391 [1].

¹⁶ Ibid 391 [2] (Kiefel CJ, Bell and Keane JJ), 406 [68] (Gageler J).

¹⁷ Talitha Fishburn, ‘Constitutional Law and Tribunals: High Court Leaves NCAT Standing with “No Standing” for Interstate Party Disputes’ [2018] (45) *Law Society Journal (NSW)* 90, 90; see also Stephen McDonald, ‘Burns v Corbett: Courts, Tribunals and a New Implied Limit on State Legislative Power’, *AUSPUBLAW* (Blog Post, 7 May 2018) <<https://auspublaw.org/2018/05/burns-v-corbett-courts-tribunals/>>.

¹⁸ *Burns v Corbett* (n 1) 392 [4]–[5].

¹⁹ Ibid 398 [41].

²⁰ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*‘Boilermakers’*).

to matters under ss 75 and 76 of the *Constitution*,²¹ any state law purporting to authorise a non-court body to determine such a dispute would be invalid.²²

In response to the arguments advanced by New South Wales and the interveners, their Honours reformulated the rhetorical question posed by the majority in *Boilermakers*:²³

what reason could there be in treating the arrangements made by Ch III for the adjudication of matters listed in ss 75 and 76 as an exhaustive statement only of the adjudicative authority that just happens to be exercised by the courts capable of comprising the federal judicature...?²⁴

According to the majority, there was ‘no good answer’ to this question and they concluded that

[t]he terms, structure and purpose of Ch III leave no room for the possibility that [federal judicial power] ... might be exercised by ... an organ of government, federal or State, other than a court referred to in Ch III of the *Constitution*.²⁵

The historical context and purpose of Ch III shed further light on the question.²⁶ The framers had sufficient confidence in the integrity of the Australian courts so as to confer federal jurisdiction on state courts by legislation made pursuant to s 77(iii), representing a divergence from the Constitution of the United States.²⁷ Their Honours held that the fact that state administrative bodies *did* exercise judicial power at the time of Federation was not decisive in interpreting Ch III.²⁸

Consequently, ss 28(2)(a) and 32 of the *Civil and Administrative Tribunal Act 2013* (NSW) were deemed invalid, and read down to the extent that they conferred jurisdiction on NCAT in relation to matters between residents of different states.²⁹

²¹ ‘Matters of specially federal concern’: John Quick and Robert Randolph Garran, *The Annotated Constitution of the Commonwealth* (Legal Books, 1901) 724.

²² *Burns v Corbett* (n 1) 399 [43].

²³ *Boilermakers* (n 20) 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²⁴ *Burns v Corbett* (n 1) 400 [46].

²⁵ *Ibid.*

²⁶ See generally William G Buss, ‘Andrew Inglis Clark’s Draft Constitution, Chapter III of the Australian Constitution and the Assist from Article III of the Constitution of the United States’ (2009) 33(3) *Melbourne University Law Review* 718, 737; Geoffrey Lindell, *Cowen and Zines’ Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 253.

²⁷ *Burns v Corbett* (n 1) 403 [56].

²⁸ *Ibid* 405 [62]–[63].

²⁹ *Ibid* 406 [64].

2 *Justice Gageler*

Justice Gageler agreed with the conclusion and substantially with the reasoning of the majority on the implication issue.³⁰ His Honour held that the exception to state conferral of judicial power on a state tribunal, for matters contained in ss 75 and 76, was warranted ‘as a structural implication from Ch III’.³¹

With respect to the inconsistency issue, Gageler J emphasised the importance of demonstrating how the state law would ‘alter, impair or detract from’ the operation of s 39(2) of the *Judiciary Act*.³² The legislative power conferred by s 77(iii) went no further than investing a state court with federal jurisdiction.³³ Absent any identifiable source of legislative power to exclude the adjudicative authority of non-court state tribunals, his Honour found no s 109 inconsistency.³⁴

In considering the implication issue, Gageler J reinforced the requirement for implying a constitutional limitation on legislative power: that it be ‘logically or practically necessary for the preservation of the integrity of [the constitutional] structure’.³⁵ His Honour’s support for a constitutional implication was strengthened by the ‘absence of Commonwealth legislative power to achieve the same result’.³⁶ According to Gageler J, if the Ch III implication were not drawn, this would leave an unplugged ‘hole in the structure of Ch III’.³⁷ Specifically, Ch III allows Parliament to enact laws enabling state courts to exercise federal jurisdiction.³⁸ Permitting a possible extension of this jurisdiction to state tribunals, which need not possess the minimum characteristics required of Ch III courts, would undermine that system.³⁹

B *The Minority Judgments — Nettle J, Gordon J and Edelman J*

In three separate judgments, the minority⁴⁰ declined to recognise any constitutional implication imposing limitations on state tribunals.⁴¹ Instead, their Honours’

³⁰ Ibid 406 [69].

³¹ Ibid 406 [68].

³² Ibid 412 [91].

³³ Ibid 413 [92].

³⁴ Ibid 411 [84].

³⁵ Ibid 414 [94], quoting *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

³⁶ Ibid 414 [95].

³⁷ Ibid.

³⁸ Ibid 414 [96].

³⁹ Ibid 415 [99].

⁴⁰ For ease of reference, the remaining justices (Nettle J, Gordon J, and Edelman J) are referred to as ‘the minority’ throughout this case note, despite their Honours agreeing with the orders proposed by the majority.

⁴¹ *Burns v Corbett* (n 1) 426 [137] (Nettle J), 435 [176] (Gordon J), 442 [205] (Edelman J).

reasoning accorded with that of the Court of Appeal: that s 39(2) of the *Judiciary Act* evinced an intention to exclude state tribunals from adjudicating federal matters.⁴²

Justice Nettle agreed with Gordon J's conclusions, offering separate reasons.⁴³ After reviewing the competing views on the operation of s 39(2),⁴⁴ his Honour held that the power contained in s 77(iii), to invest state courts with federal jurisdiction, imported with it an *implied* power to exclude the jurisdiction of state tribunals.⁴⁵ This essentially relied on the same reasons articulated by the majority to find the Ch III implication — to avoid rendering Parliament powerless to prevent non-court state tribunals from adjudicating federal matters outside of the integrated judicial system.⁴⁶ His Honour held that s 39(2) of the *Judiciary Act*, as an exercise of that implied power, invalidated any state legislation purporting to vest federal jurisdiction in a tribunal on the basis of a s 109 inconsistency.⁴⁷

In a similar vein, Gordon J held that state Parliaments cannot vest diversity jurisdiction in administrative tribunals.⁴⁸ The enactment of the *Judiciary Act* conferred exclusive jurisdiction on the High Court with respect to the matters in ss 75 and 76, and conditionally reinvested that jurisdiction in state courts, making the source of their jurisdiction exclusively federal.⁴⁹ Her Honour rejected the Commonwealth's primary submission (advanced by notice of contention) that there is an implied constitutional limit on legislative power, pointing out from the terms of s 77(ii) 'that "federal control" over jurisdiction in relation to those matters is not pre-ordained by the *Constitution*, whether in s 77 or elsewhere'.⁵⁰ On the inconsistency question, Gordon J set out the rationale behind s 109,⁵¹ finding that s 39 was intended to facilitate federal control over the exercise of federal jurisdiction by state courts.⁵² Accordingly, her Honour concluded that the provisions of the *Anti-Discrimination Act 1977* (NSW) purporting to confer jurisdiction on NCAT in relation to these matters were invalid for inconsistency.⁵³

⁴² Ibid 428 [145] (Nettle J), 440 [192] (Gordon J), 457 [252] (Edelman J).

⁴³ Ibid 421 [123].

⁴⁴ Ibid 424 [131], citing *Felton v Mulligan* (1971) 124 CLR 367, 412 (Walsh J) ('*Felton*'); cf *Commonwealth v Queensland* (1975) 134 CLR 298, 327–8 (Jacobs J).

⁴⁵ *Burns v Corbett* (n 1) 426 [139], 427 [141].

⁴⁶ Ibid 427 [140].

⁴⁷ Ibid 428 [145]–[146].

⁴⁸ Ibid 429 [148].

⁴⁹ Ibid 429 [150], citing *Felton* (n 44) 412–13; *Burns v Corbett* (n 1) 432 [164].

⁵⁰ *Burns v Corbett* (n 1) 436 [179].

⁵¹ Ibid 439 [189].

⁵² Ibid 440 [192]–[193].

⁵³ Ibid 441 [199].

Justice Edelman, on the other hand, did not need to have recourse to s 109.⁵⁴ His Honour accepted that ss 38 and 39 of the *Judiciary Act* could invalidate the conferral of diversity jurisdiction on any body other than a state court,⁵⁵ but construed this as a direct exercise of the power to exclude in s 77(ii) of the *Constitution*.⁵⁶ Importantly, Edelman J's reasoning avoided the difficulties inherent in the reasons of Nettle J and Gordon J. Their Honours had relied upon an 'incidental power'⁵⁷ as the source of the power to exclude the jurisdiction of non-court state tribunals. This appears to exceed the express limits of the s 77(ii) power, namely to exclude the jurisdiction of state courts.⁵⁸ Justice Edelman concluded that by avoiding any constitutional implication, he had avoided a significant practical dilemma: the requirement of a referendum should that legislative power need to be returned to the states.⁵⁹

VI COMMENT

A Gap in Jurisdiction?

A number of consequences arise from the decision in *Burns v Corbett*. First, state tribunals can continue to exercise state judicial power. It is only the exercise of judicial power in relation to 'federal matters' of which state tribunals are deprived.⁶⁰

Whilst the decision reaffirms that there is no strict separation of powers at state level,⁶¹ the implication established by the majority has potential relevance, albeit indirectly, to the *Kable* incompatibility doctrine.⁶² In particular, the rationale behind the *Kable* doctrine has previously been that state courts must remain 'fit receptacles for the investing of federal jurisdiction',⁶³ meaning that they cannot be given functions incompatible with the exercise of federal judicial power.⁶⁴ However, the concept of 'federal jurisdiction' merely refers to the *source* of adjudicative authority,⁶⁵ not to

⁵⁴ Ibid 443 [208].

⁵⁵ Ibid 457 [252].

⁵⁶ Ibid 457 [254].

⁵⁷ Ibid 427 [141] (Nettle J), 441 [196]–[197] (Gordon J).

⁵⁸ McDonald (n 17).

⁵⁹ *Burns v Corbett* (n 1) 458–9 [260].

⁶⁰ Ibid 395 [21], 396 [27]; see also *Qantas Airways Ltd v Lustig* (n 2).

⁶¹ Anthony J Connolly, *The Foundations of Australian Public Law; State, Power, Accountability* (Cambridge University Press, 2017) 258; *Gilbertson v South Australia* [1978] AC 772, 783; *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

⁶² *Kable* (n 61) 103 (Gaudron J), 116–17 (McHugh J), 135, 143–4 (Gummow J).

⁶³ *Forge v ASIC* (2006) 228 CLR 45, 82 [82] (Gummow, Hayne and Crennan JJ); *Northern Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

⁶⁴ See Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power Over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15, 21, 24.

⁶⁵ See Stephen McDonald, "'Defining Characteristics" and the Forgotten "Court"' (2016) 38(2) *Sydney Law Review* 207, 210–11.

the *nature* of the jurisdiction being exercised. The majority's reasoning in *Burns v Corbett* — that only the judicial organs identified in Ch III may exercise jurisdiction over the matters contained in ss 75 and 76 of the *Constitution* — may signal a subtle shift in the justification for the *Kable* doctrine. Rather than needing to be fit repositories for federal jurisdiction, it can now be said that state courts (but not non-court state tribunals) must retain their independence and impartiality so as to remain suitable organs to exercise judicial power in 'matters of specially federal concern',⁶⁶ irrespective of the *source* of that jurisdiction.

Further, tribunals occupy a more prominent position in our system of government today.⁶⁷ Consequently, the decision in *Burns v Corbett* has the potential to disrupt the workings of state tribunals by leaving a jurisdictional gap.⁶⁸ Prima facie, this may have far-reaching consequences, particularly given that many low-level disputes between members of the public are dealt with by these tribunals.⁶⁹ As the submissions for the Attorney-General of Queensland highlighted, the subject matters in ss 75 and 76 cut across a wide range of areas and 'may arise in potentially any topic...'.⁷⁰ However, it should be remembered that the dispute must involve an exercise of federal *judicial power*.⁷¹ In the context of a dispute between residents of different states, where the power being exercised is administrative in nature, the jurisdiction of state tribunals would likely remain unaffected.⁷²

⁶⁶ *Burns v Corbett* (n 1) 394 [17], 401 [49]–[51] (Kiefel CJ, Bell and Keane JJ).

⁶⁷ See Garry Downes, 'Tribunals in Australia: Their Roles and Responsibilities' [2004] (84) *Australian Law Reform Commission Reform Journal* 7, 9; Michael Barker, 'The Emergence of the Generalist Administrative Tribunal in Australia and New Zealand' (Speech, Australian Institute of Judicial Administration Conference, 9–10 June 2005) 2–4.

⁶⁸ See generally David Rowe, 'State Tribunals Within and Without the Integrated Federal Judicial System' (2014) 25(1) *Public Law Review* 48, 58.

⁶⁹ Anna Olijnyk and Stephen McDonald, 'State Tribunals, Judicial Power and the Constitution: Some Practical Responses' (2018) 29(2) *Public Law Review* 104, 105; Neil Foster, 'High Court Upholds Rejection of Inter-State Vilification Orders', *Law and Religion Australia* (Blog Post, 18 April 2018) <<https://lawandreligionaustralia.blog/2018/04/18/high-court-upholds-rejection-of-inter-state-vilification-orders/>>.

⁷⁰ A-G (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, *NSW v Burns*, S188/2017, 24 August 2017, [38].

⁷¹ See, eg, 'Disputes Where One Party is Interstate', *South Australian Civil and Administrative Tribunal* (Web Page, July 2018) <http://www.sacat.sa.gov.au/upload/FINAL_FDJ_FAQ%20sheet_v18.7.18.pdf>.

⁷² An example is a dispute that may arise between residents of different States in relation to a proposed order under the *Guardianship and Administration Act 1993* (SA), which is essentially administrative in nature: see David Bleby QC, *2017 Statutory Review: South Australian Civil and Administrative Tribunal* (Report, 1 August 2017) 89.

Interestingly, in *Burns v Corbett* the parties had accepted it as uncontroversial that NCAT was not a ‘court of a State’.⁷³ Accordingly, the High Court did not need to conclusively resolve the question of whether NCAT (or other state tribunals) can properly be characterised as ‘State courts’ within the meaning of Ch III,⁷⁴ so as to have valid jurisdiction in federal matters. In the interim, a decision of the Appeal Panel of NCAT brought that conclusion into question.⁷⁵ More recently, the New South Wales Court of Appeal definitively held that NCAT is *not* a ‘court of a State’ for the purposes of Ch III of the *Constitution*.⁷⁶ By contrast, the Queensland Civil and Administrative Tribunal has been considered a ‘court’ of the State for the purposes of s 77(iii).⁷⁷ Thus what the decision in *Burns v Corbett* leaves is an unresolved question which has already been met with differing responses on a state-by-state basis.

B *Affected Parties*

Aside from offering a comprehensive judicial commentary on federalism, the decision also has tangible practical implications.⁷⁸ Although *Burns v Corbett* was specifically concerned with a matter ‘between residents of different states’ under s 75(iv) of the *Constitution*,⁷⁹ it necessarily invites a more detailed consideration of the precise *nature* of the jurisdiction being exercised in any given case.

One area that will certainly be affected is residential tenancy disputes. In the wake of the High Court’s decision, where a tenant is resident in one state but their landlord resides in another, the dispute becomes one of federal jurisdiction and must be heard by a Ch III Court.⁸⁰ Illustrative of this was a recent decision in South Australia, *Raschke v Firinauskas*, which involved an application for vacant possession by the

⁷³ *Burns v Corbett* (n 1) 398 [39].

⁷⁴ See, eg, Geoffrey Kennett, ‘Fault Lines in the Autochthonous Expedient: The Problems of State Tribunals’ (2009) 20(2) *Public Law Review* 152, 157–8.

⁷⁵ See *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45; cf *Zistis v Zistis* [2018] NSWSC 722, [68]–[72] (Latham J).

⁷⁶ *A-G (NSW) v Gatsby* (2018) 361 ALR 570, 603–4 [184]–[190] (Bathurst CJ), 606 [201] (McColl JA).

⁷⁷ Alan Robertson, ‘The Importance of Federal Jurisdiction’ (Conference Paper, Australian Bar Association Conference, 5 July 2017) 15, citing *Owen v Menzies* [2013] 2 Qd R 327.

⁷⁸ *Fishburn* (n 17) 90.

⁷⁹ *Burns v Corbett* (n 1) 398 [38].

⁸⁰ ‘Frequently Asked Questions About the Impact of the Decisions of *Burns v Corbett* and *Raschke v Firinauskas*’, *South Australian Civil and Administrative Tribunal* (Information Sheet, 15 June 2018) <<http://www.sacat.sa.gov.au/upload/FAQ%20-%20impact%20of%20the%20decisions%20in%20Burns%20v%20Corbett%20and%20Raschke%20v%20Firinauskas.pdf>>; Eliza M Bergin, ‘Does the Tribunal Have Jurisdiction? Implications of a Recent High Court Decision Regarding Residents of Different States’, *Word Press* (Blog Post, 21 June 2018) <https://elizambergin.wordpress.com/2018/06/21/does-the-tribunal-have-jurisdiction-implications-of-a-recent-high-court-decision-regarding-residents-of-different-states/#_ftnref3>.

landlord who was an interstate resident.⁸¹ The Tribunal considered that it did not have jurisdiction to decide the dispute, where the exercise of that jurisdiction was *judicial* rather than administrative:

The nature of the task of the Tribunal is to supervise the compliance of the parties with the terms of their agreement and make orders that largely mimic the remedies that flow from the enforcement of the agreement as if it were the subject of a contractual dispute in a court.⁸²

Importantly, the issue as to jurisdiction in *Burns v Corbett* was expressed in terms of matters involving residents in different *states*. State tribunals may continue to have jurisdiction in matters involving a resident of a territory or a party living overseas (there being only one state involved).⁸³

Further, a corporation is not considered a ‘resident’ of a state within the meaning of s 75(iv),⁸⁴ meaning that the decision does not affect the jurisdiction of state tribunals to deal with applications in which one party is a corporate entity or organisation operating from another state. As such, the limits on state tribunals articulated in *Burns v Corbett* are somewhat diluted in the context of commercial lease disputes across different states (such as strata schemes),⁸⁵ given that one of the parties will likely be an owners’ corporation, building manager, developer, construction company or similar.⁸⁶ Nonetheless, caution should be exercised before parties commence tribunal proceedings to resolve such disputes, as (similar to residential tenancy disputes) they have the potential to attract the jurisdictional limitations imposed by *Burns v Corbett*.⁸⁷

C Possible Reform

The High Court’s decision confirms that state tribunals cannot exercise judicial power in respect of matters involving federal jurisdiction.⁸⁸ However, as this case

⁸¹ [2018] SACAT 19.

⁸² *Ibid* [27].

⁸³ Grant Arbuthnot, ‘The Gap in NCAT’s Jurisdiction and What It Means for Tenancy’, *Tenants NSW* (Web Page, November 2018) <<https://www.tenants.org.au/resource/gap-ncats-jurisdiction-and-what-it-means-tenancy>>.

⁸⁴ *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290.

⁸⁵ See generally ‘Buying Into a Strata Scheme’, *Fair Trading NSW* (Web Page, 20 July 2018) <<https://www.fairtrading.nsw.gov.au/housing-and-property/buying-and-selling-property/buying-a-property/buying-into-a-strata-scheme>>.

⁸⁶ See, eg, ‘Interstate Disputes — Does NCAT Have Jurisdiction?’, *Bannermans Lawyers* (Information Sheet, 21 June 2018) <<http://www.bannermans.com.au/strata/articles/ncat-and-court-proceedings/654-interstate-disputes-does-ncat-have-jurisdiction>>.

⁸⁷ See, eg, House of Assembly, Parliament of South Australia, *Government Response to 81st Report of the Environment, Resources and Development Committee: Strata Titles* (Parliamentary Paper, 26 July 2018) 3.

⁸⁸ *Burns v Corbett* (n 1) 405 [63] (Kiefel CJ, Bell and Keane JJ).

note highlights, it has direct practical implications for the exercise of judicial power by state tribunals more generally. There are a number of potential reform options available to overcome the constitutional problems identified.⁸⁹

Maintaining the status quo, such that state tribunals continue exercising judicial power except in ‘federal matters’, is an option prone to abuse,⁹⁰ and could lead to wasted resources as federal issues may not be immediately identifiable.⁹¹ Alternatively, the legislation conferring judicial power on a tribunal could provide an express exception to its exercise in ‘federal matters’. This may be a viable solution in jurisdictions which provide for orders of tribunals to be registered as a judgment of the court,⁹² whereby the tribunal could continue to determine such matters without exercising judicial power.

A further possibility is that states could designate their tribunals as ‘courts’,⁹³ potentially enabling them to exercise federal jurisdiction.⁹⁴ However, it is not easy to draw a distinction between the two adjudicative bodies, and there remains some ambiguity attaching to such a designation.⁹⁵ Another approach, one which appears to have already found favour in some states, is for any federal matters that come before a tribunal to be referred to a state court.⁹⁶ Jurisdictional issues may be overcome by issuing proceedings concurrently, so that a member of the court who is also appointed

⁸⁹ Anna Olijnyk, ‘The High Court’s Decision in *Burns v Corbett*’ (Speech, Council of Australasian Tribunals Conference, 7–8 June 2018).

⁹⁰ Olijnyk and McDonald (n 69) 106–7.

⁹¹ See, eg, *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 543–4.

⁹² See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) s 78; *State Administrative Tribunal Act 2004* (WA) ss 85, 86; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 121, 122.

⁹³ See, eg, the Queensland Civil and Administrative Tribunal, which has been designated as a ‘court of record’: *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164(1); *Owens v Menzies* (n 77) 338 [17]–[20] (de Jersey CJ).

⁹⁴ *Judiciary Act* s 39; see, eg, Jackson Vernon and Ursala Malone, ‘NSW Tenancy Agreements Potentially Unenforceable Against Interstate Landlords’, *ABC News* (online, 14 July 2017) <<https://www.abc.net.au/news/2017-07-14/nsw-residential-tenancy-agreements-may-be-invalid/8709240>>; cf *A-G (NSW) v Gatsby* (n 76) 604 [191] (Bathurst CJ), 612 [223] (Basten JA).

⁹⁵ See *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501; see also Peter Johnston and Peter McNab, ‘The Evolution of State Adjudicative Power as an Alternative to State Judicial or Administrative Power’ (Conference Paper, National Administrative Law Conference, 25 July 2014) 18.

⁹⁶ *Civil and Administrative Tribunal Act 2013* (NSW) Pt 3A; *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Act 2018* (SA) s 38B; ‘Resolving Disputes Between Residents of Different Australian States’, *Victorian Civil and Administrative Tribunal* (Web Page, 13 June 2018) <<https://www.vcat.vic.gov.au/news/resolving-disputes-between-residents-of-different-australian-states>>.

as a tribunal member determines the proceedings together.⁹⁷ Finally, there may be scope for a ‘hybrid tribunal’, with a judicial section specifically for determination of federal matters.⁹⁸ Each of these options may go some way towards restoring the primary objective of state tribunals: delivering accessible and efficient justice.⁹⁹

VII CONCLUSION

Burns v Corbett provides an important limit on the capacity of states to enable non-court tribunals to exercise judicial power.¹⁰⁰ The High Court has clarified that the exercise of jurisdiction in respect of such matters under Ch III is exclusive to *courts*. Consequently, the decision, while reaffirming that there is no general separation of judicial power at the state level,¹⁰¹ extends the separation of judicial power in relation to matters of federal concern to the states. Although this constitutional implication may well have been ‘on the cards’,¹⁰² the decision represents a ‘truce’ of sorts, after the ongoing trials and tribulations in defining the limits on the jurisdiction of state tribunals post-*Boilermakers*.¹⁰³ It remains to be seen exactly how the states, and their tribunals, will respond to this latest piece in the constitutional puzzle.

⁹⁷ Lisa Rosenheim, ‘What We Think: Jurisdiction of State Tribunals: *Burns v Corbett* & Ors [2018] HCA 15’, *Warlows Legal* (Blog Post, 27 May 2018) <<https://www.warlows.com.au/jurisdiction-state-tribunals-burns-v-corbett-ors-2018-hca-15/>>.

⁹⁸ See, eg, the former NSW Industrial Commission: *Industrial Relations Act 1996* (NSW) ch 4 pt 3; *South Australian Employment Tribunal Act 2014* (SA) s 5(2).

⁹⁹ See, eg, *Civil and Administrative Tribunal Act 2013* (NSW) s 3(d); *South Australian Civil and Administrative Tribunal Act 2013* (SA) ss 8(1)(b)–(g).

¹⁰⁰ McDonald (n 17).

¹⁰¹ *Burns v Corbett* (n 1) 437 [183] (Gordon J), 443 [207] (Edelman J).

¹⁰² Olijnyk and McDonald (n 69) 106.

¹⁰³ See Gim del Villar and Felicity Nagorcka, ‘“Confusion Hath Now Made His Masterpiece”: Federal Jurisdiction, State Tribunals and Constitutional Questions’ (2014) 88(9) *Australian Law Journal* 648.