IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S183 OF 2017

BETWEEN: GARRY BURNS
Appellant

AND: TESS CORBETT
First Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Second Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S185 OF 2017

BETWEEN: GARRY BURNS
Appellant

AND: BERNARD GAYNOR
First Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Second Respondent

STATE OF NEW SOUTH WALES
Third Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Fourth Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Fifth Respondent

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S186 OF 2017

BETWEEN: ATTORNEY GENERAL FOR NEW SOUTH WALES
Appellant

AND:

GARRY BURNS
First Respondent

TESS CORBETT
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S187 OF 2017

BETWEEN: ATTORNEY GENERAL FOR NEW SOUTH WALES
Appellant

AND:

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

NSW CIVIL & ADMINISTRATIVE TRIBUNAL
Fourth Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S188 OF 2017

BETWEEN: STATE OF NEW SOUTH WALES
Appellant

AND: GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Fourth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

PART I PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUE

2. The issue in these appeals is whether a purported conferral of judicial power by a State in any matter that is dealt with in ss 75 or 76 of the Constitution on a person or body that is not a court of a State is invalid by reason of either:

   2.1. a limitation on State legislative power implied from Ch III of the Constitution; or

   2.2. inconsistency with s 39(2) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) within the meaning of s 109 of the Constitution.

PART III SECTION 78B NOTICE

3. The Attorney-General of the Commonwealth (**Commonwealth**) has given notice under s 78B of the Judiciary Act in respect of the matters raised in the Commonwealth's Notice of Contention. This notice is in addition to the s 78B notices given by the Appellants.

PART IV FACTS

4. The Commonwealth accepts as correct the statements of facts set out in the submissions of the Appellants in these proceedings.

PART V APPLICABLE PROVISIONS

5. The relevant constitutional and legislative provisions are set out in Annexure A.

PART VI ARGUMENT

A. INTRODUCTION AND OVERVIEW

6. In summary, the Commonwealth submits that a State law that purports to confer State judicial power in respect of the matters identified in ss 75 and 76 of the Constitution on a body that is not one of "the courts of the States" referred to in ss 77(ii) and (iii) of the Constitution is invalid or inoperative on one of two alternative grounds:

   6.1. The primary argument is that this results from a limitation on State legislative power implied from Ch III of the Constitution.

   6.2. The alternative argument is that this results from the operation of s 109 of the Constitution, which is relevantly engaged by s 39(2) of the Judiciary Act.

7. If either argument is accepted, that is determinative of the appeal because:

7.1. These matters fall within one of the heads of jurisdiction in ss 75 and 76 of the Constitution – specifically s 75(iv) (often referred to as "diversity jurisdiction").

7.2. The New South Wales Civil and Administrative Tribunal (**NCAT**), and its predecessor, the Administrative Decisions Tribunal of New South Wales (**ADT**),[1] (collectively, the **Tribunal**) is not one of "the courts of the States" referred to in ss 77(ii) and (iii) of the Constitution. This is common ground in these proceedings and was accepted by the Court of Appeal.[2] It is also supported by authority.[3] In essence, that conclusion follows from two key points: **first**, the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**) does not purport to establish NCAT as a "court" constituted principally by "judges";[4] **secondly**, the NCAT lacks the requisite attributes of independence and impartiality.[5]

7.3. In hearing and determining these matters, the Tribunal was purporting to exercise judicial power. That is also common ground in these proceedings and was accepted by the Court of Appeal.[6] It is also supported by authority.[7]

7.4. As the Tribunal is not one of "the courts of the States", if either of the arguments summarised above is accepted, the State Parliament cannot confer State judicial power upon it to determine a matter specified in ss 75 or 76 of the Constitution.

7.5. The relevant provisions of the CAT Act and the *Anti-Discrimination Act 1977* (NSW) (**AD Act**) are readily read down or severed so as to remain within constitutional limits.

B. GENERAL PRINCIPLES

8. It is convenient to commence with a number of well-established propositions regarding

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1 Appeals No S185/2017, S187/2017 and S188/2017 concern the jurisdiction of NCAT. Appeals No S183/2017 and 186/2017 concern the jurisdiction of both the ADT and the Appeal Panel of NCAT.

2 *Burns v Corbett* (2017) 316 FLR 448 (**CA**) at 456 [29] (Leeming JA); Submissions of the Attorney-General for New South Wales in Appeal No S186/2017 (**NSW**) at [13(a)]; Submissions of the Attorney-General for New South Wales and State of New South Wales in Appeals No S187/2017 and S188/2017 at [12(a)].

3 *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77; *Sunol v Collier* (2012) 81 NSWLR 619 at 621–2 [8] (Basten JA).

4 See s 13 of the CAT Act and note *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (*K-Generation*) at 529 [85] (French CJ), 562–3 [219]-[220] (Kirby J) and *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343 (*NSW PSA Case*) at 352 [12] (French CJ).

5 See sch 2, cls 2, 5, 7(2) and 8(1)(b) of the CAT Act and *NSW PSA Case* (2012) 250 CLR 343 at 352 [12] (French CJ).

6 **CA [30]-[31]; NSW [13(b)]**; Submissions of the Attorney-General for New South Wales and State of New South Wales in Appeals No S187/2017 and S188/2017 at [12(b)].

7 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 at 269-70 (Deane, Dawson, Gaudron and McHugh JJ); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 110 [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533 at 553 [28] (French CJ and Gageler J), 575 [108] (Hayne, Crennan, Kiefel and Bell JJ) (*TCL*).

Ch III of the Constitution and the judicial power of the Commonwealth.[8]

9. **First**, the various affirmative (but limited) grants of legislative power in Ch III amount to an exhaustive code, such that the limitations in the constitutional language negate both Commonwealth and State legislative power.[9]

10. **Secondly**, it follows from the first proposition that, when the Commonwealth Parliament exercises its powers to confer or invest federal jurisdiction, the repository of that jurisdiction can only be one of the courts referred to in ss 71, 73, 76, 77 and 79 of the Constitution. By reason of s 71, that includes the High Court, "such other federal courts as the Parliament creates" and "such other courts as it invests with federal jurisdiction". By reason of s 77(iii), the last category includes "any court of a State".[10] Sections 71 and 77(iii) make no mention of State administrative tribunals: they are each concerned with "Courts of law in the strict sense".[11] As such, and bearing in mind that Ch III is an exhaustive code, the Commonwealth cannot empower a State tribunal or, for that matter, a Commonwealth tribunal, to exercise the judicial power of the Commonwealth.[12]

11. **Thirdly**, it further follows from the first proposition that the grants of legislative power in Ch III, each of which is conferred upon the Commonwealth Parliament, are necessarily exclusive of the legislative powers of the States. The area of exclusive Commonwealth legislative power includes the power to confer, invest and define federal jurisdiction, and also the power to regulate the exercise of that jurisdiction.[13] As a consequence:

    11.1. only the Commonwealth can confer federal jurisdiction on a court – federal jurisdiction being authority to adjudicate derived from the Constitution or Commonwealth laws;[14]

    11.2. State Parliaments lack power to legislate with respect to the exercise of federal jurisdiction even by a State court – that is, State laws governing the exercise of a

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8 These general propositions (and the Commonwealth's submissions generally) do not address the position of Territory courts or considerations arising from s 122 of the Constitution. It is unnecessary to do so for present purposes.

9 See, eg *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (***Boilermakers***) at 269 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Gould v Brown* (1998) 193 CLR 346 at 423 [122] (McHugh J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 (***MZXOT***) at 623–4 [40] (Gleeson CJ, Gummow and Hayne JJ); *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at 405 [227] (Gummow J) (and see also *K-Generation* (2009) 237 CLR 501 at 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 567–8 [239] (Kirby J)); *Rizeq v Western Australia* [2017] HCA 23 (***Rizeq***) at [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).

10 This being what the High Court termed the "authochthonous expedient": *Boilermakers* (1956) 94 CLR 254 at 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also the reference in s 71 to "such other courts as [the Commonwealth Parliament] invests with federal jurisdiction".

11 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 *(Alexander's Case*) at 467 (Isaacs and Rich JJ).

12 *Boilermakers* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45 (***Forge***) at 73 [56] (Gummow, Hayne and Crennan JJ).

13 *Rizeq* [2017] HCA 23 at [15], [32] (Kiefel CJ), [57] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Alqudsi v The Queen* (2016) 258 CLR 203 at 266 [171] (Nettle and Gordon JJ).

14 See *CGU Insurance Ltd v Blakeley* (2016) 90 ALJR 272 at 279 [24] and cases cited there (French CJ, Kiefel, Bell and Keane JJ).

court's jurisdiction cannot operate in federal jurisdiction of their own force.[15]

12. **Fourthly**, the previous proposition does not mean that the Constitution itself prevents State courts from exercising State jurisdiction with respect to some of the subject-matters that fall within ss 75 and 76 of the Constitution. Jurisdiction in relation to some of those subject-matters was jurisdiction that "belonged to" State courts prior to Federation. In such cases, whether a State court is exercising federal or State jurisdiction depends on the source of its "authority to decide",[16] for the jurisdiction is not federal simply because it concerns a subject-matter in ss 75 or 76. It is, however, necessary to recognise that the heads of jurisdiction in ss 75 and 76 fall into two broad classes, in respect of the first of which the source of "authority to decide" is *inherently* federal:

    12.1. The first class is matters that were not known in the "anterior body of general jurisprudence in the colonies" and could not, in that sense, be said to "belong to" State jurisdiction within the meaning of s 77(ii) of the Constitution. A clear example of a controversy of this kind was identified by Gleeson CJ, Gummow and Hayne JJ in *MZXOT*, being mandamus in a State court to compel an officer of the Commonwealth to perform duties under federal law. Jurisdiction to make an order of that kind could only be brought into existence by the exercise of one of the exclusive legislative powers conferred on the Commonwealth Parliament by Ch III.[17] Accordingly, for matters in this class (concerning subjects that did not "belong to" the States, such as those referred to in ss 75(iii) and (v)), there was "no occasion for any later federal law to rely upon s 77(ii) and for s 109 of the Constitution to then render inoperative that which did not otherwise exist".[18]

    12.2. The second class is matters that were well known in colonial jurisprudence and therefore that "belonged to" the courts of the States at the time of Federation. In *MZXOT*, Gleeson CJ, Gummow and Hayne JJ explained that that which "belongs to" the State courts within the meaning of s 77(ii) is the authority they possess to adjudicate under the constitutions and laws of the States.[19] They referred to "actions in tort or contract between residents of the former colonies" (now part of the subject-matter of s 75(iv)) as an example of this class of controversies.[20] For matters in this second class, the source of authority to decide depends upon the extent to which the Commonwealth Parliament has exercised its legislative powers under ss 77(ii) and (iii). As it happens, the Commonwealth Parliament exercised the power conferred by s 77(ii) soon after Federation, by enacting ss 38 and 39(1) of the Judiciary Act. It also exercised its power under s 77(iii) to

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15 See eg *APLA* (2005) 224 CLR 322 at 406 [230] (Gummow J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 352 [35] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Hili v The Queen* (2010) 242 CLR 520 at 527 [21] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Rizeq* [2017] HCA 23 at [32] (Kiefel CJ), [103] (Bell, Gageler, Keane, Nettle and Gordon JJ), [199] (Edelman J).

16 *Rizeq* [2017] HCA 23 at [49], [50] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Lipohar v The Queen* (1999) 200 CLR 485 at 517–8 [78] (Gaudron, Gummow and Hayne JJ); *Baxter v Commissioners of Taxation* (1907) 4 CLR 1087 (*Baxter*) at 1142 (Isaacs J).

17 See *MZXOT* (2008) 233 CLR 601 at 618 [20], 619 [25], 621 [30], [31] and see also *Ex parte Goldring* (1903) 3 SR (NSW) 260.

18 *MZXOT* (2008) 233 CLR 601 at 619 [25].

19 *MZXOT* (2008) 233 CLR 601 at 619 [23]–[24].

20 *MZXOT* (2008) 233 CLR 601 at 619 [25].

conditionally invest federal jurisdiction in the "several Courts of the States" by enacting s 39(2) of the Judiciary Act. Where ss 38 and 39 of the Judiciary Act apply, any State laws that would otherwise confer State jurisdiction in ss 75 and 76 matters are rendered inoperative by s 109 of the Constitution.[21]

13. The end result is that all controversies involving any of the nine categories of matter identified in ss 75 and 76 are, if they are decided by a court, necessarily decided in the exercise of federal jurisdiction.

C. DIVERSITY JURISDICTION: THE POSITION OF STATE COURTS AND STATE TRIBUNALS

14. The Commonwealth makes five points with respect to this part of the argument: **first**, the proceedings before the Tribunal fell within one of the heads of jurisdiction in ss 75 and 76 of the Constitution – specifically s 75(iv); **second**, s 75(iv) is one of the heads of jurisdiction that "belonged" to State courts; **third**, that jurisdiction, like all that which formerly "belonged" to State courts with respect to any of the matters listed in s 75 of the Constitution, has been withdrawn by s 39(1) of the Judiciary Act; **fourth**, the State jurisdiction that formerly existed has been "replaced" by equivalent federal jurisdiction that has been conferred on State courts by s 39(2) of the Judiciary Act; and **fifth**, a State law purporting to confer judicial power in respect of the matters identified in ss 75 and 76 on a body that is not one of "the courts of the States" referred to in s 77(ii) of the Constitution will be invalid or inoperative.

15. The first four points appear to be largely uncontroversial. They are addressed shortly at [16]-[18]. The fifth is the critical issue in this case. It is addressed in detail in the balance of the submissions.

State courts and diversity jurisdiction

16. It was common ground before the Court of Appeal that, at all material times, Mr Burns has been a resident of New South Wales, Ms Corbett has been a resident of Victoria and Mr Gaynor has been a resident of Queensland [**CA [5]**]. The Tribunal proceedings in issue in these appeals were therefore "between residents of different States", which involves the class of controversy referred to in s 75(iv) of the Constitution.

17. As submitted above, the jurisdiction that formerly belonged to State courts in diversity cases is now invested in the "several Courts of the States" by s 39(2) of the Judiciary Act. Importantly, such an investiture of jurisdiction may be (and in fact is) subject to conditions – see the "conditions and restrictions" specified in ss 39(2)(a) and (c), and the "self inflicted" conditions as to jurisdiction that appear in the body of s 39(2).[22] By reason of the combined operation of ss 39(1) and (2), if the matter involving a dispute between residents of different States is before a court of the State, that court necessarily exercises federal jurisdiction, and must do so subject to conditions imposed by the Commonwealth Parliament. That is so irrespective of whether the subject-matter of the dispute "belonged" to the State prior to Federation, for there is "no room for the exercise of a State jurisdiction which apart from any operation of the Judiciary Act the

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21 *Rizeq* [2017] HCA 23 at [67] (Bell, Gageler, Keane, Nettle and Gordon JJ); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 (*PT Bayan*) at 21 [53] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

22 *R v Bull* (1974) 131 CLR 203 at 275 (Mason J). It has been clear for almost 100 years that the Parliament has power to attach such conditions to a grant of federal jurisdiction: *Lorenzo v Carey* (1921) 29 CLR 243; *Commonwealth v Limerick Steamship Co Limited* (1924) 35 CLR 69.

State court would have had" and "there is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court".[23]

18. The above propositions are uncontroversial. They demonstrate the undisputed power of the Commonwealth Parliament to control or condition the exercise of jurisdiction by any State court with respect to any of the matters identified in ss 75 and 76. The question raised by these appeals is whether the position is fundamentally different with respect to State tribunals or administrators.

State tribunals and other State administrative decision makers?

19. As a general proposition, the Commonwealth accepts that there is no separation of powers doctrine at the State level that prevents a State Parliament from conferring State judicial power on a State tribunal, or on any other State officer.[24] The question raised by these appeals is whether that general proposition extends to permit a State Parliament to confer judicial power on a tribunal or an administrative decision-maker in circumstances where it could not confer judicial power with respect to the same matter on its own courts.

20. While NSW focuses its submissions on the position with respect to State tribunals, the legislative power that it asserts for itself is not limited to quasi-judicial tribunals. If that power exists, it would allow a State Parliament to confer judicial power upon a State Minister in respect of ss 75 and 76 matters, without any right of appeal (subject only to review by the Supreme Court for jurisdictional error). It would, for example, permit the NSW Parliament to empower the NSW Minister for Racing to exercise judicial power to decide a matter involving the validity of legislation dealing with betting exchanges under the Commonwealth Constitution,[25] despite the fact that it plainly could not empower its own Supreme Court to decide the same question. The prospect that the Constitution would create such an absurd result should not readily be countenanced.

21. There are two reasons why the absence of a strict separation of powers at the State level does not mean that the States can validly confer judicial power with respect to the subject-matter of ss 75 and 76 of the Constitution upon State administrative decision makers that are not amongst the "courts of the States" referred to in s 77(ii) of the Constitution.

    21.1. The first is the result of a limitation, implied from Ch III, on State legislative power (see [22]-[42] below);

    21.2. The second arises from the operation of s 109 of the Constitution, which is relevantly engaged by s 39(2) of the Judiciary Act (see [43]-[64] below).

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[23] See *Felton v Mulligan* (1971) 124 CLR 367 (*Felton*) at 373 (Barwick CJ). See also (referring to that passage) *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7] (Gleeson CJ, Gaudron and Gummow JJ); *MZXOT* (2008) 233 CLR 601 at 657–8 [180] (Heydon, Crennan and Kiefel JJ).

[24] See eg *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 354 [53] (French CJ); *South Australia v Totani* (2010) 242 CLR 1 at 86 [221] (Hayne J).

[25] Indeed, the NSW scheme involving Land Boards, upon which NSW relies (see NSW [31]–[33]), supplies a further example of an exercise of judicial power by a State Minister: see *Ex parte Browne* (1888) 9 LR (NSW) 102 and the *Crown Lands Act 1884* (NSW) ss 11-17. See also Helmore, *The Law of Real Property in New South Wales* (Law Book Co, 2nd ed, 1966) 527.

D. PRIMARY ARGUMENT: IMPLIED LIMITATION ON STATE LEGISLATIVE POWER

22. It is implicit in Ch III that only those courts referred to in Ch III (including State courts) can exercise judicial power in respect of the matters identified in ss 75 and 76. That implication is well established in relation to the powers of the Commonwealth Parliament. It is the reason that the Commonwealth Parliament cannot, pursuant to any of its legislative powers outside Ch III, confer judicial power on a body that is not a court referred to in Ch III.

23. That same implication limits State Parliaments, such that any State law that purports to confer judicial power with respect to a ss 75 or 76 matter on a body that is not one of "the courts of the States" within Ch III is invalid. For the reasons that follow, that implication is required, as a matter of logical or practical necessity, to protect those features of the institutional landscape envisaged by Ch III (to the extent it is in fact necessary to demonstrate such logical or practical necessity to support the implication).[26] In that sense, the relevant limitation may be seen to have an "essentially structural and functional foundation", similarly to the implication that supports the *Kable* principle.[27]

24. The implication identified above is an aspect of what has been described as "one of the clearest features of our Constitution", being that it provides for an "integrated Australian judicial system for the exercise of the judicial power of the Commonwealth".[28] It prevents the fragmentation of that "integrated system", by negating the possible existence of a (non-integrated) parallel system. For the possibility of such fragmentation necessarily follows if entities other than State courts are permitted to exercise State judicial power in respect of the same subject-matter referred to in ss 75 and 76, without being subject to the same uniform set of rules established by the Constitution and the Judiciary Act. If that were permissible, the architecture envisaged by Ch III (and the Commonwealth's legislative power to provide for and maintain those arrangements) would be significantly undermined.

25. The importance of Commonwealth control over the exercise of State judicial power with respect to federal matters has long been recognised. For example, Quick and Garran, speaking of s 77(ii), observed that:[29]

> [the effect of the Constitution] is that there remains a concurrent jurisdiction in the courts of the States in all those cases of federal jurisdiction which would have been within the competence of the courts of the States if no federal jurisdiction had existed. It is obvious that some federal control over this concurrent jurisdiction is necessary ...

26. The obvious purpose and effect of s 77(ii) is to secure for the Commonwealth Parliament the "federal control" spoken of by Quick and Garran in the above passage. The fact that s 77(ii) empowers Parliament to ensure that there is a coherent national

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26 Note, in that regard, *APLA* (2005) 224 CLR 322 at 409 [240]–[242] (Gummow J) and at 452-454 [385]-[389] (Hayne J).

27 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 106 [183] (Gageler J).

28 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102 (Gaudron J) and *Rizeq* [2017] HCA 23 at [49] (Bell, Gageler, Keane, Nettle and Gordon JJ).

29 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 802 (emphasis added).

system for the exercise of judicial power with respect to the matters identified in ss 75 and 76, rather than mandating that outcome directly, is not fatal to the implication for which the Commonwealth contends.[30] The Constitution could not sensibly mandate a particular outcome, because it needed to accommodate the latitude accorded to the Commonwealth Parliament both as to what (if any) federal courts would be created, and as to the extent to which federal jurisdiction would be invested in State courts. At one end of the spectrum, Parliament could, pursuant to s 77(iii), confer federal jurisdiction in ss 75 and 76 matters only on State courts and not create or give jurisdiction to any federal courts (as was broadly the case prior to the enactment of the *Federal Court of Australia Act 1976* (Cth)). Equally, by exercise of the powers conferred by ss 77(i) and (ii), Parliament could have created a system of federal courts with exclusive jurisdiction.

27. Whatever choices Parliament makes as to the repositories of federal judicial power, it is crucial to the scheme of Ch III that the Commonwealth Parliament has comprehensive power over the extent to which State judicial power can be exercised with respect to the matters addressed in ss 75 and 76. To that end, by s 77(ii) the Commonwealth Parliament was given legislative power to determine which of the potentially available sources of (sovereign)[31] authority would be applied to the quelling of controversies falling within ss 75 and 76. The reason for that (and for the structure of Ch III as a whole) was explained by this Court in *Boilermakers* by reference to the federal structure. The Court recognised that the conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature,[32] noting further that "it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary power of the States".[33]

28. State judicial power exercised by an administrative decision maker or tribunal, no less than State judicial power exercised by a State court, involves an assertion of sovereign adjudicative authority of the State polity.[34] It is inherently unlikely that the Commonwealth control secured by Ch III was addressed only to the primary "manifestation" of that adjudicative authority through State courts, while leaving the States free to confer the same adjudicative authority on less authoritative decision-makers, particularly given the systemic interests in play that were identified in *Boilermakers*.

29. That result is avoided by recognising that s 77(ii) performs two functions. Its most obvious function is to acknowledge that parallel federal and State jurisdiction may exist in the "courts of the States" with respect to some of the matters in ss 75 and 76, and to confer power upon the Commonwealth Parliament to exclude State jurisdiction with

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30 Contra **NSW [29], [30]** referring to **CA [64]**.

31 *TCL* (2013) 251 CLR 533 (*TCL*) at 566 [75] (Hayne, Crennan, Kiefel and Bell JJ); *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

32 (1956) 94 CLR 254 at 267–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

33 (1956) 94 CLR 254 at 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

34 See *Rizeq* [2017] HCA 23 at [53] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Wakim* (1999) 198 CLR 511 at 573 [108] (Gummow and Hayne JJ).

respect to those matters. But secondly, and more importantly for present purposes, it also implies a "negative": being that no other State institution or administrative decision maker can exercise authority derived from the State to adjudicate controversies in respect of the subject-matters addressed in ss 75 and 76. That second operation is a conventional application of the approach to construction of Ch III identified in *Boilermakers*, where Dixon CJ, McTiernan, Fullagar and Kitto JJ said:[35]

> The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation ...

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30. Absent the second operation just identified, s 77(ii) could not achieve its object. The exclusiveness of the jurisdiction (in the sense of authority to adjudicate) of a federal court that is contemplated by s 77(ii) is exclusiveness of <u>all</u> potentially available sovereign adjudicative authority derived from each of the State polities. The necessary premise from which s 77(ii) operates is that, if jurisdiction is to be exercised by any State body in respect of ss 75 or 76 matters, that body must be a State court. Otherwise, a State could respond to a decision by the Commonwealth Parliament to exercise its power under s 77(ii) to prevent State courts from exercising State judicial power simply by conferring the judicial power previously exercised by its courts on a State administrative decision-maker.[36] In that way, the operation of s 77(ii) could be entirely defeated, and the "federal control" spoken of by Quick and Garran would be illusory.

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31. It is no answer to the above submission to say that any parallel system of State administrators or tribunals exercising judicial power would necessarily remain subject to an exercise of the supervisory jurisdiction of the Supreme Court.[37] The issue is not the possible existence of "islands of power"; the constitutional concern is rather with the undermining of the legislative power conferred by Ch III to provide for uniformity in the exercise of a jurisdiction that is "national" in nature,[38] and which is essential for the preservation of the federal compact.

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32. The significance of State courts, rather than other State bodies, being the repositories of judicial power should not be overlooked. Speaking of s 77(iii), Quick and Garran said:[39]

> It is noteworthy that in this section, as elsewhere in the Constitution, the judicial department of the Commonwealth is more national and less distinctively federal, in character, than either the legislative or the executive

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35 (1956) 94 CLR 254 at 270.

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36 See Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) at 314, agreeing with an argument to this effect advanced by the Commonwealth in *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 (*Tasmanian ADT Case*) at 137–8 [222] (Kenny J).

37 See Cf Gim Del Villar and Felicity Nagorcka, "Confusion Hath Now Made His Masterpiece": Federal Jurisdiction, State Tribunals and Constitutional Questions' (2014) 88 *Australian Law Journal* 648 at 657–8, referring to *Kirk v Industrial Relations Court (NSW)* (2010) 239 CLR 531 (*Kirk*) at 580–1 [98]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); NSW at [37].

38 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 258 [8] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

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39 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 804 (emphasis added). See also *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 330 (Higgins J), noting that the circumstances of Australia involved "State Courts of high character and impartiality".

> departments ... Confidence in the integrity and impartiality of the Bench ... makes it possible to contemplate without misgiving the exercise of federal jurisdiction by State courts – subject, of course, to the controlling power of the Federal Parliament.

That sentiment makes it unlikely that the framers sought to allow federal control of State courts, but to leave the States entirely free to invest judicial power in State tribunals or administrators with respect to the matters identified in ss 75 and 76. The better view is that Ch III was thought to, and does, preclude that outcome.

33. In rejecting the Commonwealth's primary argument, the Court of Appeal erred in failing to give sufficient weight to the exhaustiveness with which Ch III governs the exercise of jurisdiction with respect to the ss 75 and 76 subject-matters with a view to ensuring "federal control" over the exercise of that jurisdiction. The Commonwealth's submission is not that Ch III, and s 77 in particular, "mandate" any particular outcome **[cf CA [58], [64]; NSW [30]]**. The submission is that if State tribunals and administrators can exercise judicial power outside the constraints of Ch III, then that defeats the intention that the Commonwealth have power to create a coherent and uniform national scheme for the exercise of judicial power with respect to the ss 75 and 76 subject-matters.

34. It can be noted in that regard that, prior to the enactment of the *Australia Acts 1986* (Cth) and (UK), the exercise of Commonwealth legislative power[40] to ensure that ss 75 and 76 matters should be finally determined by this Court and not the Privy Council was equally not "mandated" by Ch III itself. Yet, in *Commonwealth v Queensland,* Gibbs J (with whom Barwick, Stephen and Mason JJ agreed) had no difficulty concluding that it was "implicit in Ch III" that it is not permissible for a State to provide a procedure that sought to circumvent those legislative arrangements.[41] Justice Gibbs observed that "Parliament should be entitled to ensure that ... questions arising in the exercise of federal jurisdiction [other than inter se questions] should ... be finally determined in this Court and not in the Judicial Committee".[42] That reasoning did not rest upon s 109 (cf **CA [64]**).

35. NSW emphasises the existence of State administrative bodies exercising judicial power at the time of Federation: **NSW [31]–[33]**. A similar point was made by the Court of Appeal: **CA [59], [65]**. But the existence of examples of this kind cannot be decisive. Applying a similar analysis, one would equally say that this Court's holding in *Boilermakers* is wrong: for it is quite clear that early conceptions of Ch III proceeded on the understanding that an administrative body was capable of exercising Commonwealth judicial power. Obvious examples include the Interstate Commission[43] and the Conciliation and Arbitration Court.[44] Those understandings, in turn, reflect the course of the Convention Debates, which suggest that consideration of the question of

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40 See s 39(2)(a) of the Judiciary Act and the *Privy Council (Limitation of Appeals) Act 1968* (Cth) (made under s 74 of the Constitution – see *Kitano v Commonwealth* (1975) 132 CLR 231 at 233-234).

41 (1975) 134 CLR 298 at 314–5.

42 (1975) 134 CLR 298 at 315 (emphasis added).

43 See *New South Wales v Commonwealth* (1915) 20 CLR 54 (*Wheat Case*) and compare the views expressed by Isaacs J (at 90) with the dissenting views of Barton J (at 70–1) and Gavan Duffy J (at 101–2).

44 See *Alexander's Case* (1918) 25 CLR 434 at 442 (Griffith CJ).

the separation of powers was, at best, "a somewhat hazy consideration".[45] Equally, it is likely that aspects of the legislative arrangements for the exercise of State judicial power at around the time of Federation (then considered entirely unexceptional) would now fall foul of the *Kable* doctrine.[46] Attention to those matters illustrates why the question in this case cannot be answered by consideration of historical practice as at or around 1900. The real question is how to interpret the scheme erected by Ch III, having regard to the systemic values on which it rests.[47]

36. In any event, to the extent that it sheds any light upon the current matter, the history upon which NSW relies cuts the other way. The fact that it was "known prior to Federation" that "State administrative bodies exercised judicial power" [**NSW [31]**] serves only to emphasise that those bodies were, by design, excluded from the national scheme envisaged by the terms of Ch III.

Earlier authority

37. There is no authority of this Court that presents any obstacle to acceptance of the submission advanced above. This Court did consider a similar argument in *K-Generation*, where the Commonwealth submitted:[48]

> A State Parliament cannot invest bodies that are not State courts with jurisdiction in respect of matters covered by ss 75 and 76. To do so would undermine the operation of s 77(iii) which allows the Commonwealth Parliament to define the extent to which the jurisdiction of any federal court in respect of those matters is to be exclusive of the jurisdiction of State courts.

38. As is apparent from the context, the reference to "s 77(iii)" is a typographical error and should be understood to be a reference to s 77(ii),[49] although s 77(iii) does reinforce the implication for which the Commonwealth contends (in that it reflects an assumption that, if ss 75 or 76 jurisdiction is to be exercised by any State body, it is to be exercised

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45 Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96 at 99 (see also at 99–102) and J Finnis, 'Separation of Powers in the Australian Constitution' (1968) 3 *Adelaide Law Review* 159 at 170–7. Indeed, even after the *Wheat Case* and *Alexander's Case*, the second principle established by *Boilermakers* (that the Courts exercising Commonwealth judicial power can only exercise judicial power or non-judicial power incidental to the exercise of Commonwealth judicial power) took some time to crystallise: see the discussion in James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113 at 113–7. Note also the example of the Federal Court of Bankruptcy, considered in *R v Federal Court of Bankruptcy; Ex Parte Lowenstein* (1938) 59 CLR 556 (see particularly at 567 (Latham CJ), 591 (McTiernan J)).

46 See, for example, the Court of Appeals for the Province of South Australia discussed in S McDonald "Defining Characteristics" and the Forgotten "Court" (2016) 38 *Sydney Law Review* 207 at 213-219. In addition to establishing the Supreme Court of South Australia, the *Supreme Court Act 1837* (SA) also provided, in s XVI, for the Governor and the members of the Council of SA (except the Advocate-General and Crown Solicitor) to constitute a body described as a "Court", which "shall have power and authority to receive and hear appeals from judgments decrees orders and sentences of the said Supreme Court".

47 See *Palmer v Ayers; Ferguson v Ayres* (2017) 91 ALJR 325 at 341 [69] (Gageler J) and see also at 334 [37] (Kiefel, Keane, Nettle and Gordon JJ).

48 Recorded in (2009) 237 CLR 501 at 507; see also *K-Generation Pty Ltd v Liquor Licensing Court* [2008] HCATrans 366 at lines 4590–4626.

49 As is confirmed by the transcript: *K-Generation Pty Ltd v Liquor Licensing Court* [2008] HCATrans 366 at lines 4590–4626.

by a State court). The Court did not need to decide the point, although it did observe that:[50]

> There is no doubt that, with respect to subject matter outside the heads of federal jurisdiction in ss 75 and 76 of the Constitution, the State legislatures may confer judicial powers on a body that is not a "court of a State" ...

39. While falling short of acceptance of the Commonwealth's submission, nothing in the judgment casts doubt on that submission. To the contrary, the emphasised qualification implies that the Court recognised that it does not follow from the general proposition that States may confer judicial power on bodies that are not courts that they can confer judicial power on such a body with respect to a subject-matter that falls within ss 75 or 76.[51]

40. There are several intermediate appellate authorities that directly support the Commonwealth's submission: see *Attorney-General (NSW) v 2UE Sydney Pty Ltd (2UE)*[52] per Spigelman CJ (with whom Ipp J agreed) and *Tasmanian ADT Case*[53] per Kenny J. Notwithstanding the Court of Appeal's criticism of these authorities [**CA [84]–[86], [91]**], it is submitted that they are persuasive. Particular criticism is made of the reliance in these authorities on the reasons of Jacobs J in *Commonwealth v Queensland*.[54] Indeed, the Court of Appeal went so far as to suggest [**CA [88]**] that Jacobs J's reasons cannot be reconciled with the State courts' exercise of the "belongs to" jurisdiction prior to the enactment of the Judiciary Act. NSW apparently now adopts that proposition [**NSW [20]**].

41. Two things should be said about the attack on the above authorities. **First**, on a fair reading of their judgments, neither Spigelman CJ nor Kenny J held that the same reasoning applies to deny State jurisdiction with respect to ss 75 and 76 matters to State tribunals and to State courts. Instead, their Honours at times used language that described (in cumulative fashion) the operation of the implied limitation identified above (with respect to State tribunals and administrative decision makers) and the operation of the (separate) limitation arising from the Judiciary Act and s 109 of the Constitution with respect to State courts.[55]

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50 *K-Generation* (2009) 237 CLR 501 at 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) (emphasis added).

51 See Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) at 310, stating that the above quotation from *K-Generation* points "to the strong possibility of the High Court finding against the ability of State legislatures to create powers of this kind". Lindell went on to express the view that State laws of that kind are "impliedly prevented by Ch III of the Constitution": at 313.

52 (2006) 236 ALR 385 at 395–7 [56].

53 (2008) 169 FCR 85 at 137–8 [222].

54 (1975) 134 CLR 298 at 327–8, cited in *2UE* (2006) 236 ALR 385 at 395–6 [56] (Spigelman CJ) and *Tasmanian ADT Case* (2008) 169 FCR 85 at 137 [221] (Kenny J). The criticisms include Gim Del Villar and Felicity Nagorcka, "Confusion Hath Now Made His Masterpiece": Federal Jurisdiction, State Tribunals and Constitutional Questions' (2014) 88 *Australian Law Journal* 648 at 652–3; Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152 at 156, 160–1; David Rowe, 'State Tribunals Within and Without the Integrated Federal Judicial System' (2014) 25 *Public Law Review* 48 at 60–1.

55 See particularly *2UE* (2006) 236 ALR 385 at 394 [49]–[50], 395 [55] (Spigelman CJ); *Tasmanian ADT Case* (2008) 169 FCR 85 at 134 [209], 136 [217], 138–9 [222] (Kenny J). See also **CA [86]**.

42. **Secondly**, it is not right to attribute to Jacobs J a view that denied the existence of the "belongs to" jurisdiction of State courts. His Honour's observation that Ch III is an exhaustive enunciation of the judicial power that can be conferred on "or exercised by"[56] a court necessarily encompasses the "belongs to" jurisdiction that Ch III recognises State courts have and may exercise. The point Jacobs J made in that same passage regarding "exhaustiveness" was directed to the "kind" of State judicial power that may be conferred or exercised in respect of those subject matters. A State cannot confer judicial power with respect to a ss 75 or 76 matter of a "kind" that the Commonwealth could not confer (as illustrated by the example of an attempt by a State to enable a State court to give an advisory opinion on such a matter). But, on a fair reading of the entire passage, Jacobs J did not deny the possibility that State judicial power may be exercised over a subject-matter within ss 75 or 76. He simply recognised (correctly) that the positive grants of power in Ch III contain negative implications that deny certain powers to the States.

E. ALTERNATIVE ARGUMENT: SECTION 109

43. In the alternative to the submissions above based upon an implication from Ch III, the Commonwealth submits that essentially the same result follows by operation of s 109 of the Constitution. In particular, a State law that purports to invest bodies that are not State courts with State judicial power in respect of matters covered by ss 75 and 76 is inconsistent with s 39(2) of the Judiciary Act, and inoperative to that extent by reason of s 109.

44. The principles governing the operation of s 109 have been revisited by this Court several times in recent years. In all cases, the inquiry must begin with an analysis of the laws in question and of their true construction.[57] Section 109 requires a "comparison between any two laws which create rights, privileges or powers, and duties or obligations", and it resolves conflict, if any exists, in favour of the Commonwealth.[58]

45. Conflict can arise in a number of ways. Of relevance here, it has long been recognised that it may arise where a State law, if valid, would "alter, impair or detract from the operation of [the Commonwealth] law".[59] In *Jemena*, the Court explained those concepts, stating that:[60]

> The crucial notions of "altering", "impairing" or "detracting from" the operation of a law of the Commonwealth have in common the idea that a State

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56 *Commonwealth v Queensland* (1975) 134 CLR 298 at 327.

57 *Bell Group NV (in liq) v Western Australia* (2016) 90 ALJR 655 (***Bell Group***) at 666 [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at 111 [242] (Gummow J), 135 [323] (Hayne J).

58 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 (***Jemena***) at 523 [37] (the Court) (emphasis added), quoted in *Bell Group* (2016) 90 ALJR 655 at 665 [50] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

59 *Victoria v Commonwealth* (1937) 58 CLR 618 (***The Kakariki***) at 630 (Dixon J), quoted by the whole Court in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [28]; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]; *Jemena* (2011) 244 CLR 508 at 524 [39].

60 (2011) 244 CLR 508 at 525 [41] (emphasis added), quoted in *Bell Group* (2016) 90 ALJR 655 at 665–6 [51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

law conflicts with a Commonwealth law if the State law undermines the Commonwealth law.

46. Another circumstance in which a State law will be found to be inconsistent with a Commonwealth law was described by Dixon J in an oft-cited passage in *The Kakariki*, when he said:[61]

> if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.

47. These settled statements of principle recognise that inconsistency between laws does not require direct conflict. It is enough if one law undermines another, by purporting to operate in an area that is comprehensively regulated by the other.

48. In this respect, Leeming JA's analysis in the Court of Appeal is instructive. His Honour considered s 77 of the Constitution to be facultative. Rather than Ch III mandating a "uniform national system" for the exercise of jurisdiction with respect to the ss 75 and 76 subject matters, his Honour considered that such uniformity depended on the extent to which the legislative powers in s 77 had been exercised [**CA [58]**]. Once those powers were exercised to create a uniform national system, any State conferral of jurisdiction that would alter, impair or detract from that uniform scheme was inconsistent with that scheme, and therefore inoperative pursuant to s 109 of the Constitution [**CA [64]**].[62]

49. Another way of putting that point is that s 77 of the Constitution is a component of a constitutional design whereby Parliament is given power to create a system of "uniform laws" governing the exercise of sovereign adjudicative authority in respect of the matters referred to in ss 75 and 76. Particularly having regard to the important underlying systemic values underpinning that design, it can readily be concluded that that power, once exercised, contains an "implicit negative proposition" that there is to be no other law on this topic.[63]

50. Of course, pursuant to its legislative powers under Ch III, the Commonwealth Parliament has established a set of uniform rules governing:

50.1. the circumstances in which State courts are invested with federal jurisdiction (the investiture in s 39(2) is to State courts "within the limits of their several jurisdictions ...");

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61 (1937) 58 CLR 618 at 630 (emphasis added). See also *Ex parte McLean* (1930) 43 CLR 472 at 483 (Dixon J); *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136–7 (Dixon J); *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76–7 [28] (the Court); *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13] (the Court).

62 Subject to the difference as to whether these considerations of "uniformity" are engaged only after the exercise of the s 77 powers, Leeming JA's reasons are consistent with the Commonwealth's emphasis above on ss 77(ii) and (iii) being directed to securing "federal control" over the exercise of jurisdiction with respect to the ss 75 and 76 matters.

63 *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 468 [59] (the Court).

50.2. the law to be applied regulating the exercise of federal jurisdiction by courts (see ss 79 and 80 of the Judiciary Act);[64] and

50.3. the rights of appeal from an exercise of federal jurisdiction: see s 39(2)(a) of the Judiciary Act - which formerly regulated rights of appeal to the Privy Council prior to these being abolished by s 11 of the *Australia Acts 1986* (Cth) and (UK).

51. As is now settled,[65] s 39 of the Judiciary Act took away the "belonging to" jurisdiction of State courts in respect of the matters in ss 75 and 76 and re-invested it conditionally and universally as federal jurisdiction.[66] In *Baxter*, Griffith CJ, Barton and O'Connor JJ described the effect of this as follows:[67]

> The result [of s 39] is that the jurisdiction of the State Courts is now derived from a new source, with all the incidents of jurisdiction derived from that new source, one of which is an appeal in all cases to the High Court.

52. Significantly, the incidents of federal jurisdiction to which this passage refers are not limited to the express conditions in s 39(2) of the Judiciary Act itself. The very example cited, being the requirement that appeals in all cases lie to the High Court is achieved by s 73(ii) of the Constitution, rather than the condition in s 39(2)(c).[68] Section 39(2)(c) merely regulates that appeal by incorporating a special leave procedure.[69] That illustrates that the effect of the removal and re-investiture of jurisdiction by s 39 is that the exercise of jurisdiction with respect to the ss 75 and 76 matters by State courts is subject to all the incidents of federal jurisdiction provided for in the Constitution, Judiciary Act and elsewhere.[70]

53. Section 39 thereby manifests an intention to control the exercise of State judicial authority with respect to the matters in ss 75 and 76. It leaves no room for the concurrent operation of State legislation conferring parallel judicial power on State administrative decision makers or tribunals. This point is aptly captured in the (dissenting) reasons of Dixon J in *Ffrost v Stevenson*,[71] where (anticipating the modern view of the effect of s 39 of the Judiciary Act) his Honour said:

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64 *Rizeq* [2017] HCA 23 at [15]–[23], [84]– [90] (Bell, Gageler, Keane, Nettle and Gordon JJ).

65 *PT Bayan* (2015) 258 CLR 1 at 21 [53] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

66 See also, most recently, *Rizeq* [2017] HCA 23 at [6] (Kiefel CJ, citing *Felton* (1971) 124 CLR 367 at 394 (Windeyer J)), [67] (Bell, Gageler, Keane, Nettle and Gordon JJ), [139] (Edelman J). Indeed, as Dixon KC observed in argument before the Victorian Supreme Court in *Booth v Shelmerdine Bros Pty Limited* [1924] VLR 276 at 278: "The whole object of [s 39 of the Judiciary Act] in taking away jurisdiction and then giving it back was to place conditions upon its exercise" (emphasis added). See also Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press, 2012) at 148.

67 (1907) 4 CLR 1087 at 1137–8 (emphasis added). While this understanding of the effect of s 39 was somewhat attenuated by the Court's decision in *Lorenzo v Carey* (1921) 29 CLR 243, the *Baxter* position was in effect re-instated in *Felton* and subsequent cases.

68 Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) at 285; Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press, 2012) at 149-150.

69 *Wishart v Fraser* (1941) 64 CLR 470 at 480 (Dixon J).

70 Eg Judiciary Act ss 40, 55B(4), 78A and 78B.

71 (1937) 58 CLR 528 at 573.

> It has always appeared to me that, once the conclusion was reached that Federal jurisdiction was validly conferred, then under sec. 109 it was impossible to hold valid a State law conferring jurisdiction to do the same thing, whether subject to no appeal or subject to appeal in a different manner or to a different tribunal or tribunals, or otherwise producing different consequences.

54. Leeming JA also correctly emphasised the importance of the conditional investment of jurisdiction (and its universal application in all cases where federal law invests federal jurisdiction in a State Court, by reason of s 39A(1) of the Judiciary Act [**CA [24]-[25]**). He pointed out that:[72]

> the essence of s 39(2) is to invest federal jurisdiction *conditionally* ... and to do so *universally*, in all matters falling within ss 75 and 76. To the extent that matters falling within ss 75 or 76 are determined by the exercise of judicial power which is not qualified in the way achieved by s 39(2), that alters, impairs or detracts from the federal law.

55. Similar reasoning was applied in *Felton*,[73] where s 39(2) of the Judiciary Act was held to render inoperative, by operation of s 109, State laws under which the State courts would otherwise exercise their "belonging" jurisdiction. That conclusion rested upon the proposition that that provision disclosed an intention that, in the matters to which the section relates (being all matters identified in ss 75 and 76 of the Constitution), the only jurisdiction to be exercised by the State courts was to be federal jurisdiction, the exercise of which would be subject to the specified conditions.

56. As Leeming JA correctly held, s 39(2) of the Judiciary Act equally renders inoperative a State law conferring State judicial power upon an entity other than a State court, for a State law of that nature would likewise purport to authorise the exercise of the sovereign adjudicative authority of the State in respect of ss 75 and 76 matters, but free of the conditions prescribed by the Commonwealth Parliament in s 39(2) and other parts of the Judiciary Act.

57. The submissions of NSW fail to bring those matters to account. That is revealed most starkly at **NSW [52]**, where it (partially) extracts a passage from Leeming JA's extra-curial writings.[74] His Honour was there addressing the point made by Professor Zines (to which NSW also refers at **NSW [52]**), to the effect that: (a) there is no express power in the Commonwealth to deprive State courts of jurisdiction that otherwise "belongs to" them other than as a consequence of the power in s 77(ii); and (b) that scrutiny of the text reveals that s 39(2) of the Judiciary Act, in contrast to s 39(1), does not, in fact, do so.[75] A somewhat similar point was made by Professor Sawyer prior to the decision in *Felton* (see the passage extracted at **NSW [47]**). But as Leeming JA went on to observe (in the passage which NSW does not extract):

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72 CA [75] (emphasis in original), see also [78].

73 (1971) 124 CLR 367 at 412–3 (Walsh J) and also at 373 (Barwick CJ), 392–3 (Windeyer J). Note also Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press, 2012) at 149.

74 Mark Leeming, *Authority to Decide – the Law of Jurisdiction in Australia* (Federation Press, 2012) at 149.

75 Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) at 237–8. See also Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) at 306.

> [O]n analysis [an argument that the exercise of s 77(ii) power is required] seems to be no different to an argument that there is no power to invest jurisdiction conditionally. If a conditional investment is possible, as plainly it is, then it is not necessary to invoke a separate power to exclude 'belonging to' jurisdiction, because of the operation of s 109.

58. In other words, the exercise of power to invest jurisdiction conditionally pursuant to s 77(iii) is effective in itself to exclude, by operation of s 109, the exercise of such jurisdiction not subject to those conditions (including that exercised by State administrative decision makers).

59. The balance of the Appellants' submissions may be dealt with shortly.

60. *First*, it is no answer to the Commonwealth's submission that proceedings in the Tribunal under the AD Act are, as a matter of "practical effect", subject to similar "conditions" to those in s 39(2) of the Judiciary Act (if that is what is intended to be conveyed by **Burns [27]** and **NSW [59]**). There are two difficulties with that argument. **First**, it ultimately rests upon the availability of *Kirk* review (**Burns [30]**), but fails to account for the lacunae identified in *Kirk* itself: cases in which a State administrative decision maker makes a non-jurisdictional error of law appearing on the face of the record.[76] **Secondly**, and even if it were otherwise, those decision makers will not be subject to all of the other incidents of federal jurisdiction.

61. *Secondly*, the fact that ss 39 and 39A of the Judiciary Act do not refer to "tribunals" is not determinative [**cf NSW [51]**]. For the reasons already addressed, the existence of s 109 inconsistency is not limited to the comparison of the "text" or "terms" of State and Commonwealth provisions.[77] The fact that a Commonwealth law "was intended as a complete statement of the law governing a particular matter", such as to render any State regulation of the matter inoperative, may be discerned "from the terms, the nature or the subject-matter" of the provision.[78]

62. *Thirdly*, the fact that the Judiciary Act elsewhere refers to "tribunals" [**NSW [51]**], or that such references were contained in the *High Court Procedure Act 1903* (Cth) (**1903 Procedure Act**) [**Burns [22]**], does not imply that the exclusory effect of ss 39 and 39A was not intended to extend to State tribunals. Section 39 follows the contours of the constitutional text pursuant to which it was enacted. In that context, it is unsurprising that it does not refer to tribunals. Nevertheless, if the Court accepts that s 39 constitutes an exhaustive vesting of jurisdiction in the matters identified in ss 75 and 76 of the Constitution, that conferral implicitly negatives the existence of any jurisdiction with respect to such matters in any other body. There is no need for s 39 to specify each body affected by the implicit negative. If that were necessary, the negativing of power would no longer be "implicit".

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76 *Kirk* (2010) 239 CLR 531 at 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

77 Although the conclusion that a federal law, on its proper construction, is a complete statement of the law governing a particular matter is more easily reached if that is apparent on its terms: *Jemena* (2011) 244 CLR 508 at 524 [40] (the Court); *Momcilovic* (2011) 245 CLR 1 at 222 [243]–[244] (Gummow J).

78 *The Karakiri* (1937) 58 CLR 618 at 630 (Dixon J), cited in *Momcilovic* (2011) 245 CLR 1 at 118 [264] (Gummow J), 141 [341] (Hayne J) and 233 [629] (Crennan and Kiefel JJ).

63. In any case, the references to "tribunals" in the 1903 Procedure Act and the Judiciary Act do not suggest that "the Commonwealth Parliament *chose* to exclude any reference to [State administrative bodies] in ss 39 and 39A" [**cf NSW [51]**]. The Judiciary Act did not refer to "tribunals" when it was first enacted or when s 39A was inserted. The word "tribunal" in the 1903 Procedure Act is best construed to mean "court" in light of the fact that that Act was intended to be limited to the scope of the Judiciary Act[79] and the connotation of "tribunal" in 1903 as meaning a "court".[80] References to "tribunals" in the current version of the Judiciary Act do not in any way recognise the exercise of judicial power by State administrative bodies. Rather, these either concern Commonwealth tribunals[81] or appear in the context of a Commonwealth instrument[82] or High Court proceedings.[83]

64. *Fourthly*, NSW underplays the significance of the matters identified by the Court of Appeal at **CA [79]** – where the Court noted the "strange[ness]" of the different incidents of litigation at first instance and on appeal (that latter of which was, on any view, in federal jurisdiction). As is plain from the Court's reference to *Dickson v The Queen*[84] at 504 [20], that comparison was intended to highlight the "differing methods of trial" (or procedural incidents) that applied under the respective State and federal legislative schemes. The point is that, if the Appellants were correct, proceedings which from the outset involve ss 75 and 76 matters do not at all times attract all the incidents of federal jurisdiction. For the reasons given above, that supports the Commonwealth's submission that s 109 is engaged [contra **NSW [61]**].

F. CONSEQUENCES OF THE COMMONWEALTH'S SUBMISSIONS

65. If the Commonwealth's submissions are accepted, neither the Commonwealth nor the State Parliament could confer on the Tribunal the power to determine the matters in question, as this would involve the exercise of judicial power in a matter referred to in s 75(iv) of the Constitution:

    65.1. The Commonwealth Parliament could not (and did not) invest the Tribunal with federal jurisdiction with respect to a s 75(iv) matter, because it is not a "court of a State" within the meaning of s 77(iii); and

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79 Second Reading Speech for the High Court Procedure Bill 1903: Hansard, *Parliamentary Debates*, House of Representatives, 30 June 1903 at 1525 (Alfred Deakin).

80 In the Parliamentary Debates for the Judiciary Bil 1903 and the High Court Procedure Bil 1903, the word "tribunal" was variously used to refer to courts, including State courts, the proposed High Court, proposed federal courts, the House of Lords and Privy Council, the Dominion Court of Canada and the US Supreme Court. There were no references to "tribunal" in these Debates which suggest that the word was intended to connote State (or colonial) administrative bodies of the kind which now exist and are referred to as "State tribunals". See Hansard, *Parliamentary Debates*, House of Representatives, 11 June 1903 at 804-819, 827, 841 (Edmund Barton), 826 (L Bonython), 827 (Thomas Kennedy), 832, 833, 836 (M L E Groom); Hansard, *Parliamentary Debates*, House of Representatives, 9 June 1903 at 589-594 (Alfred Deakin).

81 Judiciary Act ss 55H.

82 Judiciary Act s 55ZG (namely, the Legal Services Direction, which may apply in non-judicial proceedings in State administrative bodies).

83 Judiciary Act Part XAB (which provides for allows the High Court to take conduct in proceedings in, inter alia, State tribunals as a factum for making vexatious proceedings orders).

84 (2010) 241 CLR 491.

65.2. The State Parliament could not confer State jurisdiction upon the Tribunal with respect to a s 75(iv) matter, either by reason of an implied limitation derived from Ch III, or by reason of s 109 of the Constitution and s 39(2) of the Judiciary Act.

66. A question arises as to the consequence of those conclusions for the validity of provisions of the AD Act and the CAT Act that purport to confer jurisdiction contrary to the above limitations. The Commonwealth submits that similar consequences flow from acceptance of either the Commonwealth's primary or alternative argument, notwithstanding that, as Leeming JA pointed out the route to those consequences differs as between the two arguments [**CA [35]**].

10 67. On the Commonwealth's primary argument, to the extent that the AD Act and CAT Act purport to authorise the Tribunal to exercise judicial power to determine matters falling within s 75(iv) of the Constitution they would be invalid. However, those Acts can be (and therefore must be) read down or severed so as to remain within constitutional limits.[85] It might be thought sufficient to avoid invalidity to read down the registration provisions, which would produce the result that the Tribunal would not exercise judicial power in such a matter.[86] However, for reasons explained by Kenny J in the *Tasmanian ADT Case*, reading down or severance of that kind would produce a result that was "fundamentally different" to the operation of those Acts in other cases, and would result
20 in a "set of provisions that the Parliament did not intend", meaning that such a reading down is not possible.[87] It is, however, possible to read down the AD Act and CAT Act such that they do not confer jurisdiction at all in cases where the complainant and respondent to a complaint made under s 87A of the AD Act are "residents of different states" within the meaning of s 75(iv) of the Constitution.[88] The same reading down would be possible in other cases falling within ss 75 or 76 of the Constitution.

68. If, on the other hand, the Court accepts the Commonwealth's alternative argument based on s 109 of the Constitution, the AD Act and CAT Act would not be contrary to Ch III in a way that would require reading down or severance.[89] The AD Act and CAT
30 Act would, however, be inoperative "to the extent of the inconsistency". The end result would be equivalent to that of the reading down identified in the previous paragraph, for the AD Act and CAT Act would be invalid to the extent that they purport to confer jurisdiction on the Tribunal to determine complaints under s 87A of the AD Act

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85 *Interpretation Act 1987* (NSW) s 31.

86 The provisions providing for the registration of a certificate that the Tribunal has made an order, which then "operates as a judgment of the Court" (AD Act s 114), are critical to the (agreed)
40 conclusion that the Tribunal exercises judicial power: see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261 (Mason CJ, Brennan and Toohey JJ), 269–70 (Deane, Dawson, Gaudron and McHugh JJ); *Attorney-General (Commonwealth) v Breckler* (1999) 197 CLR 83 at 110 [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); see also **CA [30]**.

87 *Tasmanian ADT Case* (2008) 169 FCR 85 at 147 [254].

88 That is the approach Kenny J adopted in the *Tasmanian ADT Case* (2008) 169 FCR 85 at 147 [255]. It is consistent with the analysis of Gageler J in *Tajjour v New South Wales* (2014) 254 CLR 508, 585–6 [168]–[171], noting that provisions expressed in general terms can be read down to conform to constitutional limitations.

50 89 Indeed, s 31 of the *Interpretation Act 1987* (NSW) would have no application in such a case, as it is not addressed to cases of inconsistency between otherwise valid laws: see *Sportsbet Pty Limited v New South Wales* (2012) 249 CLR 298 at 317 [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

between "residents of different states" within the meaning of s 75(iv) (or in any other cases falling within ss 75 or 76 of the Constitution).

69. Finally, the ground raised in Ms Corbett's Notice of Contention that s 114(3) of the AD Act is invalid[90] is similarly disposed of. Section 114 would be invalid if it operated upon orders made against Ms Corbett in the proceedings before the Tribunal (as it would involve the very thing that is forbidden to State legislatures, being the conferral of judicial power with respect to a s 75(iv) matter on a body that is not one of "the courts of the States"). However, for the reason already advanced, that section can be read down so as not to *give force* to a purported order of the Tribunal by deeming it to operate as a judgment of the Supreme Court upon registration. Or, on the Commonwealth's alternative argument, s 114(3) is inoperative only "to the extent of the inconsistency", and therefore can continue to operate upon matters that do not involve the exercise of State judicial power by the Tribunal in ss 75 and 76 matters.

PART VII ESTIMATE OF TIME

70. The Commonwealth estimates that it will require approximately 90 minutes for the presentation of oral argument.

Dated: 17 August 2017

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[90] See First Respondent's Notice of Contention in Appeals No S183/2017 and No S186/2017 dated 10 July 2017 at [4].

ANNEXURE A

Chapter III—The Judicature

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

72 Judges' appointment, tenure and remuneration[16]

The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges)* 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked,[17] but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

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

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

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

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

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.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Part VI—Exclusive and invested jurisdiction

38 Matters in which jurisdiction of High Court exclusive

Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

(a) matters arising directly under any treaty;

(b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;

(c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;

(d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;

(e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

Note: Under the *Jurisdiction of Courts (Cross-vesting) Act 1987*, State Supreme Courts are, with some exceptions and limitations, invested with the same civil jurisdiction as the Federal Court has, including jurisdiction under section 39B of this Act.

39 Federal jurisdiction of State Courts in other matters

(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as

provided in section 38, and subject to the following conditions and restrictions:

(a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.

Special leave to appeal from decisions of State Courts though State law prohibits appeal

(c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

39A Federal jurisdiction invested in State Courts by other provisions

(1) The federal jurisdiction with which a Court of a State is invested by or under any Act, whether the investing occurred or occurs before or after the commencement of this section, including federal jurisdiction invested by a provision of this Act other than the last preceding section:

(a) shall be taken to be invested subject to the provisions of paragraph (a) of subsection (2) of the last preceding section; and

(b) shall be taken to be invested subject to paragraph 39(2)(c) (whether or not the jurisdiction is expressed to be invested subject to that paragraph), so far as it can apply and is not inconsistent with a provision made by or under the Act by or under which the jurisdiction is invested;

in addition to any other conditions or restrictions subject to which the jurisdiction is expressed to be invested.

(2) Nothing in this section or the last preceding section, or in any Act passed before the commencement of this section, shall be taken to prejudice the application of any of sections 72 to 77 (inclusive) in relation to jurisdiction in respect of indictable offences.

Anti-Discrimination Act 1977 No 48

87A Persons who may make a complaint

(1) A complaint alleging that a named person has, or named persons have, contravened a provision of this Act or the regulations (other than a provision for which a specific penalty is imposed) may be made by any of the following:

(a) one or more persons:

(i) on his, her or their own behalf, or

(ii) on his, her or their own behalf as well as on behalf of another person or persons,

(b) a parent or guardian of a person who lacks the legal capacity to lodge a complaint (for example, because of age or disability),

(c) a representative body on behalf of a named person or persons, subject to section 87C,

(d) an agent of any of the persons referred to in paragraph (a), (b) or (c).

(2) Nothing in this Division prevents a person from making a complaint (not being a representative complaint) even though the conduct in respect of which the complaint is made is also conduct in respect of which a representative complaint has been made.

(3) In this section, ***guardian*** has the same meaning as it has in the *Guardianship Act 1987*.

Anti-Discrimination Act 1977 No 48

114 Enforcement of non-monetary orders

(1) This section applies to an order, or part of an order, of the Tribunal other than an order, or part of an order, for the recovery of an amount ordered to be paid by the Tribunal or a civil or other penalty ordered to be paid by the Tribunal.

(2) For the purpose of enforcing an order, or part of an order, to which this section applies, a registrar of the Tribunal may certify the making of the order, or part, and its terms.

(3) A certificate of a registrar of the Tribunal under this section that is filed in the registry of the Supreme Court operates as a judgment of that Court.

(4) Nothing in this section limits or otherwise affects section 78 of the *Civil and Administrative Tribunal Act 2013*.

Civil and Administrative Tribunal Act 2013 No 2

13 Qualifications of members

(1) The President

A person is qualified to be appointed as the President only if the person is a Judge of the Supreme Court.

(2) However, the Minister may not recommend the appointment of a person as the President unless the Minister has consulted with the Chief Justice of the Supreme Court about the appointment.

(3) Deputy Presidents

A person is qualified to be appointed as a Deputy President only if the person is:

(a) an Australian lawyer of at least 7 years' standing, or

(b) a person who holds, or has held, a judicial office of this State or of the Commonwealth, another State or Territory.

(4) Principal members

A person is qualified to be appointed as a principal member only if the person:

(a) is an Australian lawyer of at least 7 years' standing, or

(b) has, in the opinion of the person making the appointment, special knowledge, skill or expertise in relation to any one or more classes of matters in respect of which the Tribunal has jurisdiction.

(5) Senior members

A person is qualified to be appointed as a senior member only if the person:

(a) is an Australian lawyer of at least 7 years' standing, or

(b) has, in the opinion of the person making the appointment, special knowledge, skill or expertise in relation to any one or more classes of matters in respect of which the Tribunal has jurisdiction.

(6) General members

A person is qualified to be appointed as a general member only if, in the opinion of the person making the appointment, the person:

(a) has special knowledge, skill or expertise in relation to any class of matters in respect of which the Tribunal has jurisdiction, or

(b) is capable of representing the public (or a sector of the public), or a particular organisation, body or group of persons (or class of organisations, bodies or groups of persons), in relation to any one or more classes of matters in respect of which the Tribunal has jurisdiction.

Note. A Division Schedule for a Division of the Tribunal may, in some cases, make special provision for the assignment of members to that Division based on particular skills, expertise or qualifications.

Civil and Administrative Tribunal Act 2013 No 2

28 *Jurisdiction of Tribunal generally*

(1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.

(2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction:

(a) the general jurisdiction of the Tribunal,

(b) the administrative review jurisdiction of the Tribunal,

(c) the appeal jurisdiction of the Tribunal (comprising its external and internal appeal jurisdiction),

(d) the enforcement jurisdiction of the Tribunal.

(3) Subject to this Act and enabling legislation, the Tribunal has jurisdiction in respect of matters arising before or after the establishment of the Tribunal.

Note. Section 35D of the *Ombudsman Act 1974* enables the Ombudsman and the President to enter into arrangements with respect to the co-operative exercise of the respective functions of the Ombudsman and the Tribunal (including providing for the referral of matters between them).

Civil and Administrative Tribunal Act 2013 No 2

Schedule 1 Savings, transitional and other provisions

Part 1 General

1 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of any of the following Acts:

this Act or any other Act that amends this Act

any other Act to the extent that it confers or imposes (or amends an Act or a statutory rule so as to confer or impose) jurisdiction or functions on the Tribunal or to alter or remove any of the jurisdiction or functions of the Tribunal

(2) If the regulations so provide, any such provision may:

(a) have effect despite any specified provisions of this Act (including a provision of this Schedule), and

(b) take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

(4) A regulation made for the purposes of this clause may make separate savings and transitional provisions or amend this Schedule to consolidate the savings and transitional provisions.

Part 2 Provisions consequent on enactment of this Act

Division 1 Interpretation

2 Definitions

(1) In this Part:

current tribunal member of an existing tribunal means a person who, immediately before the establishment day, held office as:

(a) the head of the tribunal or a division of the tribunal (however described), or

(b) a deputy head of the tribunal (however described), or

(c) any other kind of member of the tribunal.

existing health practitioner tribunal means each of the following Tribunals established under section 165 of the *Health Practitioner Regulation National Law (NSW)*:

(a) the Aboriginal and Torres Strait Islander Health Practice Tribunal of New South Wales,

(b) the Chinese Medicine Tribunal of New South Wales,

(c) the Chiropractic Tribunal of New South Wales,

(d) the Dental Tribunal of New South Wales,

(e) the Medical Radiation Practice Tribunal of New South Wales,

(f) the Medical Tribunal of New South Wales,

(g) the Nursing and Midwifery Tribunal of New South Wales,

(h) the Occupational Therapy Tribunal of New South Wales,

(i) the Optometry Tribunal of New South Wales,

(j) the Osteopathy Tribunal of New South Wales,

(k) the Pharmacy Tribunal of New South Wales,

(l) the Physiotherapy Tribunal of New South Wales,

(m) the Podiatry Tribunal of New South Wales,

(n) the Psychology Tribunal of New South Wales.

existing tribunal means any of the following tribunals:

(a) the Aboriginal Land Councils Pecuniary Interest and Disciplinary Tribunal established under the *Aboriginal Land Rights Act 1983*,

(b) the Administrative Decisions Tribunal of New South Wales established under the *Administrative Decisions Tribunal Act 1997*,

(c) the Charity Referees constituted as provided by section 5 of the *Dormant Funds Act 1942*,

(d) the Consumer, Trader and Tenancy Tribunal of New South Wales established under the *Consumer, Trader and Tenancy Tribunal Act 2001*,

(e) the Guardianship Tribunal constituted under the *Guardianship Act 1987*,

(f) each existing health practitioner tribunal,

(g) the Local Government Pecuniary Interest and Disciplinary Tribunal established under the *Local Government Act 1993*,

(h) each local land board constituted under the *Crown Lands Act 1989*,

(i) the Vocational Training Appeal Panel constituted by section 62 of the *Apprenticeship and Traineeship Act 2001*.

relevant amending Act means each of the following Acts:

(a) the *Civil and Administrative Tribunal Amendment Act 2013*,

(b) the *Civil and Administrative Legislation (Repeal and Amendment) Act 2013*.

(2) If a provision of this Part provides for a matter or other thing to occur on a specified day, the matter or thing is taken to have occurred at the beginning of the specified day.

(3) For the purposes of this Part (except clause 5), proceedings are not finally determined if:

(a) any period for bringing an appeal as of right in respect of the proceedings has not expired (ignoring any period that may be available by way of extension of time to appeal), or

(b) any appeal in respect of the proceedings is pending (whether or not it is an appeal brought as of right).

Division 2 Abolition of existing tribunals and transfer of members

3 Abolition of existing tribunals

Each existing tribunal is abolished on the establishment day.

4 Current tribunal members cease to hold office on establishment day

(1) Each current tribunal member of an existing tribunal ceases to hold office as such on the establishment day.

(2) If a person ceases to hold an office by operation of this clause:

(a) the person is not entitled to any remuneration or compensation because of the loss of that office, and

(b) the person is appointed to the new office or position in NCAT (if any) specified in clause 5 for the kind of current tribunal member concerned or, if clause 5 does not operate to make an appointment, is eligible (if otherwise qualified) to be appointed as a member of NCAT.

(3) This clause has effect despite anything to the contrary in any other legislation concerning the circumstances or processes for the removal of (or the vacation of office by) a current tribunal member of an existing tribunal.

5 Transfer of current tribunal members to NCAT

(1) A person who is a current tribunal member of an existing tribunal of a kind specified in Column 1 of the Table to this clause is taken, on and from the establishment day, to have been appointed under this Act to the kind of office or position in NCAT specified in Column 2 next to the kind of current tribunal member specified in Column 1.

(2) A current tribunal member of an existing tribunal who is appointed as a member of NCAT by operation of this clause is taken:

(a) if the current tribunal member's current office was for a term or the member was entitled to hold his or her current office until a specified age—to have been appointed as a term member, or

(b) if the current tribunal member held his or her current office only in relation to specified proceedings before the existing tribunal and those proceedings have been transferred to NCAT by clause 6—to have been appointed as an occasional member for the proceedings until the proceedings are finally determined (within the meaning of section 11).

(3) Despite clause 2 of Schedule 2, a current tribunal member of an existing tribunal who is appointed as a term member of NCAT by operation of this clause is taken to hold his or her new office in NCAT for:

(a) if the current tribunal member's current office was for a term—the balance of that term, or

(b) if the current tribunal member was entitled to hold his or her current office until a specified age—the period expiring on the day the person attains that age.

14 Orders of existing tribunals

(1) An existing order of an existing tribunal made under other legislation is taken, on and from the establishment day, to be an order made by NCAT under the corresponding provision of that legislation (as amended by a relevant amending Act) or this Act (as the case may be).

(2) This clause is subject to the other provisions of this Schedule.

(3) In this clause:

existing order of an existing tribunal is an order made by the tribunal before the establishment day, and includes an order that would have come into effect on or after the establishment day.

Division 4 Miscellaneous

15 Making of first principal Regulation

Part 2 of the *Subordinate Legislation Act 1989* is taken to apply to the first principal regulation (within the meaning of that Act) that is made under this Act as if the Minister administering the *Subordinate Legislation Act 1989* had given a certificate under section 6 (1) (b) of that Act with respect to the regulation.

16 Expiration of current period

If, for any purpose, time had commenced to run under a provision of other legislation in relation to an existing tribunal (but had not expired) before the establishment day, it expires for the corresponding purpose under that legislation (as amended by a relevant amending Act) or this Act, as the case may be, at the time at which it would have expired if the tribunal had not been abolished.

17 Updating references to abolished existing tribunals and their functions

(1) Legislative provisions to which clause applies

This clause applies to a provision (an ***affected legislative provision***) of any other Act or any instrument made under any other Act (whether enacted or made before or after the commencement of this clause) other than an excluded provision.

(2) Each of the following is an ***excluded provision*** for the purposes of subclause (1):

(a) a provision of this Act or an instrument made under this Act,

(b) a provision of the *Administrative Decisions Review Act 1997* or an instrument made under that Act,

(c) a provision of the *Public Sector Employment and Management Act 2002* or *Government Sector Employment Act 2013* or an instrument made under either Act,

(d) a provision of a relevant amending Act,

(e) a provision of any other Act or instrument made under any other Act that contains a reference to which this clause would otherwise have applied if that reference was inserted or substituted by, or retained despite, an amendment made to the provision by a relevant amending Act,

(f) a spent savings or transitional provision of any other Act or an instrument made under any other Act,

(g) a provision of an Act or instrument made under an Act (or a provision belonging to a class of such provisions) prescribed by the regulations.

(3) References to existing tribunals

A reference in an affected legislative provision to an existing tribunal is to be read, on and from the applicable day, as a reference to NCAT.

Civil and Administrative Tribunal Act 2013 No 2

Current version for 1 July 2017 to date (accessed 17 August 2017 at 11:12)
Schedule 2

Schedule 2 Provisions relating to members

1 Acting President

(1) If the President is absent from duty, the most senior Deputy President is to be Acting President unless the Minister makes an appointment under subclause (2).

(2) The Minister may appoint a Deputy President to be Acting President during the absence of the President from duty.

(3) The Minister may make any appointment for a particular absence or for any absence that occurs from time to time.

(4) An Acting President has the functions of the President and anything done by an Acting President in the exercise of those functions has effect as if it had been done by the President.

(5) In this clause, *absence from duty* includes a vacancy in the office of President.

2 Terms of appointment for term members

Subject to this Act, a term member holds office for a period (not exceeding 5 years) specified in the member's instrument of appointment, but is eligible for re-appointment.

3 Oaths

The Governor may require an oath to be taken by a presidential member.

4 Protection and immunities of member

A member has, in the exercise of functions performed as a member, the same protection and immunities as a Judge of the Supreme Court.

5 Remuneration of members

(1) A member is entitled to be paid:

(a) such remuneration as is determined by the Minister, and

(b) such travelling and subsistence allowances as the Minister may from time to time determine in respect of the member.

(2) Without limiting subclause (1), the Minister may make different determinations for the purposes of this clause for different classes of members or members exercising different classes of functions.

(3) However, the Minister may not make a determination in relation to a term member that operates to reduce the remuneration of the member during his or her term of office.

(4) A member is not, if a Judge of a New South Wales Court and while receiving remuneration as such a Judge, entitled to remuneration under this Act.

(5) In this clause, *Judge of a New South Wales Court* includes a NSW judicial officer.

6 Vacancy in office of President

(1) The President cannot be removed from office except by the Governor on an address from both Houses of Parliament in the same session seeking removal on the ground of proved misbehaviour or incapacity and in accordance with the applicable provisions of Parts 7 and 8 of the *Judicial Officers Act 1986*. However, simply because the President is removed from office under this subclause does not affect the person's tenure as a judicial officer.

(2) The President may be suspended or retired from office in accordance with the applicable provisions of Parts 7 and 8 of the *Judicial Officers Act 1986*.

(3) If the President is suspended from office and is remunerated as President at the time of the suspension, he or she is entitled to be paid remuneration as President during the period of suspension at the current rate applicable to the office.

(4) The office of President becomes vacant if the President:

(a) dies, or

(b) is removed from office or retires in accordance with this clause, or

(c) completes a term of office and is not re-appointed, or

(d) resigns the office by written instrument addressed to the Governor, or

(e) ceases to hold office as a Judge of the Supreme Court.

7 Vacancy in office of member (other than President)

(1) The office of a member (other than the President) becomes vacant if the member:

(a) dies, or

(b) in the case of a term member—completes a term of office and is not re-appointed, or

(c) in the case of an occasional member—when the proceedings in relation to which the member has been appointed as an occasional member have been finally determined for the purposes of section 11, or

(d) resigns the office by written instrument addressed to the Minister, or

(e) is nominated for election as a member of the Legislative Council or of the Legislative Assembly or as a member of a House of Parliament or a legislature of another State or Territory or of the Commonwealth, or

(f) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or

(g) becomes a mentally incapacitated person, or

(h) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable, or

(i) is removed from office under subclause (2).

(2) The Governor may remove a member (other than the President) from office for incapacity, incompetence or misbehaviour.

8 Members and former members may complete unfinished matters

(1) This clause applies to a member (an *affected member*) dealing with any matters relating to proceedings before the Tribunal that have been heard or partly heard (or were otherwise the subject of deliberations) by the member if, during the proceedings, the member:

(a) ceases to have a qualification specified by a Division Schedule for a Division of the Tribunal or enabling legislation for participation in the proceedings other than because of any of the following reasons:

(i) misconduct or unsatisfactory conduct of the member,

(ii) the mental incapacity of the member,

(iii) the member becoming bankrupt or insolvent, or

(b) ceases to be a member because of the expiration of the period of the member's appointment,

or both.

(2) An affected member may, despite becoming an affected member, complete or otherwise continue to deal with any matters in the proceedings concerned.

(3) While completing or otherwise dealing with matters referred to in subclause (2), the affected member is taken to have and may exercise all the rights and functions of a member that the affected member had immediately before becoming an affected member.

9 Leave for term members

(1) The entitlement of a term member to annual and other leave is to be as stated in the instrument of appointment as a member.

(2) A member may be granted leave:

(a) in the case of the President—by the Minister, and

(b) in any other case—by the President.

(3) This clause is subject to clause 5.

10 Superannuation and leave—preservation of rights for term members

(1) In this clause:

eligible member means a term member who, immediately before becoming such a member, was a public servant or an officer or employee of a public authority declared by an Act or proclamation to be an authority to which this clause applies.

superannuation scheme means a scheme, fund or arrangement under which any superannuation or retirement benefits are provided and which is established by or under an Act.

(2) An eligible member:

(a) may continue to contribute to any superannuation scheme to which he or she was a contributor immediately before becoming an eligible member, and

(b) is entitled to receive any payment, pension or gratuity accrued or accruing under the scheme,

as if he or she had continued to be such a contributor during service as a member.

Interpretation Act 1987 No 15

31 Acts and instruments to be construed so as not to exceed the legislative power of Parliament

(1) An Act or instrument shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.

(2) If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament:

(a) it shall be a valid provision to the extent to which it is not in excess of that power, and

(b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.

(3) This section applies to an Act or instrument in addition to, and without limiting the effect of, any provision of the Act or instrument.