HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

Matter No S183/2017

GARRY BURNS APPELLANT

AND

TESS CORBETT & ORS RESPONDENTS

Matter No S185/2017

GARRY BURNS APPELLANT

AND

BERNARD GAYNOR & ORS RESPONDENTS

Matter No S186/2017

ATTORNEY GENERAL FOR NEW SOUTH WALES APPELLANT

AND

GARRY BURNS & ORS RESPONDENTS

Matter No S187/2017

ATTORNEY GENERAL FOR NEW SOUTH WALES APPELLANT

AND

GARRY BURNS & ORS RESPONDENTS

Matter No S188/2017

STATE OF NEW SOUTH WALES APPELLANT

AND

GARRY BURNS & ORS RESPONDENTS

Burns v Corbett
Burns v Gaynor
Attorney General for New South Wales v Burns
Attorney General for New South Wales v Burns
New South Wales v Burns
[2018] HCA 15
18 April 2018
S183/2017, S185/2017, S186/2017, S187/2017 & S188/2017

ORDER

Matter No S183/2017

1. Appeal dismissed.

2. The appellant pay the first respondent's costs.

Matter No S185/2017

1. Appeal dismissed.

2. The appellant pay the first respondent's costs.

Matter No S186/2017

1. Appeal dismissed.

2. The appellant pay the second respondent's costs.

Matter No S187/2017

1. Appeal dismissed.

2. The appellant pay the second respondent's costs.

Matter No S188/2017

1. Appeal dismissed.

2. The appellant pay the second respondent's costs.

On appeal from the Supreme Court of New South Wales

Representation

M G Sexton SC, Solicitor-General for the State of New South Wales and K M Richardson SC with M O Pulsford for the Attorney General for New South Wales and for the State of New South Wales (instructed by Crown Solicitor's Office (NSW))

K T Nomchong SC with K L Madgwick for Garry Burns in matters S183/2017 and S186/2017 and with H E Jewell for Garry Burns in matters S185/2017, S187/2017 and S188/2017 (instructed by Allens in S183/2017 and S186/2017, Lander & Rogers Lawyers in S185/2017 and S188/2017, and Dowson Turco Lawyers in S187/2017)

S P Donaghue QC, Solicitor-General of the Commonwealth and C L Lenehan with J Freidgeim for the Attorney-General of the Commonwealth (instructed by the Australian Government Solicitor)

P E King with J A Loxton for Tess Corbett (instructed by Robert Balzola and Associates)

P E King for Bernard Gaynor (instructed by Robert Balzola and Associates)

Submitting appearance for Civil and Administrative Tribunal of New South Wales in S185/2017, S187/2017 and S188/2017

Interveners

P J Dunning QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland intervening (instructed by Crown Solicitor (Qld))

P D Quinlan SC, Solicitor-General for the State of Western Australia, with C I Taggart for the Attorney-General for the State of Western Australia intervening (instructed by State Solicitor (WA))

M E O'Farrell SC, Solicitor-General for the State of Tasmania, with S K Kay, for the Attorney-General of the State of Tasmania intervening (instructed by Solicitor-General of Tasmania)

K L Walker QC, Solicitor-General for the State of Victoria, with K E Foley for the Attorney-General for the State of Victoria intervening (instructed by Victorian Government Solicitor)

CATCHWORDS

Burns v Corbett
Burns v Gaynor
Attorney General for New South Wales v Burns
Attorney General for New South Wales v Burns
New South Wales v Burns

Constitutional law (Cth) – Chapter III – Where complaints made under *Anti-Discrimination Act* 1977 (NSW) came before Civil and Administrative Tribunal of New South Wales ("NCAT") – Where parties to disputes residents of different States – Where common ground that NCAT exercised State judicial power in hearing and determining disputes – Where common ground that NCAT not a "court of a State" – Whether Ch III of Constitution contains implication preventing any party to federal compact from conferring adjudicative authority in respect of matters listed in ss 75 and 76 of Constitution on organ of government, federal or State, other than a court referred to in Ch III.

Constitutional law (Cth) – Inconsistency between Commonwealth and State laws – Where *Civil and Administrative Tribunal Act* 2013 (NSW) purports to confer jurisdiction on NCAT to determine disputes between residents of different States – Whether State law alters, impairs or detracts from operation of *Judiciary Act* 1903 (Cth), s 39(2).

Words and phrases – "adjudicative authority", "administrative tribunal", "alter, impair or detract", "belongs to or is invested in", "constitutional implication", "court", "court of a State", "diversity jurisdiction", "federal Judicature", "federal jurisdiction", "inconsistency", "integrated national court system", "judicial power", "jurisdiction", "matter", "negative implication", "residents of different States", "State jurisdiction".

Constitution, Ch III, ss 51(xxxix), 71, 73(ii), 75, 76, 77, 106, 107, 108, 109.
Judiciary Act 1903 (Cth), ss 38, 39.
Anti-Discrimination Act 1977 (NSW), ss 49ZT, 114.
Civil and Administrative Tribunal Act 2013 (NSW), ss 28(2), 29(1), 32.
Interpretation Act 1987 (NSW), s 31.

1 KIEFEL CJ, BELL AND KEANE JJ. The first issue in these appeals is whether the Commonwealth Constitution precludes the Parliament of a State from conferring jurisdiction in respect of a matter between residents of different States within s 75(iv) of the Constitution on a tribunal which is not one of the "courts of the States" referred to in s 77 ("the Implication Issue"). If that issue were to be resolved in the negative, the further issue would arise as to whether a State law which purports to confer jurisdiction on such a tribunal in respect of such a matter is rendered inoperative by virtue of s 109 of the Constitution on the basis that it is inconsistent with s 39 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") ("the Inconsistency Issue").

2 The Implication Issue should be resolved in the affirmative. Considerations of constitutional text, structure and purpose compel the conclusion that a State law that purports to confer jurisdiction with respect to any of the matters listed in ss 75 and 76 of the Constitution on a tribunal that is not one of the courts of the States is inconsistent with Ch III of the Constitution, and is, therefore, invalid.

3 Chapter III of the Constitution provides for the authoritative adjudication of matters listed in ss 75 and 76 by federal courts and by State courts co-opted for that purpose as components of the federal Judicature. The provisions of Ch III exhaustively identify the possibilities for the authoritative adjudication of matters listed in ss 75 and 76. Adjudication by an organ of State government other than the courts of the States is not included within those possibilities and is therefore excluded from them. While s 77(ii) contemplates the possibility that, unless and until the Commonwealth Parliament legislates under s 77(iii), the courts of the States may continue to exercise their existing adjudicative authority, if any, finally to resolve such matters, it does not contemplate that this authority – the authority characteristically exercised by courts – will be exercised by agencies of the executive government of the States.

4 The Inconsistency Issue and the Implication Issue are distinct: the resolution of the Inconsistency Issue is not determinative of the Implication Issue, as is recognised in the approach taken by the court below and in the arguments presented to this Court. Whether Ch III denies the possibility of the conferral of adjudicative authority with respect to any of the matters listed in ss 75 and 76 of the Constitution on a tribunal that is not one of the courts referred to in Ch III by the legislature of any party to the federal compact is a question that is logically anterior to any question as to the power of the Commonwealth Parliament to override such a conferral of adjudicative authority by a State Parliament. Indeed, to treat a conclusion that the Commonwealth Parliament has no power to override such a conferral by a State Parliament as demonstrating a lacuna in the express provisions of Ch III which must be filled by implication in

order to give effect to Ch III is merely to beg the question as to the true effect of Ch III.

5 Because the Implication Issue must be decided in the affirmative, it is unnecessary to resolve the Inconsistency Issue and the appeals to this Court must be dismissed.

The proceedings

6 In 2013 and 2014, Mr Garry Burns made separate complaints to the Anti-Discrimination Board of New South Wales about statements made by Ms Therese Corbett and Mr Bernard Gaynor, which Mr Burns claimed were public acts which vilified homosexuals, contrary to s 49ZT of the *Anti-Discrimination Act* 1977 (NSW) ("the AD Act"). The complaint against Ms Corbett was referred to the Administrative Decisions Tribunal of New South Wales. The complaint against Mr Gaynor was referred to the Civil and Administrative Tribunal of New South Wales ("NCAT").

7 At all material times, Mr Burns was a resident of New South Wales, Ms Corbett was a resident of Victoria and Mr Gaynor was a resident of Queensland[1].

8 The AD Act allows complaints under that Act to be referred to NCAT[2]. A referral having been made, NCAT is empowered to dismiss the complaint in whole or in part (ss 102 and 108(1)(a)), to find the complaint substantiated in whole or in part (s 108(1)(b)) and to make interim and final orders (ss 105 and 108(2)).

9 Prior to the commencement of the *Civil and Administrative Legislation (Repeal and Amendment) Act* 2013 (NSW) on 1 January 2014, these provisions of the AD Act were in substantially the same terms as they are now, except that it was the Administrative Decisions Tribunal, rather than NCAT, to which complaints were to be referred[3]. By cl 3 of Sched 1 to the *Civil and Administrative Tribunal Act* 2013 (NSW) ("the NCAT Act"), the Administrative Decisions Tribunal was abolished on 1 January 2014, and by s 7, NCAT was established that same day.

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1 *Burns v Corbett* (2017) 343 ALR 690 at 693 [5].

2 Sections 90B(5), 93A, 93B, 93C, 95(2).

3 See *Anti-Discrimination Act* 1977 (NSW), s 4(1), definition of "Tribunal" (as at 21 June 2013).

10 Part 3 of the NCAT Act deals with the jurisdiction of NCAT. Section 29(1) provides that NCAT has "general jurisdiction" over a matter if legislation other than the NCAT Act enables NCAT to make decisions or exercise other functions in respect of that matter, and the matter does not otherwise fall within NCAT's administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction. Where NCAT has determined a matter over which it has general jurisdiction, s 80(1) allows a party to appeal against the decision to an Appeal Panel of NCAT, which is in turn invested with jurisdiction to hear such appeals (s 32).

11 It may be noted that Pt 3A of the NCAT Act commenced operation on 1 December 2017, four days before these appeals came on for hearing[4]. It provides a mechanism for matters to be heard by an authorised court, instead of NCAT, if, upon an application for leave by a person with standing to make it, the court is satisfied that NCAT does not have jurisdiction to determine the application because its determination involves the exercise of federal diversity jurisdiction (s 34B). It is unnecessary to consider the operation of these new provisions further in order to determine these appeals.

12 The Administrative Decisions Tribunal found that Ms Corbett had breached the AD Act and ordered her to make a public and private apology[5]. She appealed unsuccessfully to the newly constituted Appeal Panel of NCAT[6]. The Appeal Panel's orders were entered in the Supreme Court pursuant to s 114 of the AD Act. Thereafter, Mr Burns brought separate proceedings in the Supreme Court charging Ms Corbett with contempt for failing to make either apology. As part of her defence to that charge, Ms Corbett contended that neither the Administrative Decisions Tribunal nor the Appeal Panel of NCAT had jurisdiction in the dispute, because she is a resident of Victoria. That aspect of her defence was removed to the Court of Appeal of the Supreme Court of New South Wales[7].

13 Mr Burns' complaint against Mr Gaynor has not yet been heard on the merits. Mr Gaynor succeeded in having the proceedings in NCAT dismissed on the basis that there had been no "public act" in New South Wales as required by

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4 See *Justice Legislation Amendment Act (No 2)* 2017 (NSW), Sched 1.2 [3].

5 *Burns v Corbett* [2013] NSWADT 227.

6 *Corbett v Burns* [2014] NSWCATAP 42.

7 *Burns v Corbett (No 2)* [2016] NSWSC 612.

s 49ZT of the AD Act[8]. While an appeal by Mr Burns to the Appeal Panel of NCAT was yet to be heard, some further interlocutory skirmishing between them resulted in the making of an order for costs against Mr Gaynor. Mr Gaynor obtained a grant of leave to appeal to the Court of Appeal from that order[9]. By a summons filed in that appeal, Mr Gaynor sought a declaration that NCAT had no jurisdiction to determine matters pertaining to citizens resident in a State other than New South Wales, as well as an order in the nature of prohibition preventing steps from being taken by Mr Burns in NCAT or to enforce its orders[10].

14 The Court of Appeal (Bathurst CJ, Beazley P and Leeming JA) heard these various matters together in order to resolve the common issue of whether NCAT may hear and determine a dispute arising under the AD Act between a resident of New South Wales and a resident of another State[11]. In order to understand the decision of the Court of Appeal, it is necessary to note the material provisions of the Constitution and the Judiciary Act.

The Constitution

15 Section 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in this Court, in such other federal courts as the Parliament creates, and in such other courts as the Parliament invests with federal jurisdiction. To the extent that the courts of the States are invested with federal jurisdiction by the Parliament of the Commonwealth, those courts thereby become part of the federal Judicature established under Ch III of the Constitution[12].

16 Section 75 establishes the original jurisdiction of this Court in relation to certain kinds of matters. It provides:

"In all matters:

(i) arising under any treaty;

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8 *Burns v Gaynor* [2015] NSWCATAD 211.

9 *Gaynor v Burns* [2016] NSWCA 44.

10 *Burns v Corbett* (2017) 343 ALR 690 at 694 [7].

11 *Burns v Corbett* (2017) 343 ALR 690 at 693 [3].

12 *Rizeq v Western Australia* (2017) 91 ALJR 707 at 713 [12]; 344 ALR 421 at 425; [2017] HCA 23.

(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."

17 Section 76 of the Constitution empowers the Commonwealth Parliament to confer additional original jurisdiction on this Court to determine other kinds of matters. Quick and Garran described the matters listed in s 76 as "matters of specially federal concern"[13]. Section 76 provides:

"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."

18 In relation to the matters referred to in ss 75 and 76, s 77 of the Constitution empowers the Commonwealth Parliament to make laws establishing the extent of the jurisdiction of federal courts other than the High Court, and investing State courts with federal jurisdiction. Section 77 provides:

"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;

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13 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 724.

(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."

19 Section 73 provides ("with such exceptions and subject to such regulations as the Parliament prescribes") for the appellate jurisdiction of this Court relevantly as:

> "to hear and determine appeals from all judgments, decrees, orders, and sentences … of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State … and the judgment of the High Court in all such cases shall be final and conclusive."

20 While Ch III does not mandate the establishment of a single federal judicial system, it does establish the federal "Judicature", which may exercise adjudicative authority with respect to the matters listed in ss 75 and 76 of the Constitution. The federal Judicature is not a uniform national court system, but it has aptly been described as an "integrated national court system"[14], at the head of which this Court exercises constitutionally guaranteed appellate jurisdiction. In *Re Wakim; Ex parte McNally*, Gummow and Hayne JJ said[15]:

> "[W]hen it is said that there is an 'integrated' or 'unified' judicial system in Australia, what is meant is that all avenues of appeal lead ultimately to this Court and there is a single common law throughout the country. This Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured."

21 It is convenient to note here that the term "jurisdiction", as it is used in the context of Ch III[16], is concerned with the exercise of adjudicative authority for the purpose of "quelling controversies about legal rights and legal obligations through ascertainment of facts, application of law and exercise, where

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14 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 138; see also at 114-115; [1996] HCA 24; *Rizeq v Western Australia* (2017) 91 ALJR 707 at 718 [49]; 344 ALR 421 at 431.

15 (1999) 198 CLR 511 at 574 [110] (footnote omitted); [1999] HCA 27.

16 See *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; [1907] HCA 76.

appropriate, of judicial discretion"[17]. That function is the characteristic function of the courts[18], albeit that, under the constitutions of the States, adjudicative authority may be vested in organs other than those recognised as courts within Ch III of the Constitution[19].

22 A State court invested with adjudicative authority in respect of matters listed in ss 75 and 76 of the Constitution pursuant to s 77 is so invested as a "component part" of the federal Judicature for which Ch III provides[20].

23 It may be noted here with particular regard to s 77(ii) that several of the matters listed in ss 75 and 76 could not, on any view, be said to be within the adjudicative authority belonging to the courts of the States in the absence of a conferral of jurisdiction by the Commonwealth Parliament. Obvious examples are the matters referred to in s 75(iii) and (v). On the other hand, the most obvious example of a matter that, prior to Federation, would have been part of the jurisdiction that belonged to the courts of the States is a dispute between residents of the different Australian colonies.

The Judiciary Act

24 Sections 38 and 39 of the Judiciary Act were enacted pursuant to s 77(ii) and (iii) of the Constitution. Section 38 provides, subject to presently immaterial exceptions, that the jurisdiction of the High Court in certain matters shall be exclusive of that of the courts of the States.

25 Section 39 of the Judiciary Act excludes the jurisdiction of the State courts where the High Court has original jurisdiction or where original jurisdiction can be conferred on it, and then invests the State courts with that jurisdiction subject to certain conditions and restrictions.

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17 *Rizeq v Western Australia* (2017) 91 ALJR 707 at 719 [52]; 344 ALR 421 at 432. See also *Fencott v Muller* (1983) 152 CLR 570 at 608; [1983] HCA 12; *South Australia v Totani* (2010) 242 CLR 1 at 63 [131]; [2010] HCA 39.

18 *Marbury v Madison* 5 US 137 at 177 (1803); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; [1990] HCA 21.

19 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 67, 81-82, 93, 101-102, 109, 137; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [13]-[16]; [1998] HCA 54.

20 *Le Mesurier v Connor* (1929) 42 CLR 481 at 514; [1929] HCA 41; *Rizeq v Western Australia* (2017) 91 ALJR 707 at 717 [45]; 344 ALR 421 at 430.

26 The effect of these provisions of the Judiciary Act is that the exercise by a State court of adjudicative authority in respect of any of the matters listed in ss 75 and 76 of the Constitution, including matters between residents of different States, is an exercise of federal jurisdiction. As was explained[21] in *Baxter v Commissioners of Taxation (NSW)*:

> "The result 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."

The Court of Appeal

27 In the Court of Appeal it was accepted by all parties that even though, in hearing and determining Mr Burns' complaints, NCAT was exercising the judicial power of the State because it was able to render a binding, authoritative and curially enforceable judgment independently of the consent of the persons against whom his complaints had been brought, NCAT was not a "court of the State"[22].

28 The Commonwealth's primary argument in the Court of Appeal was that there arises from Ch III of the Constitution an implied limitation on State legislative power that prevents a State law from conferring adjudicative authority in respect of any of the matters listed in ss 75 and 76 of the Constitution on a State administrative body as opposed to one of the "courts of the States" referred to in s 77. The Commonwealth's alternative argument was that s 39 of the Judiciary Act is inconsistent with any State law conferring adjudicative authority in respect of a matter identified in s 75 or s 76 on a State tribunal other than a court; and that such a State law is inoperative to the extent it does so by virtue of s 109 of the Constitution[23].

29 The State of New South Wales ("NSW") argued that nothing in the Constitution prevents a State law from authorising a State tribunal that is not a court from exercising State judicial power in respect of a matter of the kind described in s 75(iv) of the Constitution[24]. As to the Judiciary Act, NSW argued

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21 (1907) 4 CLR 1087 at 1137-1138. See also *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21 [53]; [2015] HCA 36.

22 *Burns v Corbett* (2017) 343 ALR 690 at 698 [29].

23 *Burns v Corbett* (2017) 343 ALR 690 at 699-700 [33].

24 *Burns v Corbett* (2017) 343 ALR 690 at 700 [34].

that it is directed only to "courts" and not to "tribunals" other than courts, so that it does not operate inconsistently with the NCAT Act.

30 Leeming JA, with whom Bathurst CJ and Beazley P agreed, held that no implication from the Constitution prevents State Parliaments from conferring jurisdiction on State tribunals in respect of matters falling within s 75(iv) of the Constitution, but that a State law purporting to have that effect would be inconsistent with s 39 of the Judiciary Act and, therefore, invalid to the extent of the inconsistency by virtue of s 109 of the Constitution.

31 As to the Implication Issue, Leeming JA concluded that the very conferral by s 77 on the Commonwealth Parliament of a choice as to whether, and the extent to which, adjudicative authority in respect of matters listed in ss 75 and 76 of the Constitution should be exercised by State courts is inconsistent with an implication that the Constitution itself denies power to a State to permit adjudication of a matter referred to in s 75(iv) by any organ of the State designated by the State legislature. In his Honour's view, to the extent that the legislative power conferred by s 77 is not exercised by the Commonwealth Parliament, then the provisions of Ch V of the Constitution, notably ss 106, 107 and 108, preserve the powers and laws of the States as they were before Federation[25], including the power to determine disputes between residents of different States.

32 On the other hand, in his Honour's view, once the legislative power conferred by s 77 has been exercised, as it was by the enactment of ss 38 and 39 of the Judiciary Act, then s 109 of the Constitution ensures that any inconsistent State law is inoperative. That a matter falling within s 75(iv) might be determined otherwise than in accordance with s 39(2) would alter, impair or detract from the federal law so as to attract the operation of s 109 of the Constitution[26].

The appeals to this Court

33 Mr Burns, NSW and the Attorney General for New South Wales each appealed by special leave to this Court. The Attorneys-General of the States of Queensland, Western Australia, Tasmania and Victoria intervened in the appeals, making submissions in support of NSW.

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25 *Burns v Corbett* (2017) 343 ALR 690 at 705 [58]-[59], 706 [64].

26 *Burns v Corbett* (2017) 343 ALR 690 at 709 [75]-[77].

34 NSW and Mr Burns supported the conclusion of the Court of Appeal on the Implication Issue, arguing that the Constitution itself did not remove the "belongs to" jurisdiction of State courts recognised in s 77(ii) of the Constitution. NSW submitted that if, as is common ground, Federation did not remove the "belongs to" jurisdiction of State courts in respect of disputes between residents of different States, then a fortiori it did not remove the existing jurisdiction of State tribunals other than courts.

35 It was argued for NSW and the interveners that the terms of s 77(ii) and (iii), and the absence of any express provision in Ch III of the Constitution denying the possibility of the conferral by a State of adjudicative authority as it may see fit, are indicative of the survival, respectively, of pre-Federation State judicial and legislative power in that regard. That indication was said to be supported by the consideration that the exercise of judicial power by tribunals other than courts was familiar at the time the Constitution was drafted.

36 The Commonwealth submitted, pursuant to a notice of contention, that it is not to be supposed that the scheme for the adjudication of matters listed in ss 75 and 76 of the Constitution by the federal Judicature established under Ch III might be subverted by a conferral by State law of adjudicative authority in respect of such matters on an administrative body of the State. It was said that s 77(ii) itself assumes that, if adjudicative authority is to be exercised by any State body in respect of any matter listed in s 75 or s 76, that body must be a State court. The Commonwealth submitted that the argument for NSW and the interveners would permit a State Parliament to confer judicial power on a State Minister in respect of matters listed in ss 75 and 76 without any right of appeal to a court of the State and subject only to review by the Supreme Court for jurisdictional error that might then come to this Court on appeal on that limited basis.

37 Ms Corbett and Mr Gaynor resisted the appeals on the same grounds as were advanced by the Commonwealth. In addition, they sought special leave to cross-appeal against an order of the Court of Appeal that there should be no order in their favour as to the costs of the proceedings before it. This Court refused to grant special leave in this regard on the footing that the interests of justice did not warrant the grant of special leave.

The Implication Issue

Common ground

38 It is as well to begin consideration of the parties' submissions in relation to the Implication Issue by recalling what is not in dispute. First, it is common ground that the disputes between Mr Burns, and Ms Corbett and Mr Gaynor are

matters between residents of different States, within the meaning of s 75(iv) of the Constitution.

39 Secondly, and most importantly, it is uncontroversial that NCAT is not a "court of a State" for the purposes of Ch III of the Constitution. It is, therefore, unnecessary to delve into the considerations that bear upon the question whether any given tribunal is to be recognised as a "court" for the purposes of Ch III of the Constitution[27]. In addition, the circumstance that it is common ground that NCAT is not relevantly a court means that the argument for NSW and the interveners did not seek to suggest that any material distinction could be drawn between a tribunal such as NCAT and other kinds of administrative decision-maker, including those more closely associated with the executive government of a State.

40 The issue on which the parties are squarely divided is whether the provisions of Ch III deny the possibility that the authority to adjudicate any of the matters listed in ss 75 and 76 of the Constitution may be exercised by an organ of government which is not a court for the purposes of Ch III. Consideration of that issue must begin with a consideration of the negative implications of Ch III.

The negative implications of Ch III

41 Chapter III of the Constitution, and in particular ss 71 and 77, adopted the "autochthonous expedient"[28] of allowing the Commonwealth Parliament to vest the adjudicative authority of the Commonwealth in the courts of the States in respect of the matters listed in ss 75 and 76 of the Constitution. Chapter III of the Constitution thus provides for the authoritative adjudication of these matters by a federal Judicature, a component part of which may be the courts of the States[29] depending on the choices made by the Commonwealth Parliament under s 77(ii) and (iii). Section 77(ii) recognises the possibility that, absent Commonwealth legislation excluding the adjudicative authority that otherwise

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27 Cf *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 256-260, 267-271; [1995] HCA 10; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76-77 [64]-[66], 82-83 [82]-[85]; [2006] HCA 44.

28 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268; [1956] HCA 10.

29 *Rizeq v Western Australia* (2017) 91 ALJR 707 at 717 [45]; 344 ALR 421 at 430.

belongs to the State courts, that authority may continue to be exercised by those courts.

42 NSW and the interveners argued that Ch III of the Constitution does not mandate a uniform national judicature with respect to the matters listed in ss 75 and 76 of the Constitution; and that the extent to which the courts of the States are co-opted into the federal Judicature depends on the choices made by the Commonwealth Parliament under s 77(ii) and (iii) of the Constitution. It was said, echoing the view of Leeming JA, that the very existence of those choices is fatal to the implication for which the Commonwealth contended.

43 But whatever choices may be made by the Commonwealth Parliament in this regard, adjudicative authority in respect of the matters listed in ss 75 and 76 of the Constitution may be exercised only as Ch III contemplates and not otherwise. Chapter III contemplates the exercise of adjudicative power only by this Court, by other federal courts created by the Commonwealth Parliament, by State courts invested with such power by the Commonwealth Parliament or by State courts to which such adjudicative authority belongs or in which it is invested. Accordingly, even if the Commonwealth Parliament had made no law under s 77(ii) or (iii), a State law purporting to authorise an agency of the government of a State other than a court to determine, for example, a dispute between residents of different States would be invalid because Ch III left no room for such an adjudication.

44 In the *Boilermakers' Case*, in one of the seminal passages in the judicial exposition of the Constitution, Dixon CJ, McTiernan, Fullagar and Kitto JJ said[30]:

> "If attention is confined to Chap III it would be difficult to believe that the careful provisions for the creation of a federal judicature as the institution of government to exercise judicial power and the precise specification of the content or subject matter of that power were compatible with the exercise by that institution of other powers. The absurdity is manifest of supposing that the legislative powers conferred by s 51 or elsewhere enabled the Parliament to confer original jurisdiction not covered by ss 75 and 76. It is even less possible to believe that for the Federal Commonwealth of Australia an appellate power could be created or conferred that fell outside s 73 aided possibly by s 77(ii) and (iii). As to the appellate power over State courts it has recently been said in this Court: 'On the face of the provisions they amount to an express statement

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30 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 272.

> of the Federal legislative and judicial powers affecting State courts which, with the addition of the ancillary power contained in s 51(xxxix), one would take to be exhaustive': *Collins v Charles Marshall Pty Ltd*[31]. To one instructed only by a reading of Chap III and an understanding of the reasons inspiring the careful limitations which exist upon the judicial authority exercisable in the Federal Commonwealth of Australia by the federal judicature brought into existence for the purpose, it must seem entirely incongruous if nevertheless there may be conferred or imposed upon the same judicature authorities or responsibilities of a description wholly unconnected with judicial power. It would seem a matter of course to treat the affirmative provisions stating the character and judicial powers of the federal judicature as exhaustive. What reason could there be in treating it as an exhaustive statement, not of the powers, but only of the judicial power that may be exercised by the judicature?"

45 The actual decision in the *Boilermakers' Case* confirmed that, notwithstanding the widely held understanding up to that time[32], there was no good answer to the rhetorical question with which this passage concludes. While that decision specifically denied the power of the Commonwealth Parliament to confer upon an agency of the government of the Commonwealth other than a court the authority to adjudicate that is characteristic of the courts, the approach to the interpretation of Ch III, whereby the statement of what may be done is taken to deny that it may be done otherwise, is also apt to deny the possibility that any matter referred to in s 75 or s 76 might be adjudicated by an organ of government, federal or State, other than a court referred to in Ch III. In short, Ch III recognises no other governmental institution as having the potential to exercise adjudicative authority over the matters listed in ss 75 and 76 of the Constitution.

46 Indeed, the argument advanced by NSW and the interveners invites a response in the form of a rhetorical question similar to that asked by the majority in the *Boilermakers' Case*: what reason could there be in treating the arrangements made by Ch III for the adjudication of matters listed in ss 75 and 76 as an exhaustive statement only of the adjudicative authority that just happens to be exercised by the courts capable of comprising the federal Judicature referred to in Ch III? There is no good answer to this question. The terms, structure and purpose of Ch III leave no room for the possibility that adjudicative

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31 (1955) 92 CLR 529 at 543; [1955] HCA 44.

32 See Wheeler, "The *Boilermakers* Case", in Lee and Winterton (eds), *Australian Constitutional Landmarks*, (2003) 160 at 163.

authority in respect of the matters in ss 75 and 76 might be exercised by, or conferred by any party to the federal compact upon, an organ of government, federal or State, other than a court referred to in Ch III of the Constitution.

47 Chapter III, in providing for the establishment of the federal Judicature, is not concerned solely with the conferral of the judicial power of the Commonwealth and the limits on the conferral of that power. In the working out of the ramifications of the negative implications in Ch III of the Constitution, it is not the case "that Ch III has nothing to say … concerning judicial power other than the judicial power of the Commonwealth."[33] In *MZXOT v Minister for Immigration and Citizenship*, Gleeson CJ, Gummow and Hayne JJ adverted[34] to the effect of covering cl 5 of the Constitution, which renders the Constitution (set out in s 9 of the *Commonwealth of Australia Constitution Act* 1900 (Imp)[35]) "binding on the courts, judges, and people of every State … notwithstanding anything in the laws of any State", and observed that that which is binding "is the federal scheme manifested in the text and structure of the Constitution." It was noted that the federal scheme includes Ch III and the "various inferences which have been held to follow necessarily from that federal scheme."[36] Their Honours concluded their discussion with the observation that "a State legislature may not expand or contract the scope of the appellate jurisdiction of the Court conferred by s 73; or that of the original jurisdiction conferred by s 75[37]."[38]

48 The inevitability of the effect of Ch III upon State judicial power was touched on by Dixon CJ, McTiernan, Fullagar and Kitto JJ in the *Boilermakers'*

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33 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 543 [15]. See also *Fencott v Muller* (1983) 152 CLR 570 at 607; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 139-143; *Gould v Brown* (1998) 193 CLR 346 at 444 [186]; [1998] HCA 6; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 571-572 [66]; [2010] HCA 1.

34 (2008) 233 CLR 601 at 617-618 [19]-[20]; [2008] HCA 28.

35 63 & 64 Vict, c 12.

36 (2008) 233 CLR 601 at 618 [20].

37 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405 [227]; [2005] HCA 44.

38 (2008) 233 CLR 601 at 618 [20].

Case itself, where their Honours said[39], in a passage that warrants quotation at some length:

> "In a federal form of government a part is necessarily assigned to the judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme. A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them. 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. The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the judicature of the States must be secured from encroachment, 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. The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained. These very general considerations explain the provisions of Chap III of the Constitution".

49 Under the demarcation of the powers of the components of the federal Judicature contemplated by Ch III, adjudicative authority in respect of matters listed in ss 75 and 76 is to be exercised only by "courts", an appeal from which to this Court is guaranteed by s 73 of the Constitution. In this way, the exercise of adjudicative authority in respect of matters listed in ss 75 and 76 in accordance with Ch III, and not otherwise, ensures that adjudication in respect of all such matters occurs consistently and coherently throughout the federation[40].

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39 (1956) 94 CLR 254 at 267-268.

40 See *Fencott v Muller* (1983) 152 CLR 570 at 607; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 114-115, 138-143.

50 Even though the existence of State courts depends on State law, and they remain State courts when co-opted into the federal Judicature[41], so that the Commonwealth Parliament must take such courts as it finds them[42], the only organs of government of the States that s 77 allows to be co-opted into the federal Judicature are those which are courts[43]. Just as Ch III leaves no room for the Commonwealth Parliament to choose to co-opt an agency of the executive government of a State into the federal Judicature, it leaves no room for a State law to foist on the parties to a matter falling within one of the nine categories listed in ss 75 and 76 a determination by an agency of the executive government of the State. While the autochthonous expedient "left to the Commonwealth Parliament the selection of the courts in which federal jurisdiction should be invested"[44], the Parliament of a State could not pre-empt any selection the Commonwealth Parliament might make by vesting adjudicative authority over a s 75 or s 76 matter in an agency of its executive government.

51 Whether a State may sidestep its own courts as components of the federal Judicature by investing an agency of its executive government with the adjudicative authority characteristic of the courts in respect of the matters listed in ss 75 and 76 is a question that has not been squarely determined by this Court. That may not be surprising, given that it has never been suggested that such adjudication is not exclusively a matter for the courts identified in Ch III as potential components of the federal Judicature. However that may be, there are observations in the authorities which support the rejection of the argument now advanced by NSW and the interveners.

52 In *The Commonwealth v Queensland*[45], Gibbs J, with whom Barwick CJ, Stephen and Mason JJ agreed, observed that it is implicit in Ch III that it is not

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41 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452; [1916] HCA 58; *Le Mesurier v Connor* (1929) 42 CLR 481 at 495-496.

42 *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 313; [1912] HCA 42; *Kotsis v Kotsis* (1970) 122 CLR 69 at 109; [1970] HCA 61; *Russell v Russell* (1976) 134 CLR 495 at 516-517, 530, 535, 554; [1976] HCA 23.

43 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 75 [61].

44 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 67.

45 (1975) 134 CLR 298 at 314-315; see also at 327-328 per Jacobs J, with whom McTiernan J agreed; [1975] HCA 43.

permissible for a State law to detract from this Court's functions under Ch III. The case was directly concerned with the question whether a State Parliament had power to confer upon the Judicial Committee of the Privy Council adjudicative authority in respect of matters dealt with in s 74 of the Constitution. Gibbs J said[46]:

> "Legislation passed by a State which had that effect would violate the principles that underlie Ch III – that questions arising as to the limits of Commonwealth and State powers, having a peculiarly Australian character, and being of fundamental concern to the Australian people, should be decided finally in this Court … In other words, such legislation would be contrary to the inhibitions which, if not express, are clearly implicit in Ch III."

53 Thus, a State law could not deny an appeal to this Court from a decision of a State court in respect of a matter of the kinds listed in ss 75 and 76 of the Constitution. It would be surprising if a State law could achieve indirectly what it could not achieve directly by the expedient of vesting adjudicative authority in organs of the State other than its courts. Further in this regard, it is not to the point to say that an adjudication by an agency other than a court may be amenable under State law to judicial review by the Supreme Court of the State[47], and that the result of such a review might then find its way to this Court. The constitutional guarantee of an appeal contained in s 73 is (save for exceptions and regulations prescribed by the Commonwealth Parliament) peremptory in its operation; it is not dependent on the operation of State law[48].

54 In *K-Generation Pty Ltd v Liquor Licensing Court*, Gummow, Hayne, Heydon, Crennan and Kiefel JJ said[49]:

> "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' and that in respect of a body that is a 'court of a State', they may confer non-judicial powers. However, consistently with Ch III, the States

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46 (1975) 134 CLR 298 at 315.

47 Cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573-575 [71]-[77].

48 *Wall v The King; Ex parte King Won and Wah On [No 1]* (1927) 39 CLR 245 at 262; [1927] HCA 4.

49 (2009) 237 CLR 501 at 544 [153]; [2009] HCA 4.

> may not establish a 'court of a State' within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of the institutional independence and impartiality identified in the decisions of this Court."

55 It may fairly be said to be a fortiori these observations that a State may not, consistently with Ch III, confer on an executive agency of the State adjudicative authority in respect of any matter listed in s 75 or s 76 of the Constitution.

Considerations of historical context and purpose

56 The argument advanced by NSW and the interveners fails to recognise the historical context, and the associated purpose, of Ch III. Article III, §2 of the Constitution of the United States extended the judicial power of the United States, vested by Art III, §1 in the Supreme Court and the federal courts "ordain[ed]" and "establish[ed]" by Congress, to "Controversies … between Citizens of different States", because of a concern that "some state courts, in applying state law, might betray bias against nonresidents"[50]. In contrast, and notwithstanding the infamous colonial jealousies between the executive governments of the Australian colonies, our founders had sufficient faith in the integrity of the Australian courts that they were content to adopt the "autochthonous expedient of conferring federal jurisdiction on State courts" by federal legislation made pursuant to s 77(iii), rather than follow the lead of the United States[51]. Importantly in this regard, there is not the faintest suggestion in any historical materials that our founders entertained, even for a moment, the possibility that disputes as to the rights, duties and liabilities of residents of different States[52] might be authoritatively adjudicated by institutions of government of the States other than their courts. It may be noted in this regard

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50 Amar, *America's Constitution: A Biography*, (2005) at 228. See also *Bank of the United States v Deveaux* 9 US 61 at 87 (1809); Friendly, "The Historic Basis of Diversity Jurisdiction", (1928) 41 *Harvard Law Review* 483; Cowen, "Diversity Jurisdiction: The Australian Experience", (1955-1957) 7 *Res Judicatae* 1 at 2-3.

51 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 725, 804; *Australian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 330, 339; [1922] HCA 50; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

52 Cf Cowen, "Diversity Jurisdiction: The Australian Experience", (1955-1957) 7 *Res Judicatae* 1.

that cl 7 of Ch III of the Draft Bill of 1891, which "substantially contained"[53] the terms of s 77(ii), provided that original federal jurisdiction "may be exclusive, or may be concurrent with that of the Courts of the States."[54] Insofar as the legislative history is useful to an understanding of s 77(ii) as ultimately adopted, the reference to the "Courts of the States" is instructive, as is the apparent assumption that those "Courts" would be of the same institutional character as federal courts exercising federal jurisdiction.

Belonging to the "courts of the States"

57 An aspect of the argument advanced by NSW in relation to s 77(ii) of the Constitution that deserves particular attention is the contention that at least some of the matters listed in ss 75 and 76 of the Constitution involve jurisdiction which "belonged to" the courts of the States and which was not removed by Federation. On that footing, it was said that, absent a provision such as s 39 of the Judiciary Act, such a matter could be decided in State jurisdiction by a State court. It was then said that, if Federation did not remove the "belongs to" jurisdiction of State *courts*, then a fortiori it did not remove the existing jurisdiction of State administrative bodies. Three points may be made in respect of this aspect of the argument.

58 The first point is that the argument by NSW fails to attend to the negative effect of the express provisions of Ch III of the Constitution. The suggestion that the exercise of adjudicative authority by agencies of the government of a State other than its courts is unaffected by the negative implications of Ch III must be rejected for the reasons derived from this Court's jurisprudence in relation to Ch III, which is discussed above. One should not be distracted from the consideration that Ch III deals comprehensively with arrangements for the adjudication of all matters listed in ss 75 and 76 by the circumstance that the present appeals concern only matters within s 75(iv). The express provision for the exercise of adjudicative authority through courts capable of inclusion as components of the federal Judicature identified by ss 71 and 77 leaves no room for the possibility of an adjudication of any of the matters listed in ss 75 and 76 by an organ of the government which is not a court of a State that may become a component of the federal Judicature.

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53 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 801.

54 As extracted in Williams, *The Australian Constitution: A Documentary History*, (2005) at 307.

59 The second point to be made here is that the use of the expression "jurisdiction … which belongs to … the courts of the States" in s 77(ii) is itself a positive indication that, within the scheme of Ch III, the adjudicative authority finally to determine disputes as to the rights, duties and liabilities of parties to a matter of the kinds listed in s 75 or s 76 is the exclusive province of the courts there referred to. Section 77(ii) cannot be read as if it referred to the "jurisdiction that belongs to the courts of the States in contradistinction to the jurisdiction conferred by a State on a tribunal other than a court." The expression "jurisdiction … which belongs to … the courts of the States" in s 77(ii) refers to "courts", and necessarily excludes agencies of the executive government of the States from the scope of s 77(ii).

60 In *MZXOT v Minister for Immigration and Citizenship*, Gleeson CJ, Gummow and Hayne JJ, speaking of s 77(ii), said[55]:

> "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[56]."

61 The authority to adjudicate which "belongs to" State courts under their constitutions and laws is adjudicative authority that was characteristically exercised by courts. As was said[57] by Knox CJ, Rich and Dixon JJ in *Le Mesurier v Connor*, "the Courts of a State are the judicial organs" of the State government. It may be noted that s 77(ii), in speaking of "jurisdiction … which belongs to or is invested in the courts of the States", substantially repeats language contained in s 4 of the Supreme Court Ordinance 1861 (WA)[58], which served to establish "a Court of Judicature" in the colony of Western Australia. This provision invested in the Supreme Court of Western Australia all the powers and adjudicative authority "which belong[ed] to … the Courts of Queen's Bench, Common Pleas, and Exchequer at Westminster"[59]. It is tolerably clear that s 77(ii), in speaking of the jurisdiction that is "invested" in the courts of the States, is speaking of authority to adjudicate that has actually been invested in State courts by State or Imperial laws and not jurisdiction invested by the

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55 (2008) 233 CLR 601 at 619 [23].

56 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

57 (1929) 42 CLR 481 at 495.

58 24 Vict No 15.

59 See also *Puisne Judge Act* 1825 (NSW) (6 Geo IV No 16).

Commonwealth Parliament: that is because the investiture of jurisdiction by laws of the Commonwealth is expressly dealt with by s 77(iii). But however that may be, the point remains that adjudicative authority required by Ch III to be brought to bear in the determination of matters listed in ss 75 and 76 is that authority which is characteristically exercised by courts and, consistently with that character, is exercisable only by courts capable of inclusion in the federal Judicature.

62 The third point to be made here relates to the argument for NSW that the absence from s 77 of any reference to administrative tribunals of the States was a deliberate omission to preserve State legislative power in relation to the conferral of adjudicative authority upon such tribunals. This argument included the suggestion that the founders were familiar with the adjudicative authority of the States being exercised by administrative tribunals prior to Federation. In this regard, particular attention was given to *Wilson v Minister for Lands*[60] as an example of a State tribunal other than a court exercising judicial power prior to Federation. That case came before the Full Court of the Supreme Court and subsequently the Privy Council on appeal from the Land Appeal Court as a court of appeal from a Local Land Board. In delivering the advice of the Privy Council, Lord Macnaghten observed that the Land Board was a "lay tribunal"[61]. It is, however, also to be noted that, both in the Full Court and in the Privy Council, the Local Land Board was referred to as a court[62]. It is apparent that the judges before whom the case came were not at all concerned with whether the Local Land Board was to be regarded as an arm of the executive government distinct from the judiciary. Just as later commentators spoke of "tribunals" when clearly referring to courts within the meaning of Ch III[63], the case was not concerned to observe the distinction which has come to be regarded as vital to our understanding of the separation of powers under our Constitution. Accordingly, *Wilson's Case* does not support the proposition that the founders can be taken to have deliberately omitted administrative tribunals from the negative implications of Ch III of the Constitution. The same insouciance as to the distinction, which since the *Boilermakers' Case* has assumed crucial

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60 (1899) 20 LR (NSW) (L) 104, reversed on appeal: *Minister for Lands v Wilson* [1901] AC 315.

61 [1901] AC 315 at 323.

62 (1899) 20 LR (NSW) (L) 104 at 110; [1901] AC 315 at 322.

63 Cowen, "Diversity Jurisdiction: The Australian Experience", (1955-1957) 7 *Res Judicatae* 1 at 3, 7.

importance[64], between an administrative tribunal and a court is apparent in other pre-Federation decisions[65].

63 In any event, the existence of State administrative bodies exercising judicial power at the time of Federation cannot be decisive of the true operation of Ch III. As noted earlier, until this Court's decision in the *Boilermakers' Case*, it was commonly, but erroneously, understood that an administrative body, such as the Inter-State Commission or the Commonwealth Court of Conciliation and Arbitration, was capable of exercising the judicial power of the Commonwealth. The decision in the *Boilermakers' Case* established that the adjudicative authority of the Commonwealth was exercisable only by the courts of the federal Judicature; that being so, it became of vital importance to observe the difference between such courts and administrative tribunals for the purposes of Ch III[66]. True it is that neither the decision nor the reasoning in the *Boilermakers' Case* suggested that a State Parliament was precluded generally from conferring the adjudicative authority of a State on an organ of the State other than its courts. Within the scope of the general legislative authority of a State there can be no doubt that s 107 of the Constitution preserved the power of State Parliaments in that regard. But the question is whether Ch III withdrew from State Parliaments the power to confer adjudicative authority in respect of the matters listed in ss 75 and 76 upon agencies of the State other than its courts. That question cannot be answered in the negative by denying the now well-established distinction between courts and administrative tribunals in relation to the federal Judicature, or by asserting that s 77(ii) of the Constitution is to be understood as if, in referring to the courts of a State, it is also referring to agencies of the executive government or other agencies that are not recognisable as courts as that term is used in Ch III of the Constitution.

Conclusion

64 Sections 28(2)(a) and (c), 29(1) and 32 of the NCAT Act are invalid to the extent that they purport to confer jurisdiction upon NCAT in relation to the

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64 Cf *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

65 *Ex parte Dalton* (1876) 14 SCR (NSW) (L) 277 at 281; *Burrey v Marine Board of Queensland* (1892) 4 QLJ 151 at 152-153.

66 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

matters between Mr Burns, and Ms Corbett and Mr Gaynor. Pursuant to s 31 of the *Interpretation Act* 1987 (NSW) they may be read down to avoid that conclusion so that they do not confer jurisdiction upon NCAT where the complainant and the respondent to the complaint are "residents of different States" within the meaning of s 75(iv) of the Constitution.

Orders

65 The appeals to this Court should be dismissed.

66 In Matter Nos S183 and S185 of 2017, the appellant should pay the first respondent's costs. In Matter Nos S186, S187 and S188 of 2017, the appellant should pay the second respondent's costs.

GAGELER J.

The question of constitutional principle and its answer

67 The High Court has in the past made plain that, except with respect to the subject matters identified in ss 75 and 76 of the Constitution, a State Parliament can confer State judicial power on a State tribunal that is not a court of that State[67]. The ultimate question now for determination is whether the exception is warranted.

68 My opinion is that the exception is warranted as a structural implication from Ch III of the Constitution. The implication is needed because State legislative power to confer State judicial power on a State tribunal that is not a court of a State must be denied in order to ensure the effective exercise of the legislative powers conferred on the Commonwealth Parliament by s 77(ii) and (iii) to produce by legislation the constitutionally permissible result that an exercise of judicial power with respect to a subject matter identified in s 75 or s 76 occur only under the authority of Commonwealth law, in a forum which meets the minimum characteristics of a Ch III court, so as to give rise to a judgment or order that is appealable directly to the High Court subject only to such exceptions or regulations as the Commonwealth Parliament may prescribe under s 73(ii).

69 In the result, I agree with the conclusion and substantially with the reasoning of Kiefel CJ, Bell and Keane JJ on the Implication Issue. I think it appropriate to set out my own process of reasoning to that conclusion. That is in part because my own process of reasoning involves me first addressing the Inconsistency Issue. It is in part because I feel compelled to confront, and to explain why I reject, the premise of a discrete historical argument made by New South Wales and State interveners against the constitutional implication.

Section 77 and its limits

70 Understanding the scope and operation of s 77 and its interaction with s 73(ii) of the Constitution is impossible without first understanding some of the technical terms employed in the drafting of those provisions. The first is "matter", which encompasses a concrete controversy about legal rights existing independently of the forum in which that controversy might come to be adjudicated[68]. The second is "jurisdiction", which encompasses authority to

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67 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 544 [153]; [2009] HCA 4.

68 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20; *Fencott v Muller* (1983) 152 CLR 570 at 603; [1983] HCA 12; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 351 [27], 352 [30]; [2016] HCA 2.

adjudicate such a controversy through the exercise of judicial power[69]. The third is "court", which refers to an institution[70] which (whatever other characteristics it might need to possess) must be capable of exercising judicial power and must meet critical minimum characteristics of independence and impartiality[71].

71 Remaining aspects of the terminology employed in the drafting of ss 73 and 77 which need to be understood are the compound references respectively to "federal jurisdiction" and to jurisdiction which "belongs to ... the courts of the States". Both allude to the source of the authority of a court to adjudicate. Federal jurisdiction is authority to adjudicate that is derived from the Constitution or a Commonwealth law. Federal jurisdiction is limited to authority to adjudicate a matter identified in s 75 or s 76. Jurisdiction which belongs to the courts of the States, equating to "State jurisdiction", is the authority of State courts to adjudicate that is derived from State Constitutions or State laws[72]. State jurisdiction is not limited to authority to adjudicate a "matter"[73], let alone a matter identified in s 75 or s 76, although it encompasses authority to adjudicate at least some of those matters.

72 State jurisdiction cannot simply be equated with the jurisdiction which belonged to the courts of the colonies which on federation became States. On federation, everything adjusted. State courts which had until then been colonial courts retained the same jurisdiction with which they had previously been invested under colonial Constitutions and colonial laws with respect to controversies between residents of the geographical areas of the bodies politic which had been colonies and which became States. But what had been colonial jurisdiction was transmogrified into State jurisdiction. The colonial jurisdiction

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69 *Rizeq v Western Australia* (2017) 91 ALJR 707 at 718 [50]; 344 ALR 421 at 432; [2017] HCA 23, quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; [1907] HCA 76.

70 *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 58; [1982] HCA 13.

71 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; [2004] HCA 31; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 81 [78]; [2006] HCA 44; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 106 [181]-[183]; [2013] HCA 7.

72 *Rizeq v Western Australia* (2017) 91 ALJR 707 at 718 [50]-[51]; 344 ALR 421 at 432.

73 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 136-137; [1996] HCA 24. Cf *Minister for Works (WA) v Civil and Civic Pty Ltd* (1967) 116 CLR 273 at 277-279; [1967] HCA 18.

those courts had previously had with respect to controversies between residents of different colonies became State jurisdiction with respect to matters between residents of different States, a class of matters also within the original and concurrent jurisdiction of the High Court under s 75(iv) of the Constitution. The same State courts, within the limits of the subject-matter, geographical and personal jurisdiction they had previously had as colonial courts, immediately acquired new State jurisdiction in respect of classes of matters which had not previously existed. Those new classes of matters included matters within the description in s 76(i) of the Constitution of matters arising under the Constitution as well as those within the description in s 76(ii) of the Constitution of matters arising under Commonwealth laws. To what extent State courts acquired State jurisdiction with respect to matters within the remaining classes and subclasses of matters identified in ss 75 and 76 of the Constitution need not now be explored[74]. Complexities attributable to the continuation of Imperial laws conferring jurisdiction on State courts can also be put to one side[75].

73 The important point for present purposes is that, whatever State jurisdiction State courts had on and from federation with respect to the matters identified in ss 75 and 76 of the Constitution, the State jurisdiction of State courts became subject to displacement by a law enacted by the Commonwealth Parliament under s 77(ii) or (iii) of the Constitution. Each of those powers is quite confined in its operation.

74 The words "[w]ith respect to" at the commencement of s 77 are words which identify the subject matter to which the specific powers conferred on the Commonwealth Parliament by s 77(i), (ii) and (iii) are directed. Those sub-sections confer powers to "defin[e]" or "invest[]" jurisdiction "[w]ith respect to" any of the matters identified in ss 75 and 76. The words "[w]ith respect to" do not expand the scope of those powers beyond identifying the subject matter to which they are directed[76].

75 The power conferred by s 77(ii) is an express power to "make laws ... defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to ... the courts of the States" "[w]ith respect to

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74 Cf *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 617-621 [16]-[31]; [2008] HCA 28.

75 Cf *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175 at 210; [1945] HCA 11; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 204, 228-230, 243-244; [1979] HCA 57.

76 See *Abebe v The Commonwealth* (1999) 197 CLR 510 at 525-527 [27]-[29]; [1999] HCA 14. Cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 574 [110]; [1999] HCA 27.

any of the matters mentioned" in ss 75 and 76. Neither in the judgment under appeal nor in the arguments of the parties and interveners was the suggestion made that s 77(ii) could be read to mean anything other than what the provision says.

76 Although it would provide an attractively simple way of cutting through a knotty constitutional problem, I am unable to read s 77(ii) as if the words "the courts of" did not appear, or as if the words "the courts of the States" encompassed bodies that do not meet the description of a "court of a State" within s 77(iii). In that respect, I am unable to find anything to support either of those non-textual readings of s 77(ii) in case law or commentary on the implied congressional power of exclusion of State court jurisdiction under the United States Constitution, which informed the drafting of s 77(ii). The "general principle" of United States constitutional law is that "where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it"[77]. That was at federation (and remains) the articulated extent of the principle which formed the background to the drafting of s 77(ii), nothing more[78].

77 Nor can I see that it is possible to treat s 77(ii) as extending by implication to permit the Commonwealth Parliament to exclude the adjudicatory authority of State tribunals that are not State courts. No doubt, "consistency with the principles upon which constitutional provisions are interpreted and applied demands that" the power conferred by s 77(ii) "should be given as full and flexible an operation as will cover the objects it was designed to effect"[79]. But the affirmative terms in which the power is conferred have express limitations. Those limitations cannot be glossed by drawing an implication. The power is confined in its terms to a power to exclude the adjudicatory authority of State courts which is derived, relevantly, from State Constitutions or State laws. The power permits the exclusion of that adjudicatory authority of State courts: (1) only with respect to matters identified in ss 75 and 76; and (2) only to the extent that, with respect to those matters, the High Court has original jurisdiction

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77 *Claflin v Houseman* 93 US 130 at 136 (1876).

78 See generally Fallon et al, *Hart and Wechsler's The Federal Courts and the Federal System*, 7th ed (2015) at 412-460 ("Federal Authority and State Court Jurisdiction"); Kent and Lacy, *Commentaries on American Law*, rev ed (1889), vol 1 at 318-321, 395-404.

79 *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 349; [1948] HCA 7.

under s 75 or has original jurisdiction conferred on it under s 76[80] or has appellate jurisdiction under s 73[81], or a federal court other than the High Court is invested with federal jurisdiction under s 77(i).

78 The power conferred by s 77(iii) is limited to a power to invest federal jurisdiction in one or more State courts. That is to say[82]:

> "The power conferred by s 77(iii) is expressed in terms which confine it to making laws investing State Courts with Federal jurisdiction. Like all other grants of legislative power this carries with it whatever is necessary to give effect to the power itself. But the power is to confer additional judicial authority upon a Court fully established by or under another legislature. Such a power is exercised and its purpose is achieved when the Parliament has chosen an existing Court and has bestowed upon it part of the judicial power belonging to the Commonwealth."

79 Particularly in light of the limited scope of the express power conferred by s 77(ii), I cannot see that it is possible to treat s 77(iii) as extending by implication to permit the Commonwealth Parliament to exclude the adjudicatory authority of non-court State tribunals. The existence of such an implied power of exclusion finds no support in the analysis underlying the now settled view[83] that a matter answering the description of a matter within s 75 or s 76 which is not excluded from a State court's State jurisdiction under s 77(ii) by s 38 or s 39(1) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") is nevertheless excluded as a consequence of the State court's investiture with federal jurisdiction under s 77(iii) by s 39(2) of the Judiciary Act. That exclusion is effected by s 109 of the Constitution, the relevant operation of which I now turn to explain.

Section 109 and its limits

80 By operation of s 109 of the Constitution, a State law which confers State jurisdiction on a State court is rendered invalid, in the sense of "suspended,

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80 See Quick and Groom, *The Judicial Power of the Commonwealth*, (1904) at 163; *Booth v Shelmerdine Bros Pty Ltd* [1924] VLR 276 at 282.

81 *Flint v Webb* (1907) 4 CLR 1178 at 1186-1187; [1907] HCA 77.

82 *Le Mesurier v Connor* (1929) 42 CLR 481 at 496; [1929] HCA 41. See also *Russell v Russell* (1976) 134 CLR 495 at 516-517; [1976] HCA 23.

83 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21 [53]; [2015] HCA 36.

inoperative and ineffective"[84], if and to the extent that the State law would otherwise operate to confer that State jurisdiction on that State court with respect to a matter with respect to which federal jurisdiction is either: (1) conferred on the High Court or a federal court and excluded from State jurisdiction by force of Commonwealth law enacted under s 77(ii); or (2) invested in a State court to the exclusion of State jurisdiction by force of Commonwealth law enacted under s 77(iii). In the case of Commonwealth law enacted under s 77(ii), the inconsistency within the meaning of s 109 lies in the Commonwealth law withdrawing an authority to adjudicate which the State law confers. In the case of Commonwealth law enacted under s 77(iii), the nature of the inconsistency within the meaning of s 109 requires a little more elaboration.

81 To the extent that a Commonwealth law enacted under s 77(iii) results in a State law which confers State jurisdiction on a State court being rendered inoperative by operation of s 109 of the Constitution, the Commonwealth law produces that result in consequence of investing federal jurisdiction in the State court with respect to a matter or matters identified in ss 75 and 76 of the Constitution. The inconsistency within the meaning of s 109 does not lie simply in the State court being subjected to simultaneous Commonwealth and State commands to adjudicate the same controversy; the State court by determining the controversy would be able to fulfil both commands. The inconsistency lies rather in the disparity of the legal incidents of the dual sources of authority to adjudicate[85]. Quite apart from such conditions as the Commonwealth Parliament might validly attach to its investiture of federal jurisdiction in the State court[86], and quite apart from the source of the powers of a State court exercising federal jurisdiction being different from the source of the powers of a State court exercising State jurisdiction[87], a judgment or order made by the State court in the

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84 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 464; [1995] HCA 47, quoting *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 286; [1961] HCA 32.

85 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1137-1138; *Ffrost v Stevenson* (1937) 58 CLR 528 at 573; [1937] HCA 41; *Minister for Army v Parbury Henty & Co* (1945) 70 CLR 459 at 483; [1945] HCA 52; *Felton v Mulligan* (1971) 124 CLR 367 at 412-413; [1971] HCA 39; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471, 479; [1980] HCA 32.

86 Eg s 39(2)(a) of the Judiciary Act, considered in *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393; [1926] HCA 8, and s 39(2)(d) of the Judiciary Act, considered in *Troy v Wrigglesworth* (1919) 26 CLR 305; [1919] HCA 31.

87 *Rizeq v Western Australia* (2017) 91 ALJR 707 at 720-721 [59]-[63], 726-727 [91]; 344 ALR 421 at 434-435, 443.

exercise of federal jurisdiction with respect to a matter identified in s 75 or s 76 is appealable directly to the High Court under s 73(ii) of the Constitution whereas the judgment or order of the State court in the exercise of equivalent State jurisdiction with respect to the same matter is not so appealable unless the State court is the Supreme Court of that State. For the Commonwealth law investing federal jurisdiction within that constitutional setting to have unimpeded operation, the federal jurisdiction it invests in the State court must become that court's sole operative source of jurisdiction with respect to the matter or matters concerned.

82 The crux of the carefully reasoned judgment under appeal is the view that s 109 of the Constitution can also operate with respect to a Commonwealth law enacted under s 77(iii) to render inoperative a State law conferring State judicial power on a State tribunal that is not a court of that State on the basis that the State law "would alter, impair or detract from the conditional and universal operation of federal law"[88]. On the understanding that the Civil and Administrative Tribunal of New South Wales ("NCAT") is not a State court, it was held in the judgment under appeal that s 109 operated in that way on s 39(2) of the Judiciary Act to render inoperative provisions of the *Civil and Administrative Tribunal Act* 2013 (NSW) ("the NCAT Act") which confer State judicial power on NCAT to the extent that the State jurisdiction so conferred extends to a matter between residents of different States within s 75(iv) of the Constitution.

83 The critical passage in the reasoning supporting that holding in the judgment under appeal was as follows[89]:

> "[T]he 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 s 75 or s 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."

84 Respectfully, I disagree. If I were to assume that there is State legislative capacity to confer State jurisdiction on a State tribunal that is not a State court in a matter falling within s 75 or s 76, I would be unable to accept that s 109 of the Constitution would operate on a Commonwealth law enacted under s 77(iii) so as to invalidate a State law enacted in the exercise of that legislative capacity. I proceed to explain why.

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88 *Burns v Corbett* (2017) 343 ALR 690 at 709 [78].

89 *Burns v Corbett* (2017) 343 ALR 690 at 709 [75] (emphasis in original).

85 The principle by reference to which inconsistency within the meaning of s 109 of the Constitution is discerned, although familiar, is usefully restated[90]:

> "Substantially, it amounts to this. When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, 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."

86 There is, of course, no need for a State law to impinge upon the field of legal operation of the Commonwealth law in order for the State law to impair or detract from the operation of the Commonwealth law. Impairment or detraction can result from the practical effect of the State law[91]. It follows that a State law can impair or detract from a Commonwealth law's conferral of jurisdiction under s 76 or s 77(i) or (iii) "by directly or indirectly precluding, overriding or rendering ineffective an actual exercise of that jurisdiction"[92].

87 However, I am unable to see how a State law can impair or detract from the operation of a Commonwealth law by reason of the State law impairing or detracting from the *conditional* and *universal* operation of that Commonwealth law except to the extent that the State law has a legal operation or practical effect within the universe of the conditional legal operation of the Commonwealth law[93]. To say that a State law impairs or detracts from the conditional and universal operation of a Commonwealth law, so it seems to me, is necessarily to say that the Commonwealth law is properly construed as a complete or exhaustive or exclusive statement of the law governing a subject matter lying

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90 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630; [1937] HCA 82. See to similar effect *Ex parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12; *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136-137; [1932] HCA 40.

91 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 398-401 [196]-[209]; [2005] HCA 44.

92 *P v P* (1994) 181 CLR 583 at 603; [1994] HCA 20.

93 Cf *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 454 [9], 463 [38], 467-468 [56]-[59]; [2013] HCA 55.

within the limits of Commonwealth legislative power[94]. It is to say, using the common metaphor, that the Commonwealth law "covers the field"[95].

88 Using the common metaphor of covering the field serves to highlight the critical inquiry for the purpose of s 109 as one of determining the permissible reach of the legal operation of the Commonwealth law[96]:

> "The question thus metaphorically stated arises when one asks of a valid Commonwealth law governing a particular matter whether or not it appears that it is intended that it be the whole law on the matter, intended to deal with a topic within Commonwealth power exhaustively and completely to the entire exclusion of State law. But the metaphor of occupation of a field is of no help in the initial question, what is the extent of the field available for Commonwealth occupation."

89 Reverting to the language of the decision under appeal, the critical question is: what are the limits of the universe? Only to the extent that a State law has a legal operation or practical effect within the universe covered by the Commonwealth law could it be said that the State law impaired or detracted from the conditional and universal operation of the Commonwealth law.

90 "To legislate upon a subject exhaustively" is "an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise. It is still more widely different from an attempt to limit the exercise of State legislative power so that the Commonwealth should not be consequentially affected in the ends it is pursuing."[97]

91 Translated to the immediate context, to say that the conferral of State jurisdiction on a State tribunal that is not a State court with respect to a matter identified in s 75(iv) of the Constitution would alter, impair or detract from the conditional and universal operation of s 39(2) of the Judiciary Act is to say that, in enacting s 39(2) of the Judiciary Act, the Commonwealth Parliament has made a complete or exhaustive or exclusive statement of the law with respect to a

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94 Cf *Ex parte McLean* (1930) 43 CLR 472 at 483.

95 See *Momcilovic v The Queen* (2011) 245 CLR 1 at 116-119 [262]-[265]; [2011] HCA 34; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524 [40]; [2011] HCA 33.

96 *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 156; [1965] HCA 3.

97 *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120; [1948] HCA 13.

subject matter which includes the institutions able to exercise jurisdiction with respect to matters identified in ss 75 and 76 of the Constitution. It is necessarily to say that the Commonwealth Parliament has not only provided positively for the conditional investiture of federal jurisdiction in State courts but has also stipulated negatively for the non-investiture of any jurisdiction with respect to any of those matters other than in State courts.

92 Leaving aside the textual difficulty of construing s 39(2) of the Judiciary Act to have such a negative penumbra, the fundamental problem with that approach to the invocation of s 109 of the Constitution to render inoperative a State law investing State jurisdiction in a State tribunal that is not a State court lies in the need to find a source of Commonwealth legislative power. Section 39(2) of the Judiciary Act can go no further than investing a State court with federal jurisdiction, because the legislative power conferred by s 77(iii) goes no further. Neither s 77(iii) nor any other provision of the Constitution enables the Commonwealth Parliament to confer judicial power on a tribunal that is not a State court[98]. Neither s 77(iii) nor any other provision of the Constitution enables the Commonwealth Parliament to make its conferral of federal jurisdiction on a State court exhaustive of the judicial power of a tribunal that is not a State court.

93 The legislative powers conferred on the Commonwealth Parliament by ss 76 and 77 are complemented, as distinct from supplemented[99], by s 51(xxxix) of the Constitution. In so far as s 51(xxxix) might be thought relevant, it is a provision expressed to confer power to make laws with respect to "matters incidental to the execution of any power vested by [the] Constitution in the Parliament ... or in the Federal Judicature". Although it has a superficial similarity to the "necessary and proper" clause in Art I §8 of the Constitution of the United States, s 51(xxxix) has long been understood to have a much more closely confined operation[100]. Being confined, relevantly, to matters incidental to the *execution* of the legislative power vested in the Commonwealth Parliament by s 77 or matters incidental to the *execution* of the judicial power vested in a court by s 71 as a consequence of s 75 or of a law enacted under s 76 or s 77, s 51(xxxix) has been held to be incapable of supporting: denial by the Commonwealth Parliament of a conferral of State judicial power on a State

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98 *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 9, 18, 21, 23; [1943] HCA 2; *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case*") (1956) 94 CLR 254 at 270; [1956] HCA 10; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 73 [56].

99 Cf *Duncan v State of Queensland* (1916) 22 CLR 556 at 624-625; [1916] HCA 67.

100 *Le Mesurier v Connor* (1929) 42 CLR 481 at 497. Cf *Rizeq v Western Australia* (2017) 91 ALJR 707 at 726-727 [90]-[91]; 344 ALR 421 at 442-443.

court[101]; conferral by the Commonwealth Parliament of Commonwealth judicial power on a State court[102]; conferral by the Commonwealth Parliament of Commonwealth non-judicial power on a State court[103]; and acceptance by the Commonwealth Parliament of conferral of State judicial power on a federal court[104]. Much less can s 51(xxxix) support denial by the Commonwealth Parliament of a conferral of State judicial power on a tribunal which is not a court and which for that reason is not and could not be the recipient of a conferral of Commonwealth judicial power.

The implication and its necessity

94 The threshold for implying a non-textual constitutional limitation on the ambit of legislative power of the character presently under consideration is that the limitation be "logically or practically necessary for the preservation of the integrity of [the constitutional] structure"[105]. The determinative question is whether denial of State legislative power to confer State judicial power with respect to a matter identified in s 75 or s 76 on a State tribunal that is not a State court meets that threshold.

95 For the reasons I have given in explaining the limits of s 77 and in rejecting the approach adopted in the decision under appeal to the application of s 109, that question falls to be considered against the background of an absence of Commonwealth legislative power to achieve the same result. If the existence of State legislative power to confer State judicial power with respect to a matter identified in s 75 or s 76 other than on a State court would mean that there is a hole in the structure of Ch III, there would be no option but to accept the existence of that hole as part of a flawed constitutional design. The Commonwealth Parliament would have no capacity to plug it.

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101 *Williams v Hursey* (1959) 103 CLR 30 at 113; [1959] HCA 51. See also at 88-89.

102 *Willocks v Anderson* (1971) 124 CLR 293 at 299; [1971] HCA 28. See also *Boilermakers' Case* (1956) 94 CLR 254 at 269-270.

103 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152; [1953] HCA 11.

104 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 575 [111], 577-579 [114]-[120].

105 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135; [1992] HCA 45; *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169; [1996] HCA 48.

96 The necessity for the implication, in my opinion, arises as follows. Within the structure of Ch III of the Constitution, the legislative powers conferred on the Commonwealth Parliament by s 77(ii) and (iii) operate in conjunction with s 109 of the Constitution, in the manner already described, to enable the Commonwealth Parliament to produce the result that any matter identified in s 75 or s 76 can be adjudicated in the exercise of federal jurisdiction by a federal court or a State court to the exclusion of such State jurisdiction as might be conferred on a State court by the Parliament of a State. A constitutionally mandated condition of legislation attaining that constitutionally permissible result is that the federal court or State court with federal jurisdiction to adjudicate the matter is to have and maintain the minimum characteristics of independence and impartiality required of a Ch III court.

97 The automatic constitutional consequence of attainment of that constitutionally permissible result is then that any judgment or order of the federal court or State court made in the exercise of that federal jurisdiction is appealable to the High Court under s 73(ii), subject to such exceptions or regulations as the Commonwealth Parliament might prescribe. The language of s 73(ii) makes clear that "no exceptions of or regulations of the power [of the High Court to hear and determine such appeals] can be recognized unless they are made by Parliament"[106]. To the extent that the exercise of either of the powers conferred on the Commonwealth Parliament by s 77(ii) or (iii) results in a State law conferring State jurisdiction with respect to a matter under s 75 or s 76 being rendered inoperative, s 73(ii) accordingly operates to ensure that any judgment or order made in the exercise of a corresponding conferral of federal jurisdiction under s 77(i) or (iii) is appealable to the High Court subject only to such exceptions or regulations as are prescribed by the Commonwealth Parliament alone.

98 The practical significance of a judgment or order made by a federal court or a State court in the exercise of federal jurisdiction being appealable to the High Court under s 73(ii) has diminished with the ultimate abolition by the *Australia Act* 1986 (Cth) of the alternative of an appeal to the Judicial Committee of the Privy Council and with recognition in 2010 of the constitutional entrenchment of the supervisory jurisdiction of a State Supreme Court to remedy jurisdictional error[107]. But its significance has by no means abated. Subject only to such exceptions or regulations as the Commonwealth Parliament alone might choose to prescribe, the appeal for which s 73(ii) provides is an appeal on all questions of fact and law arising in a matter within federal jurisdiction: "any act

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106 *Wall v The King; Ex parte King Won and Wah On [No 1]* (1927) 39 CLR 245 at 262; [1927] HCA 4.

107 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; [2010] HCA 1.

of the Court upon which [the] judgment or order is based is examinable ... to determine its correctness"[108]. The High Court in its appellate jurisdiction is able to do complete justice in determining the matter under appeal by itself rendering the judgment or making the order which it considers on the merits should have been made by the court from which the appeal is brought.

99 The constitutional structure which enables attainment of that constitutionally permissible result, subject to that constitutionally mandated condition and with that automatic constitutional consequence, would be undermined to a significant extent were a State Parliament able to confer State jurisdiction with respect to a matter identified in s 75 or s 76 on a State tribunal that is not a State court. Were a State Parliament to have that power, the Commonwealth Parliament's exclusion by a law enacted under s 77(ii) or (iii) of the State jurisdiction conferred on a State court could be circumvented by the simple expedient of conferring equivalent State jurisdiction on a State tribunal. The State tribunal would not need to have the minimum characteristics of independence and impartiality required of a Ch III court. The State tribunal's judgments or orders would not need to be subject to any appeal on any question of fact or law to any court, much less the High Court. The tribunal would need to be subject only to the constitutionally entrenched supervisory jurisdiction of the Supreme Court of the State. The Supreme Court in the exercise of that supervisory jurisdiction would be able to grant an appropriate remedy only if the tribunal were to exceed or to fail to exercise the State jurisdiction conferred on it.

100 I do not think that I am venturing down the forbidden path of construing the Constitution by reference to "distorting possibilities"[109] in choosing to illustrate those undermining effects by hypothesising the position of a State Commission constituted by State legislation in the same manner, and capable of exercising within a State the same judicial power with respect to the same classes of subject matter, as the ill-fated Inter-State Commission established in its original form by Commonwealth legislation[110]. There would be created "a curiously anomalous body" combining functions of "the investigating department, the prosecuting authority, the Court and the Sheriff's department"[111]. That curiously anomalous body would be immune from appeal to any court in respect of any coercive order it might make in consequence of any adjudication it might undertake with respect to a matter identified in s 75 or s 76, including a

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108 *Riley v Nelson* (1965) 119 CLR 131 at 154; [1965] HCA 62.

109 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32]; [2003] HCA 72.

110 *Inter-State Commission Act* 1912 (Cth).

111 *New South Wales v The Commonwealth* (1915) 20 CLR 54 at 109; [1915] HCA 17.

matter to which the Commonwealth is a party[112], a matter arising under Commonwealth law or a matter arising under the Constitution or involving its interpretation. Despite the terms of s 101 of the Constitution, the High Court has held that creation of such a body is denied to the Commonwealth Parliament[113]. Compounding both the curiosity and the anomaly, creation of such a body would nevertheless be allowed to a State Parliament.

101 To the extent that denial of State legislative power to confer State judicial power with respect to a matter identified in s 75 or s 76 on a non-court State tribunal is protective of the ability of the Commonwealth Parliament to invoke the appellate jurisdiction of the High Court under s 77(iii) with respect to such a matter, its implication was foreshadowed in reasoning which supported the unanimous decision of the High Court in 1975[114] holding invalid a State law enacted two years prior. The State law held invalid purported to confer on the Privy Council jurisdiction to consider and advise the Queen on "questions or matters which, whether as part of any cause or otherwise, and whether in the course of any proceedings in any court in [the State] or otherwise, arise under or concern any law in force in [the State] ... or which otherwise substantially relate to the peace, welfare and good government of [the State]"[115].

102 The reasoning of four members of the High Court was contained in the reasons for judgment of Gibbs J[116]. Having noted that, at federation, s 74 of the Constitution had the effect that "no appeal was to be permitted to the Judicial Committee from a decision of this Court upon any question ... as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, unless this Court should certify that the question is one which ought to be determined by the Judicial Committee"[117] and that "the provisions of [Ch III] enabled the Parliament by appropriate legislation to achieve the result that all of the matters mentioned in ss 75 and 76 of the Constitution (except possibly inter se questions) should be finally decided in this Court and not in the Judicial

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112 Cf *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410; [1997] HCA 36.

113 *New South Wales v The Commonwealth* (1915) 20 CLR 54.

114 *The Commonwealth v Queensland* ("the *Queen of Queensland Case*") (1975) 134 CLR 298; [1975] HCA 43.

115 Section 3 of the *Appeals and Special Reference Act* 1973 (Q).

116 *Queen of Queensland Case* (1975) 134 CLR 298 at 303, 316.

117 *Queen of Queensland Case* (1975) 134 CLR 298 at 313.

Committee"[118], his Honour stated that "[i]t is implicit in Ch III that it is not permissible for a State by legislation to provide a procedure by which the Judicial Committee is enabled to consider an inter se question in the absence of a certificate of this Court, or any other matter arising in the exercise of federal jurisdiction when the Parliament has exercised its power to prevent any appeal being brought to the Judicial Committee from a decision of this Court or a State court on any such matter"[119].

103 Whilst that statement might perhaps be interpreted as suggesting that the implied limitation on State legislative power was contingent on the Commonwealth Parliament having first legislated to achieve the result that all of the matters mentioned in ss 75 and 76 be appealable to the High Court under s 73(ii), such an interpretation would not readily explain the outcome of his Honour's reasoning. The outcome was to deny the validity of the State law in its application purportedly to authorise seeking from the Privy Council an advisory opinion as to whether the legislative power of the State extended to enacting its own Royal Style and Titles Act in opposition to the *Royal Style and Titles Act* 1973 (Cth). That purported conferral of authority was beyond the scope of any legislation which the Commonwealth Parliament had enacted, or could have enacted, with respect to any matter mentioned in s 75 or s 76, both because it was in respect of an advisory opinion and because the Privy Council was neither a federal nor a State court. The outcome was produced by a negative implication that was necessary to give efficacy to the Commonwealth legislative powers which his Honour identified.

104 The separate reasons for judgment of Jacobs J, with whom McTiernan J substantially agreed[120], were unambiguous in basing the invalidating implication on an absence of State legislative power which arose from the structure of Ch III irrespective of any exercise of Commonwealth legislative power. His Honour found in Ch III "an exhaustive statement of the kind of judicial power which may be conferred or exercised in respect of the subject matters set out in ss 75 and 76"[121]. Judicial power as envisaged by Ch III with respect to the subject matters identified in ss 75 and 76 was relevantly confined to judicial power of a kind that could be exercised only in respect of justiciable controversies answering the constitutional description of "matters"[122].

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118 *Queen of Queensland Case* (1975) 134 CLR 298 at 314.

119 *Queen of Queensland Case* (1975) 134 CLR 298 at 314-315.

120 *Queen of Queensland Case* (1975) 134 CLR 298 at 303.

121 *Queen of Queensland Case* (1975) 134 CLR 298 at 328.

122 *Queen of Queensland Case* (1975) 134 CLR 298 at 327-329.

105 His Honour's reasoning did not deny the capacity of a State Parliament to confer State jurisdiction with respect to a subject matter identified in s 75 or s 76 of the Constitution. What it denied was the capacity of a State Parliament to confer judicial power with respect to a subject matter identified in s 75 or s 76 other than by conferring State jurisdiction with respect to a "matter" identified in s 75 or s 76. His Honour's holding was that the implication from Ch III which he identified denied to the Queensland Parliament legislative capacity to confer on the Privy Council State jurisdiction to give an advisory opinion on subject matters falling within ss 75 and 76. His Honour's reasoning and conclusion is wholly consistent with the constitutional implication now confirmed.

106 Consistently with the reasoning of both Gibbs J and Jacobs J, the constitutional implication applicable to the resolution of this case is that judicial power with respect to the subject matters identified in ss 75 and 76 of the Constitution is confined to judicial power of a kind that is: (1) exercisable in respect of justiciable controversies answering the constitutional description of "matters"; and (2) conferred on or invested in institutions answering the constitutional description of "courts". With respect to the subject matters identified in ss 75 and 76, the Commonwealth Parliament and State Parliaments each lack legislative power to confer or invest judicial power of any other kind.

History and its limits

107 History is important to constitutional interpretation. That is because the Constitution was framed against the background of "many traditional conceptions"[123], and because the colonial context in which the Constitution was forged can illuminate its purposes and can expose nuances of potential meaning not obvious from its text[124]. But concentration on historical minutiae can distract from the discernment and exposition of constitutional principle.

108 In arguing against the constitutional implication denying State legislative power to confer State judicial power with respect to a subject matter identified in s 75 or s 76 on a non-court State tribunal, a consideration of historical detail on which New South Wales and State interveners placed considerable emphasis concerned the position of Local Land Boards established under the *Crown Lands Act* 1884 (NSW). New South Wales and State interveners argued that the implication would have jeopardised part of the functioning of those Local Land

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123 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; [1951] HCA 5. See also *Palmer v Ayres* (2017) 259 CLR 478 at 495-496 [42]; [2017] HCA 5.

124 *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18.

Boards. That consideration appears to have been treated in the decision under appeal as supporting rejection of the implication[125].

109 Without descending unassisted into the complex and otherwise redundant legal analysis and factual inquiry which would need to be undertaken were it necessary to decide[126], I am prepared to make a number of contestable assumptions about Local Land Boards. The assumptions are as follows. Before federation, they exercised judicial power[127], including on occasions with respect to disputes between residents of different colonies. On federation, they were not able to be characterised as State courts. They nevertheless continued immediately after federation to exercise judicial power, including again on occasions with respect to disputes between residents of different States. They did so oblivious to any constitutional impediment. Although again unassisted by argument, I am also prepared to entertain the possibility that other entities established under colonial legislation may have had similar characteristics and may have behaved in a similar manner before and after federation.

110 Legislative, judicial and administrative practices occurring since federation are by no means irrelevant to constitutional interpretation. "Every public officer, every citizen, has daily to interpret the law for himself; and the common consent of the community, operating over a long period of time, can establish a practice and a tradition of constitutional interpretation which may act as a gloss on the text of the Constitution, and carry weight with its authentic interpreters."[128] Indeed, "[s]uch matters as judicial dicta, common assumptions tacitly made and acted upon, and the fact that legislation has passed unchallenged for a considerable period of time, may be regarded as raising a presumption which should prevail until the judicial mind reaches a clear conviction that consistently with the Constitution the validity of the provisions impugned cannot be sustained"[129].

111 But practices adopted by State entities in the administration of former colonial legislation during the early years following federation without apparent

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125 *Burns v Corbett* (2017) 343 ALR 690 at 705 [59].

126 See generally Lang, *Crown Land in New South Wales*, (1973) at 10-12 [109]-[111], ch 14.

127 Cf *Wilson v Minister for Lands* (1899) 20 LR (NSW) (L) 104 at 109, 123; *Minister for Lands v Wilson* [1901] AC 315 at 322-323.

128 Garran, "The Development of the Australian Constitution", (1924) 40 *Law Quarterly Review* 202 at 203.

129 *Boilermakers' Case* (1956) 94 CLR 254 at 296.

advertence to the potential impact of the Constitution carry no interpretative weight at all. Post-federation practices of that dubious nature do not gain interpretative weight by being portrayed as indicative of pre-federation expectations. They cannot be bootstrapped into significance on the basis that they were a continuation of pre-federation practices which those involved or others with oversight of those involved might be assumed in light of their later conduct or lack of intervention to have expected to continue.

112 I reiterate: on federation, everything adjusted. Sections 107 and 108 of the Constitution recognised as much in the qualified terms in which they respectively continued colonial legislative power as State legislative power and continued colonial legislation as State legislation. To the extent that colonial legislation could be worked conformably with the text and structure of the Constitution, colonial legislation continued after federation as State legislation. To the extent that colonial legislation could not be worked conformably with the text and structure of the Constitution, colonial legislation ceased to operate[130].

113 That a particular adjustment to State legislative or judicial or administrative practice may not have been immediately perceived or immediately implemented does not mean that the adjustment was not warranted by the Constitution. Appreciation of the express terms of the Constitution has taken time. So has the unfolding of its implications.

114 Observations made by the Chief Justice at the first sitting of the High Court, nearly three years after federation, were prescient[131]:

> "I think it will be some time before the profession and the public fully realise the extent of the power of criticism and determination that is vested in this Court with respect to the decrees of the State and Federal Legislatures. Enormous and difficult questions will arise, and it is not to be expected that our decisions will meet the views of all parties."

115 Not to be forgotten is that the "struggle for standards"[132] in the interpretation of the Constitution in the first two decades after federation was manifested in disagreement about two very large constitutional implications which commended themselves to an early majority of the High Court: the supposed immunity of Commonwealth and State instrumentalities each from legislative interference by the other, and the supposed reservation of State legislative power over intra-State trade to the exclusion of Commonwealth

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130 Eg *Fox v Robbins* (1909) 8 CLR 115 at 129-130; [1909] HCA 81.

131 *The Sydney Morning Herald*, 16 October 1903 at 3.

132 Stellios, *Zines's The High Court and the Constitution*, 6th ed (2015), ch 1.

legislative power. Then, in 1920[133], "the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians were now one people and Australia one country"[134]. The earlier implications were abandoned as unwarranted and unworkable, opening the way for judicial recognition, revision and refinement of more targeted structural implications to occur over the ensuing century. That is the ongoing task in which we are presently engaged.

116 There is no reason in constitutional principle why a structural implication must be shown to accord with pre-federation expectations, or be shown to be likely to have been recognised by some actual or notional office holder or other potential litigant at the time of federation, in order for that structural implication now to be judicially recognised or confirmed. The Constitution was not framed for the moment of its creation, but as an enduring instrument of government. "Experience derived from the events that have occurred since its enactment may enable us to see more in the combination of particular words, phrases or clauses or in the document as a whole than would have occurred to those who participated in the making of the Constitution."[135] The function and duty of the judiciary, as "a living co-ordinate branch of the Government"[136], is to interpret the Constitution in light of that experience and to do so consistently with developments in constitutional doctrine that have been expounded over the years that have passed since federation.

117 Judicial explication of the Constitution has sometimes disappointed expectations and has sometimes called past practices into question. That it will continue on occasions to do so is almost inevitable if the judiciary is to continue to perform its constitutional function of interpreting the Constitution only as and when required in the context of determining controversies that are truly controversial.

118 Telling, however, is the fact that it was found necessary to hark back to the very early years of federation for an example of what was asserted to be an established practice which would have been jeopardised by recognition of the

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133 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers Case*") (1920) 28 CLR 129 at 163; [1920] HCA 54.

134 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 396; [1971] HCA 16. See also *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 119 [193]; [2006] HCA 52.

135 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 [46] (footnote omitted).

136 *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 412.

implication now under consideration. To no-one who has studied the course of the High Court's exegesis of Ch III over the past half-century[137], who has had regard to the considered reasoning of intermediate appellate courts during the past decade[138], or who is abreast of leading contemporary academic commentary[139], could confirmation by the High Court of an implied constitutional denial of State legislative power to confer State judicial power with respect to a subject matter identified in s 75 or s 76 on a non-court State tribunal now come as a surprise.

Conclusion and orders

119 On the unchallenged assumption that NCAT is not a State court, the implied constitutional exclusion of State legislative power to confer State judicial power on a non-court State tribunal has consequences for the provisions of the NCAT Act which purport to confer State judicial power on NCAT. The provisions are invalid to the extent that they purport to confer State judicial power with respect to subject matters identified in ss 75 and 76 of the Constitution.

120 The provisions can and should be read down pursuant to s 31 of the *Interpretation Act* 1987 (NSW) to exclude conferral of State judicial power with respect to those subject matters[140]. That reading down is to be achieved with respect to matters arising under the *Anti-Discrimination Act* 1977 (NSW) ("the AD Act") between residents of different States within s 75(iv) of the Constitution by excluding from the jurisdiction conferred on NCAT by the NCAT Act authority to determine a complaint by a resident of one State that a resident of another State contravened a provision of the AD Act.

121 The appeals should be disposed of by making the orders proposed by Kiefel CJ, Bell and Keane JJ.

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137 Since *Boilermakers' Case* (1956) 94 CLR 254.

138 See *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385 at 395-396 [55]-[56], 399 [76]-[77], 400 [87]-[89], 400-401 [93]; *The Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85 at 130 [201], 137-138 [222].

139 Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 309-314.

140 See *Tajjour v New South Wales* (2014) 254 CLR 508 at 585-586 [168]-[171]; [2014] HCA 35.

122 NETTLE J. These are appeals from a judgment of the Court of Appeal of the Supreme Court of New South Wales (Bathurst CJ, Beazley P and Leeming JA) in which it was held that the Civil and Administrative Tribunal of New South Wales did not have jurisdiction under s 49ZT of the *Anti-Discrimination Act* 1977 (NSW) to resolve complaints made by a resident of one State against residents of other States[141]. The principal issue is whether the Constitution prohibits a State tribunal which is not a "court of a State" within the meaning of s 77(iii) of the Constitution ("a non-court State tribunal") resolving matters between residents of different States in the exercise of State jurisdiction.

123 I have had the advantage of reading in draft the reasons for judgment of Gordon J and with respect agree with her Honour's conclusions. It is appropriate nonetheless that I explain the reasons which have brought me to that point.

124 At the outset, it is necessary to observe that in Ch III of the Constitution the term "jurisdiction" refers to the authority to adjudicate upon a class of questions concerning a particular subject matter. State jurisdiction is the authority which State courts possess to adjudicate under the State Constitution and laws and federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws. The former is that which "belongs to" State courts within the meaning of s 77 of the Constitution and the latter is that which is invested in State courts by the Commonwealth Parliament[142].

125 Section 71 of the Constitution invests the judicial power of the Commonwealth in the High Court of Australia. Section 75 confers original jurisdiction on the High Court in five kinds of matter, of which the fourth includes the relevant head of matters between residents of different States. Section 76 empowers the Commonwealth Parliament to confer original jurisdiction on the High Court in a further four kinds of matter. Section 77 provides with respect to any of the matters mentioned in s 75 or s 76 that the Parliament may make laws: (i) defining the jurisdiction of any federal court other than the High Court in relation to the matters; (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of the jurisdiction which "belongs to or is invested in" State courts; and (iii) investing any State court with federal jurisdiction. Together, these several provisions of Ch III of the Constitution empower the Parliament to enact an integrated system of federal and State courts for the adjudication of ss 75 and 76 matters in the exercise of federal

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141 *Burns v Corbett* (2017) 343 ALR 690 at 714 [101], 716 [109]-[110] per Leeming JA (Bathurst CJ and Beazley P agreeing at 693 [1], [2]).

142 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J; [1907] HCA 76; *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 349 [24] per French CJ, Kiefel, Bell and Keane JJ; [2016] HCA 2.

jurisdiction, to the exclusion of the State jurisdiction of State courts[143], exhaustive of the manner in and extent to which federal jurisdiction may be so exercised by any federal or State court[144].

126 As was observed in *Grannall v Marrickville Margarine Pty Ltd*[145]:

> "[E]very legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter."

127 Such authority to legislate for controls necessary to effectuate the main purpose of a power is an implied incidental power which is distinct and separate from, and broader than, the incidental power granted to the Parliament under s 51(xxxix) of the Constitution to make laws with respect to matters which are

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143 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 83-84 per Dawson J (Brennan CJ relevantly agreeing at 65), 101-103 per Gaudron J, 110-112, 114-115 per McHugh J, 138-143 per Gummow J; [1996] HCA 24.

144 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268, 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; [1956] HCA 10; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405-406 [227]-[230] per Gummow J; [2005] HCA 44; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 618 [20] per Gleeson CJ, Gummow and Hayne JJ; [2008] HCA 28; *Alqudsi v The Queen* (2016) 258 CLR 203 at 265-266 [167]-[171] per Nettle and Gordon JJ; [2016] HCA 24; *Rizeq v Western Australia* (2017) 91 ALJR 707 at 719-720 [58]-[62] per Bell, Gageler, Keane, Nettle and Gordon JJ; 344 ALR 421 at 434-435; [2017] HCA 23.

145 (1955) 93 CLR 55 at 77 per Dixon CJ, McTiernan, Webb and Kitto JJ; [1955] HCA 6.

incidental to the execution of the legislative power[146]. Mason CJ made the point in *Nationwide News Pty Ltd v Wills*[147] thus:

> "Each specific grant of legislative power in the Constitution extends to all matters incidental to the subject matter of the power which are 'necessary for the reasonable fulfilment of the legislative power' over that subject matter. Or, to put it another way, the specific substantive power extends to matters 'the control of which is found necessary to effectuate its main purpose'. On the other hand, s 51(xxxix) is directed not so much to matters incidental to the nominated subject of legislative power but rather to the execution of the various powers vested in the three branches of government. ...
>
> If one thing emerges clearly from the decisions of this Court it is that, to bring a law within the reach of the incidental scope of a power, it is enough that the provision is appropriate to effectuate the exercise of the power; one is not confined to what is necessary for the effective exercise of the power." (footnotes omitted)

128 The express grant of legislative power comprised in s 77 of the Constitution to enact laws investing federal jurisdiction in State courts in relation to ss 75 and 76 matters and defining the extent to which the jurisdiction of any federal court is exclusive of that which "belongs to or is invested in" State courts therefore draws with it, unexpressed but consequential, incidental and

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146 See *Le Mesurier v Connor* (1929) 42 CLR 481 at 496-497 per Knox CJ, Rich and Dixon JJ; [1929] HCA 41; *Burton v Honan* (1952) 86 CLR 169 at 177-178 per Dixon CJ; [1952] HCA 30; *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 514-515 per Stephen J; [1976] HCA 66. See and compare *G G Crespin & Son v Colac Co-operative Farmers Ltd* (1916) 21 CLR 205 at 212 per Griffith CJ, 214 per Barton J; [1916] HCA 13. See also *M'Culloch v State of Maryland* 17 US 316 at 406, 421, 426 (1819); *Anderson v Dunn* 19 US 204 at 225-226 (1821).

147 (1992) 177 CLR 1 at 26-27; [1992] HCA 46. See also *Victoria v The Commonwealth* (1996) 187 CLR 416 at 548-549 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 579-581 [118]-[122] per Gummow and Hayne JJ; [1999] HCA 27. See and compare *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 133-135 per Mason CJ; [1992] HCA 45; *McGinty v Western Australia* (1996) 186 CLR 140 at 168-170 per Brennan CJ; [1996] HCA 48; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 452-454 [385]-[389] per Hayne J.

appropriate to its exercise, the power to prohibit State courts continuing to adjudicate such matters in the exercise of State jurisdiction.

129 Although s 77 of the Constitution arms the Commonwealth Parliament with legislative power to provide that matters falling within ss 75 and 76 should be determined by federal and State courts in the exercise of federal jurisdiction to the exclusion of the State jurisdiction of State courts, Ch III of the Constitution, as enacted, left extant the "belongs to" State jurisdiction of State courts and such other State jurisdiction as might be invested in State courts by State Parliaments to adjudicate matters of the kind enumerated in ss 75 and 76[148]. Thus, until Parliament invoked the legislative power conferred under s 77, State courts and non-court State tribunals invested with State judicial power remained free to adjudicate matters falling within ss 75 and 76 in the exercise of State jurisdiction (apart from some matters, such as claims for mandamus against an officer of the Commonwealth under s 75(v), which were unknown prior to Federation)[149]. As will be explained, it was only upon the enactment of s 39(2) of the *Judiciary Act* 1903 (Cth) that federal jurisdiction to adjudicate matters of the kind identified in ss 75 and 76 was invested in State courts and that it came to be accepted that the State jurisdiction of State courts to adjudicate ss 75 and 76 matters had been excluded or "withdrawn" by operation of s 109 of the Constitution.

130 Section 38 of the *Judiciary Act* provides that the jurisdiction of the High Court with respect to certain matters is exclusive of that of State courts, subject to certain exceptions which are not now relevant. Section 39(1) provides that the jurisdiction of the High Court, so far as it is not so by virtue of s 38, is exclusive of the jurisdiction of State courts, except as provided in s 39(2). Section 39(2) then, in effect, invests State courts with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred on it (except as provided in s 38) subject to two conditions: first, that a decision of a State court shall not be subject to an appeal to Her

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148 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 65-66 per Brennan CJ, 71-72 per Dawson J; *McGinty v Western Australia* (1996) 186 CLR 140 at 171-173 per Brennan CJ; *Gould v Brown* (1998) 193 CLR 346 at 373-374 [5]-[6] per Brennan CJ and Toohey J; [1998] HCA 6; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 607 [203] per Kirby J (in diss but not on point of principle); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619 [23] per Gleeson CJ, Gummow and Hayne JJ, 657-658 [180] per Heydon, Crennan and Kiefel JJ.

149 See for example *Minister for Lands v Wilson* [1901] AC 315 at 323. See also *Ex parte Goldring* (1903) 3 SR (NSW) 260 at 262-263 per Stephen ACJ, 263-264 per Owen J, 264 per Walker J; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619-621 [24]-[30] per Gleeson CJ, Gummow and Hayne JJ.

Majesty in Council, and second, that the High Court may grant special leave to appeal to it from any decision of any State court or judge.

131 In *Felton v Mulligan*[150], Walsh J held that, by the enactment of s 39(2) of the *Judiciary Act*, the Parliament effected the exclusion or withdrawal of the State jurisdiction of State courts to adjudicate ss 75 and 76 matters as a result of the operation of s 109 of the Constitution. His Honour so concluded[151] on the basis that, by prescribing the conditions on which State courts are authorised to exercise federal jurisdiction in relation to matters falling within s 75 or s 76 of the Constitution, the Parliament manifested an intention that the only jurisdiction which State courts may exercise in relation to matters falling within s 75 or s 76 is federal jurisdiction subject to the specified conditions:

> "Doubts have been expressed by Professor Cowen and by Professor Sawer as to the availability of s 109 to meet the problem under discussion: see Cowen's *Federal Jurisdiction in Australia*, p 195; and Sawer, in *Essays on the Australian Constitution*, edited by Else-Mitchell, 2nd ed, p 86. Those writers have suggested that s 39 does not disclose an intention 'to cover the field', but, on the contrary, indicates that the intention was not to override, in all the matters to which s 39(2) refers, the jurisdiction which already belonged to the State courts. But in spite of difficulties created by the manner in which s 39 has been framed, my conclusion is that the laws under which the State courts would exercise their 'belonging' jurisdiction are made inoperative by s 39. If sub-s (2) thereof had simply invested the State courts with federal jurisdiction without adding the conditions and restrictions to which the investing was expressed to be subject, there would be perhaps no conflict with any laws under which the State courts already had jurisdiction. But when the conditions which have been attached to the grant of federal jurisdiction are considered, I think it should be held that Parliament intended that in the federal matters to which the section relates 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."

132 Similarly, in the preponderance of subsequent decisions of this Court regarding the operation of s 39 of the *Judiciary Act*, it has been held or accepted

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150 (1971) 124 CLR 367 at 412 (Barwick CJ relevantly agreeing at 372); [1971] HCA 39.

151 *Felton v Mulligan* (1971) 124 CLR 367 at 412-413 per Walsh J (Barwick CJ relevantly agreeing at 372).

that the exclusion of the State jurisdiction of State courts in relation to ss 75 and 76 matters is the result of s 109 of the Constitution[152].

133 By contrast, in *The Commonwealth v Queensland*[153], Jacobs J, on one view[154], reasoned that, since the federal judicial power delineated in Ch III of the Constitution is exhaustive of the manner in and extent to which judicial power may be conferred on or exercised by State courts in relation to ss 75 and 76 matters, it is necessarily implicit in Ch III that the State jurisdiction of State courts in relation to those matters was withdrawn on Federation:

> "In my opinion the judicial power delineated in Ch III is exhaustive of the manner in and the extent to which judicial power may be conferred on or exercised by any court in respect of the subject matters set forth in ss 75 and 76, 'matters' in those sections meaning 'subject matters'. This is so not only in respect of federal courts but also in respect of State courts whether or not they are exercising federal jurisdiction conferred on them under s 77(iii). In respect of the subject matters set out in ss 75 and 76 judicial power may only be exercised within the limits of the kind of judicial power envisaged in Ch III and if in respect of those matters an investing with federal jurisdiction of a State court does not enable it to perform the particular judicial function, then in respect of those matters the State court cannot under any law exercise that judicial function. Therefore, if in respect of those matters a State court exercising federal jurisdiction cannot give 'advisory opinions' it cannot in respect of the same matters give such opinions in exercise of some State jurisdiction. Chapter III of the Constitution is so constructed that the limits of the Commonwealth power to invest State courts with federal jurisdiction with respect to the matters mentioned in ss 75 and 76 mark out the limits of the judicial power or function which in any case State courts can exercise in

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152 See for example *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471-472 per Gibbs J, 479 per Stephen, Mason, Aickin and Wilson JJ; [1980] HCA 32; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7] per Gleeson CJ, Gaudron and Gummow JJ; [2001] HCA 1; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619 [23]-[24] per Gleeson CJ, Gummow and Hayne JJ; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21 [53] per French CJ, Kiefel, Bell, Gageler and Gordon JJ; [2015] HCA 36. See also *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142-1143 per Isaacs J.

153 (1975) 134 CLR 298 at 327-328 (McTiernan J substantially agreeing at 303); [1975] HCA 43.

154 See for example *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85 at 137-138 [221]-[222] per Kenny J.

> respect of those matters. A State thus could not empower one of its courts to give advisory opinions on those subject matters. The court would be exercising judicial power but not a judicial power envisaged by Ch III and able to be conferred on it by the Commonwealth. *It is then no answer to say that the State is conferring a judicial power which the Commonwealth is unable to confer. There is here no residuary State power, because Ch III is an exhaustive enunciation*." (emphasis added)

134 But, as the Court of Appeal observed[155] in this case, one difficulty with Jacobs J's thesis is that, until the enactment of s 39(2) of the *Judiciary Act*, State courts and non-court State tribunals continued to adjudicate ss 75 and 76 matters in the exercise of State jurisdiction. If it were implicit in the text and structure of Ch III of the Constitution that, without more, the State jurisdiction of State courts in relation to those matters was withdrawn on Federation, it would follow that the State courts which dealt with ss 75 and 76 matters between Federation and the enactment of s 39(2) did so without jurisdiction.

135 Perhaps, if that were the only obstacle in the way of the thesis, it might not be viewed as insurmountable. It might be conjectured, for example, that the actions of State courts and non-court State tribunals in continuing to adjudicate ss 75 and 76 matters in the exercise of State jurisdiction until the enactment of s 39(2) of the *Judiciary Act* could be explained, consistently with Jacobs J's thesis, on the basis that, at that early stage of the law's development, the full ramifications of the text and structure of Ch III of the Constitution remained to be perceived[156]. It is also not without significance that, in *Felton v Mulligan*, Walsh J in effect refrained from expressing a concluded view as to whether the exclusion of the State jurisdiction of State courts in relation to ss 75 and 76 matters was implicit in the text and structure of the Constitution. His Honour went no further than to observe that, if the Parliament had simply invested State courts with federal jurisdiction, without adding conditions and restrictions to which the investiture was expressed to be subject, "there would be *perhaps* no

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155 *Burns v Corbett* (2017) 343 ALR 690 at 711 [88] per Leeming JA (Bathurst CJ and Beazley P agreeing at 693 [1], [2]).

156 See generally *New South Wales v The Commonwealth* (1915) 20 CLR 54; [1915] HCA 17; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434; [1918] HCA 56; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. See also *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396 per Windeyer J; [1971] HCA 16; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553-554 [46]-[47] per McHugh J.

conflict with any laws under which the State courts already had jurisdiction" (emphasis added)[157].

136 But the greater and ultimately determinative problem with accepting Jacobs J's thesis is that the text of s 77(ii) of the Constitution expressly left it to the Parliament to determine whether and to what extent the federal jurisdiction of federal courts should be exclusive of the jurisdiction which "belongs to or is invested in" State courts.

137 Given the terms of s 77(ii), it cannot be that the Constitution of itself, without the enactment of legislation pursuant to s 77, impliedly excluded the State jurisdiction of State courts. That cannot be so because the supposed implication would be contrary to the express terms of s 77(ii). Rather, as Walsh J held in effect in *Felton v Mulligan*, it is because s 39(2) of the *Judiciary Act* invested federal jurisdiction in State courts to adjudicate ss 75 and 76 matters subject to conditions and restrictions which ensured that there would be a right of appeal to the High Court that the State jurisdiction of State courts to adjudicate such matters was impliedly excluded. *A fortiori*, it cannot be that the text of s 77(ii) of the Constitution, without the enactment of legislation pursuant to s 77, impliedly excluded the State jurisdiction of non-court State tribunals to adjudicate ss 75 and 76 matters, or that the Constitution of itself, without the enactment of legislation pursuant to s 77, had the effect from the moment of Federation that the only judicial power that could lawfully be exercised in relation to ss 75 and 76 matters was federal judicial power.

138 So, therefore, to the questions which are decisive of these appeals: whether the Constitution armed the Parliament with legislative power to enact laws excluding the State jurisdiction of non-court State tribunals to adjudicate ss 75 and 76 matters; and, if so, whether by the enactment of s 39(2) of the *Judiciary Act* the Parliament has done so.

139 It is not difficult to see that the Parliament's legislative power under s 77 of the Constitution to invest State courts with federal jurisdiction in relation to ss 75 and 76 matters includes the implied power to prevent State courts from continuing to adjudicate such matters in the exercise of State jurisdiction. To permit State courts to continue to adjudicate such matters in the exercise of State jurisdiction would negate the expedient of deploying State courts to determine ss 75 and 76 matters in the exercise of federal jurisdiction to the exclusion of State jurisdiction. At first sight it might appear more doubtful that the power to invest State courts with federal jurisdiction to determine ss 75 and 76 matters impliedly carries with it power to exclude the State jurisdiction of non-court State tribunals to adjudicate such matters.

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157 (1971) 124 CLR 367 at 413 (Barwick CJ relevantly agreeing at 372).

140 As authority makes plain, however, it is implicit in the text and structure of Ch III of the Constitution that States cannot undermine the exclusive legislative power of the Commonwealth to invest and regulate the exercise of federal jurisdiction for which Ch III provides[158]. And unquestionably it would substantially undermine the exclusive legislative power of the Commonwealth to invest and regulate the exercise of federal jurisdiction if, despite the Parliament having power to invest State courts with federal jurisdiction on conditions and subject to restrictions which exclude State courts from adjudicating such matters in the exercise of State jurisdiction, the Parliament were powerless to prevent non-court State tribunals from adjudicating such matters in the exercise of State jurisdiction. In effect, it would mean that States would be free to conduct a system of non-court State tribunals vested with State jurisdiction – conceivably even to invest officers of the State executive with State jurisdiction – to do what the Parliament had determined in the exercise of its exclusive legislative power should be done within an integrated system of federal and State courts in the exercise of federal jurisdiction to the exclusion of State jurisdiction. It would render the Commonwealth's exclusive legislative power to invest and regulate federal jurisdiction devoid of relevant content.

141 The existence of that possibility points ineluctably to the need for, and the existence of, an implied legislative power for the Parliament to prevent it occurring. It dictates that just as the implied incidental power to exclude the State jurisdiction of State courts to adjudicate ss 75 and 76 matters is appropriate to effectuate the main purpose of Parliament's legislative power to invest State courts with federal jurisdiction to adjudicate ss 75 and 76 matters, so, too, is the implied incidental power to exclude the State jurisdiction of non-court State tribunals to adjudicate such matters.

142 The question then is whether by s 39(2) of the *Judiciary Act* the Parliament exercised its implied incidental power to exclude the State jurisdiction of non-court State tribunals. As was submitted by the Solicitor-General for New South Wales, there is no *ex facie*, direct inconsistency between State courts exercising federal jurisdiction with respect to ss 75 and 76 matters on one set of conditions and non-court State tribunals exercising State jurisdiction with respect to those same matters on another, different set of conditions. In his

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158 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-104 per Gaudron J, 115-116 per McHugh J; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405-406 [227]-[230] per Gummow J; *Wainohu v New South Wales* (2011) 243 CLR 181 at 209-210 [45]-[47] per French CJ and Kiefel J, 228-229 [105] per Gummow, Hayne, Crennan and Bell JJ; [2011] HCA 24; *Alqudsi v The Queen* (2016) 258 CLR 203 at 266 [171] per Nettle and Gordon JJ; *Rizeq v Western Australia* (2017) 91 ALJR 707 at 719-720 [58]-[62] per Bell, Gageler, Keane, Nettle and Gordon JJ; 344 ALR 421 at 434-435.

contention, it is also impossible to discern an intention in s 39(2) to "cover the field" in relation to the exercise of adjudicative power with respect to ss 75 and 76 matters or, as it was referred to by the Court of Appeal, to discern an "implied negative stipulation" to exclude the State jurisdiction of non-court State tribunals to adjudicate ss 75 and 76 matters.

143 The Court of Appeal's answer was that, whether or not s 39(2) of the *Judiciary Act* contains an "implied negative stipulation" to that effect, the adjudication of ss 75 and 76 matters by non-court State tribunals not subject to an appeal to the High Court would so alter, impair or detract from the conditional and universal operation of the federal law as to engage the operation of s 109 of the Constitution[159]. But the difficulty with that, in the Solicitor-General's submission, is that it rather assumes the answer to the question.

144 There is some force in that submission. If a State law is not directly inconsistent with a federal law, the State law cannot logically alter, impair or detract from the federal law unless the federal law expressly or by implication extends to or covers the purported area of operation of the State law[160]. And since State laws which purport to confer State jurisdiction on non-court State tribunals to adjudicate ss 75 and 76 matters are not directly inconsistent with s 39(2) of the *Judiciary Act*, it cannot be that they alter, impair or detract from the operation of s 39(2) unless s 39(2) impliedly extends to or covers the purported area of operation constituted of the adjudication of ss 75 and 76 matters by non-court State tribunals. Further, if s 39(2) does impliedly extend to or cover the area of the adjudication of ss 75 and 76 matters by non-court State tribunals, it can only be because, in one way or another, s 39(2) conveys an intention that non-court State tribunals should not enter into the area of adjudication of ss 75 and 76 matters. Ultimately, therefore, it is necessary to find that s 39(2) embodies an intention to exclude non-court State tribunals from the field of adjudication of ss 75 and 76 matters.

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159 *Burns v Corbett* (2017) 343 ALR 690 at 709 [77] per Leeming JA (Bathurst CJ and Beazley P agreeing at 693 [1], [2]).

160 See *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; [1937] HCA 82; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [28]; [1999] HCA 12; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14]; [2010] HCA 30; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524-525 [39]-[42]; [2011] HCA 33; *Momcilovic v The Queen* (2011) 245 CLR 1 at 110-111 [240]-[244] per Gummow J; [2011] HCA 34; *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 467-468 [56]-[59]; [2013] HCA 55.

145 In the result, however, the Court of Appeal were correct, because it is apparent that s 39(2) of the *Judiciary Act* does evince an intention to cover the field in relation to the adjudication of ss 75 and 76 matters and so thereby does convey an implied negative stipulation that non-court State tribunals should not enter into the area of the adjudication of ss 75 and 76 matters. Given that the object of the Parliament in conferring federal jurisdiction on State courts on conditions and subject to restrictions which impliedly exclude the State jurisdiction of State courts in relation to ss 75 and 76 matters would substantially be undermined if non-court State tribunals remained free to adjudicate such matters in the exercise of State jurisdiction, and given, as was held in *Felton v Mulligan*, that s 39(2) confers federal jurisdiction on State courts on conditions and subject to restrictions which impliedly exclude the State jurisdiction of State courts in relation to such matters, s 39(2) is naturally and ordinarily to be construed (in the absence of impelling contrary indication) as giving effect to that intended object of operation[161]. As so construed, it is apparent that, by conferring federal jurisdiction on State courts to adjudicate ss 75 and 76 matters on conditions and subject to restrictions which impliedly exclude the State jurisdiction of State courts to adjudicate such matters, s 39(2) provides for an integrated system of federal and State courts for the adjudication of ss 75 and 76 matters in the exercise of federal jurisdiction to the exclusion of State jurisdiction which is so much inconsistent with non-court State tribunals continuing to adjudicate ss 75 and 76 matters in the exercise of State jurisdiction as, by the operation of s 109, to exclude their jurisdiction to do so.

146 For these reasons, I would hold that, the Parliament having provided by s 39(2) of the *Judiciary Act* that ss 75 and 76 matters shall be adjudicated by State courts in the exercise of federal jurisdiction on the conditions and subject to the restrictions there set out, the adjudication of ss 75 and 76 matters by a non-court State tribunal in the exercise of State jurisdiction is, by the operation of s 109 of the Constitution, prohibited. Accordingly, I would dismiss the appeals.

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161 *Ut res magis valeat quam pereat*: *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1022 per Viscount Simon LC.

147 GORDON J. These appeals arise out of separate proceedings in the Civil and Administrative Tribunal of New South Wales ("NCAT") involving complaints under the *Anti-Discrimination Act* 1977 (NSW) ("the AD Act") by a resident of New South Wales, Mr Garry Burns, against two residents of other States, Mr Bernard Gaynor and Ms Therese Corbett. The appeals raise an important issue about the powers of the Commonwealth Parliament and State Parliaments to invest courts and tribunals with jurisdiction in matters within the scope of ss 75 and 76 of the Constitution.

148 The issue, as framed in the Court of Appeal of the Supreme Court of New South Wales and in this Court, is whether a State Parliament can validly vest in an administrative tribunal, not being a court of a State, jurisdiction in a matter between residents of different States within the meaning of s 75(iv) of the Constitution. The answer is that a State Parliament cannot vest that jurisdiction.

149 Upon Federation, the authority to adjudicate on matters between residents of different States – often described as diversity jurisdiction – was jurisdiction which State Parliaments could validly vest in the courts of the States. The Constitution did not then, and does not now, deny to a State Parliament the power to confer upon a body other than a State court the authority to adjudicate on matters between residents of different States. That a State Parliament now cannot vest that jurisdiction in a body other than a State court does not depend upon any implied constitutional limitation on State legislative power. Rather, it depends upon the operation of s 39 of the *Judiciary Act* 1903 (Cth) in conjunction with s 109 of the Constitution.

150 In 1903, the Commonwealth exercised its powers under s 77(ii) and (iii) of the Constitution by enacting ss 38 and 39 of the Judiciary Act. With the enactment of the Judiciary Act, the jurisdiction of State courts in matters between residents of different States was withdrawn by s 39(1) of the Judiciary Act and conditionally reinvested by s 39(2) of the Judiciary Act. From that point, the source of State courts' authority to adjudicate on those matters, and the other matters in ss 75 and 76 of the Constitution[162], was federal – and could only be federal[163]. As these reasons will explain, the consequence of the operation of s 39 of the Judiciary Act is not only that any authority of State courts to adjudicate on matters between residents of different States may only derive from a federal source, but also to render invalid, by operation of s 109 of the Constitution, any State law which purports to confer such authority on a body *other than* a State court. Such a State law undermines the intended operation of

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162 Except the jurisdiction that, by reason of s 38 of the Judiciary Act, was *not* reinvested.

163 *Felton v Mulligan* (1971) 124 CLR 367 at 412-413; [1971] HCA 39.

s 39 of the Judiciary Act insofar as s 39 is designed to ensure that the exclusive source of the authority to adjudicate on those matters is federal.

151 To the extent that the Parliament of New South Wales purported to invest NCAT with the authority to adjudicate on a dispute under the AD Act between residents of different States, that investment of jurisdiction was invalid by reason of inconsistency with s 39 of the Judiciary Act. Accordingly, NCAT did not have jurisdiction to resolve the complaints against Ms Corbett and Mr Gaynor. The appeals should be dismissed.

The proceedings

152 In 2013 and 2014, Mr Burns lodged separate complaints with the Anti-Discrimination Board of New South Wales alleging that Ms Corbett and Mr Gaynor had each contravened s 49ZT of the AD Act. Section 49ZT(1) provides that it is unlawful "for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group". At all material times, Mr Burns was a resident of New South Wales, Ms Corbett was a resident of Victoria and Mr Gaynor was a resident of Queensland.

153 The complaint against Ms Corbett was referred to the Administrative Decisions Tribunal of New South Wales ("the ADT"), the predecessor to NCAT[164], as the complaint could not be resolved by conciliation. The ADT found that Ms Corbett had contravened s 49ZT of the AD Act and ordered her to make both a public and a private apology. Ms Corbett appealed to the Appeal Panel of NCAT, which dismissed her appeal. The orders requiring Ms Corbett to make the apologies were then entered in the Supreme Court pursuant to s 114 of the AD Act. Mr Burns subsequently brought proceedings in the Supreme Court charging Ms Corbett with contempt for failing to comply with those orders. In those proceedings, Ms Corbett contended by way of defence that NCAT (and its predecessor) had no jurisdiction in relation to the complaint brought by Mr Burns because, among other things, she was a resident of Victoria.

154 The contempt proceedings were then removed to the Court of Appeal for determination of separate questions addressing the jurisdiction of NCAT (and its predecessor) to determine a matter between residents of different States. It was common ground before the Court of Appeal that NCAT is not a "court of the State"[165] and that the proceedings in NCAT under the AD Act involved the exercise of judicial power by NCAT.

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164 NCAT was established, and the ADT abolished, with effect from 1 January 2014: see s 7 of the *Civil and Administrative Tribunal Act* 2013 (NSW).

165 *Burns v Corbett* (2017) 343 ALR 690 at 698 [29].

155 The remaining matters in this Court relate to complaints against Mr Gaynor. Three complaints made by Mr Burns against Mr Gaynor were referred to NCAT. Mr Burns later lodged further complaints against Mr Gaynor. The substance of the complaints and the procedural history can be put to one side. It is sufficient for present purposes to observe that the proceedings in relation to the first three complaints were dismissed on the basis that there had been no "public act" in New South Wales so as to engage the prohibition in s 49ZT of the AD Act; and, further, that a costs order was made against Mr Gaynor at an interlocutory stage. Mr Gaynor was granted leave to appeal to the Court of Appeal against that costs order and by summons sought a declaration to the effect that NCAT lacked jurisdiction to adjudicate on complaints relating to citizens resident in a State other than New South Wales.

156 The Court of Appeal heard and determined the jurisdictional question in each proceeding. The Attorney-General of the Commonwealth and the Attorney General for New South Wales intervened. The Court of Appeal held that NCAT had no jurisdiction to hear and determine the complaints against Ms Corbett and Mr Gaynor.

157 In this Court, the Commonwealth's primary submission, advanced by notice of contention, was that there is an implied constitutional constraint on State legislative power, such that any State law is invalid to the extent that it purports to confer judicial power in respect of any of the matters identified in ss 75 and 76 of the Constitution on a person or body that is not one of the "courts of the States". The Commonwealth's alternative submission, which had been accepted by Leeming JA in the Court of Appeal[166], was that such a law is inconsistent with s 39(2) of the Judiciary Act and thus invalid by operation of s 109 of the Constitution. The Attorney General for New South Wales, supported by the intervening State Attorneys-General, submitted that the Court of Appeal was correct to reject the Commonwealth's primary submission but wrong to accept the Commonwealth's alternative submission that NCAT is unable to exercise judicial power to determine matters between residents of different States by reason of s 109 of the Constitution.

Jurisdiction – nature and source

158 The question whether a State Parliament can validly vest in an administrative tribunal, not being a court of a State, jurisdiction in a matter between residents of different States within the meaning of s 75(iv) of the Constitution necessarily directs attention to the nature and source of the jurisdiction in issue.

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166 *Burns* (2017) 343 ALR 690 at 713 [95]-[97].

159 "Jurisdiction", in relation to a subject matter, refers to the authority to adjudicate upon a class of questions concerning that subject matter[167]. The distinction drawn between federal jurisdiction and State jurisdiction concerns the available sources of such authority. "State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws"[168].

160 Section 75 of the Constitution defines five classes of matters in which the High Court shall have original jurisdiction. Under s 76 of the Constitution, the Commonwealth Parliament may make laws conferring original jurisdiction on the High Court in a further four classes of matters. Federal jurisdiction is authority to adjudicate on those nine classes of matters which is vested by the Constitution or by Commonwealth laws enacted under it[169].

161 With respect to any of the matters mentioned in ss 75 and 76 of the Constitution, the Commonwealth Parliament *may*, under s 77, 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."

Section 77(ii) draws a distinction between jurisdiction that "belongs to" the courts of the States and jurisdiction that "is invested in" those courts. That distinction reflects the demarcation of State jurisdiction from federal jurisdiction: "[t]hat which 'belongs to' the State courts within the meaning of s 77(ii) is the

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167 *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 349 [24]; [2016] HCA 2. See also *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; [1907] HCA 76.

168 *Baxter* (1907) 4 CLR 1087 at 1142. See also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7]; [2001] HCA 1; *CGU* (2016) 259 CLR 339 at 349 [24]; *Rizeq v Western Australia* (2017) 91 ALJR 707 at 713 [8], 718 [49]; 344 ALR 421 at 424, 431-432; [2017] HCA 23.

169 *Rizeq* (2017) 91 ALJR 707 at 718 [51]; 344 ALR 421 at 432.

authority they possess to adjudicate under the constitutions and laws of the States"[170].

162 Section 77(ii) and (iii) confer power on the Commonwealth Parliament to withdraw *and* invest jurisdiction in the courts of the States in respect of matters within ss 75 and 76 of the Constitution. Those sub-sections thereby enable the Commonwealth to secure "federal control" over the matters in ss 75 and 76 of the Constitution; and, relevantly, over the areas where there would otherwise be concurrent State and federal jurisdiction[171].

163 Relevantly, the powers in s 77(ii) and (iii) were not exercised until the enactment of ss 38 and 39 of the Judiciary Act in 1903. The manner in which the powers were exercised – which has remained substantially the same since 1903 – is important. Sections 38 and 39(1) of the Judiciary Act make the jurisdiction of the High Court exclusive of the jurisdiction of the several courts of the States. Section 38 makes the jurisdiction of the High Court exclusive of State jurisdiction in several matters which fall within, but are not exhaustive of, the matters identified in s 75 of the Constitution[172]. Section 39(1) makes the jurisdiction of the High Court exclusive of State jurisdiction in those matters not mentioned in s 38. However, s 39(2) goes on to provide that State courts shall, "within the limits of their several jurisdictions", have jurisdiction in the matters covered by s 39(1) subject to the conditions identified in s 39(2)(a) and (c). Those conditions also apply to any other Commonwealth law that invests jurisdiction in a State court[173].

164 The direct consequence of making the jurisdiction of the High Court in matters within ss 75 and 76 of the Constitution exclusive[174] and then conditionally reinvesting such jurisdiction in State courts[175] was that, to the extent that State courts had State jurisdiction in those matters, the source of the

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170 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619 [23]; [2008] HCA 28 citing *Baxter* (1907) 4 CLR 1087 at 1142.

171 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 802.

172 The matters in s 38(a) correspond to the matters in s 75(i) of the Constitution. The matters in s 38(b) to (e) correspond in part to matters set out in s 75(iii), (iv) and (v) of the Constitution.

173 s 39A(1) of the Judiciary Act.

174 ss 38 and 39(1) of the Judiciary Act.

175 s 39(2) of the Judiciary Act.

authority to decide those matters became federal[176]. The fact that federal jurisdiction in the matters covered by s 39(2) was *conditionally* reinvested had another consequence: namely, the only jurisdiction that State courts could exercise in those matters was federal jurisdiction[177].

165 Just which matters within ss 75 and 76 of the Constitution "belong[ed] to" the courts of the States prior to the enactment of the Judiciary Act is not conclusively decided by the authorities. In *Baxter v Commissioners of Taxation (NSW)*, Griffith CJ, Barton and O'Connor JJ said that the determination of matters in ss 75 and 76 of the Constitution "was within the jurisdiction of the State Courts, who were *bound* to administer the laws of the State which include the Constitution and all laws passed by the Federal Parliament" under covering cl 5 of the Constitution[178] (emphasis added). Their Honours drew no further distinction between matters in ss 75 and 76 which belonged to the State courts and those that did not.

166 On the other hand, Andrew Inglis Clark observed in 1901 – in an analysis quoted with approval by Gleeson CJ, Gummow and Hayne JJ in *MZXOT v Minister for Immigration and Citizenship* – that the judicial power of the Commonwealth in respect of some of the matters in s 75 (if not s 76) appeared to be "necessarily exclusive of the judicial power of the States"[179]. Matters in which the Commonwealth was a defendant, or in which a writ of mandamus or prohibition or an injunction was sought against an officer of the Commonwealth, were unknown and unknowable to "the anterior body of general jurisprudence in the colonies"[180]. Griffith CJ, Barton and O'Connor JJ stated unequivocally in *Hannah v Dalgarno* that "the Supreme Court of New South Wales had no jurisdiction to entertain an action against the Commonwealth" but for the

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176 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21 [53]; [2015] HCA 36.

177 *Felton* (1971) 124 CLR 367 at 412-413; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 479; [1980] HCA 32; *PT Bayan* (2015) 258 CLR 1 at 21 [53]; *Rizeq* (2017) 91 ALJR 707 at 721 [67]; 344 ALR 421 at 436.

178 (1907) 4 CLR 1087 at 1136. That accords with the opinion of Alfred Deakin, writing as Attorney-General of the Commonwealth in 1901 (before the enactment of the Judiciary Act): see Deakin, "Federal Jurisdiction of State Courts", in Brazil and Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14*, (1981) at 30.

179 Inglis Clark, *Studies in Australian Constitutional Law*, (1901) at 177-178 quoted in *MZXOT* (2008) 233 CLR 601 at 619-620 [26].

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

investment of jurisdiction effected by s 6 of the *Claims against the Commonwealth Act* 1902 (Cth)[181].

167 The view that State jurisdiction did not extend to all matters within ss 75 and 76 necessarily suggests that there was a jurisdictional void in certain classes of matters – in the sense that no court had authority to adjudicate on them – until the establishment of the High Court and other federal courts. That outcome may seem curious. However, the basis for the contrary position – that State courts could exercise State jurisdiction in all matters within ss 75 and 76 upon the commencement of the Constitution – is not self-evident, even accounting for the possibility that, by reason of covering cl 5 of the Constitution, State jurisdiction was not strictly limited to matters known in the colonies.

168 It is not, in any event, necessary to determine precisely which matters in ss 75 and 76 of the Constitution formed part of the jurisdiction that "belong[ed] to" State courts at and immediately after Federation. But two points are presently relevant. First, s 77(ii) assumes and recognises that there was State jurisdiction in at least some of the matters in ss 75 and 76 of the Constitution. For s 77(ii) to have any operation, there must have been some State jurisdiction capable of being excluded. Second, matters between residents of different States, within the meaning of s 75(iv) of the Constitution, were among the classes of matters in which State courts could exercise State jurisdiction before the enactment of the Judiciary Act[182].

169 Matters between residents of different Australian colonies were known to colonial courts[183], notwithstanding difficulties with service of process and execution of judgments[184]. There is no logical or principled impediment to that jurisdiction persisting after Federation[185]. Indeed, State courts routinely determined matters between residents of different States up to 1903, though

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181 *Hannah v Dalgarno* (1903) 1 CLR 1 at 8; [1903] HCA 1. See s 75(iii) of the Constitution. The judgment under appeal in *Hannah* was given before the enactment of the Judiciary Act.

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

183 See, eg, *Ricketson v Dean and Laughton* (1870) 4 SALR 78; *Splatt v Splatt* (1885) 11 VLR 300; *Granowski v Shaw* (1896) 7 QLJ 18.

184 See, eg, *Banks v Orrell* (1878) 4 VLR (L) 219. See also *Ammann v Wegener* (1972) 129 CLR 415 at 443; [1972] HCA 58.

185 See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 36-37 [55]-[58]; [2002] HCA 27.

issues with service and execution and security of costs continued to arise[186]. It was consistently assumed, and never doubted, that State courts could exercise State jurisdiction in matters between residents of different States[187]. They were among the matters which were subject to the operation of s 39(1) and (2) of the Judiciary Act.

170 Ms Corbett and Mr Gaynor's contrary submission – which appeared to rely on the proposition that "[t]he States did not exist either politically or constitutionally" and that any prior jurisdiction in matters between residents of different colonies therefore did not survive Federation – is untenable in light of ss 106, 107 and 108 of the Constitution and the simple fact that "[t]he States" are defined in covering cl 6 to include (among other entities) the colonies that existed at the time of Federation.

171 The consequence is that any authority of a State court to adjudicate on a matter between residents of different States can derive only from a federal source. Where a State court adjudicates on a matter between residents of different States, "the State court is invested with federal jurisdiction with respect to the matter under s 39(2) *to the exclusion of* State jurisdiction under s 109 of the Constitution"[188] (emphasis added).

172 On the other hand, neither ss 38 and 39 of the Judiciary Act nor s 77 of the Constitution expressly deals with tribunals that are not courts of the States. The question that therefore arises is whether a State Parliament can validly authorise a tribunal, not being a court of a State, to exercise judicial power and therefore jurisdiction in a matter between residents of different States within s 75(iv) of the Constitution.

Section 109 or constitutional implication?

173 Where it is contended that a law of a State and a law of the Commonwealth conflict with one another, s 109 of the Constitution requires a comparison between the two laws and "resolves conflict, *if any exists*, in favour of the Commonwealth"[189] (emphasis added). More particularly, s 109 is

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186 See, eg, *Wain v Greschke* (1902) 19 WN (NSW) 144; *Ramsay v Eager* (1902) 27 VLR 603; *Evans v Sneddon* (1902) 28 VLR 396; *Ex parte Hore* (1903) 3 SR (NSW) 462; *Conrad v Muston* (1903) 20 WN (NSW) 28.

187 See *Evans* (1902) 28 VLR 396 at 400.

188 *Rizeq* (2017) 91 ALJR 707 at 721 [67]; 344 ALR 421 at 436.

189 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 523 [37]; [2011] HCA 33.

concerned with the identification of conflict between laws that are otherwise valid. As explained in *D'Emden v Pedder*, "[w]hen a law of a State otherwise within its competency is inconsistent with a law of the Commonwealth on the same subject, such subject being also within the legislative competency of the Commonwealth, the latter shall prevail"[190]. Where one or both of the laws are otherwise invalid, no conflict can exist and no occasion arises to consider the operation of s 109.

174 Each of the Commonwealth's submissions sought to demonstrate that the purported conferral of jurisdiction by the AD Act to address the complaints by Mr Burns was not permitted under the Constitution. Resolution of these appeals must begin with the Commonwealth's primary submission, by which it contended that there is an implied constitutional limitation which denies to a State Parliament the power to invest a person or body other than a State court with jurisdiction in matters within ss 75 and 76. If such a limitation were found to exist, the AD Act would not validly confer jurisdiction on NCAT to adjudicate on matters between residents of different States. It follows that there could be no relevant conflict with s 39 of the Judiciary Act, and any consideration of the invalidating operation of s 109 of the Constitution (the subject of the Commonwealth's alternative submission) would be hypothetical.

Constitutional implication?

175 It is not disputed that where an implication is sought to be derived from the structure of the Constitution, it is necessary to show that the implication is "logically or practically necessary" for the preservation of the constitutional structure[191]. The requirement that the implication be logically or practically necessary reflects the need for any implication to be "securely based" in the text and structure of the Constitution[192]. In oral argument, the Commonwealth submitted that the implied limitation for which it contended was not a "new" implication, but rather a "consequence" of implications from Ch III of the Constitution recognised in earlier cases[193]. The Commonwealth contended that

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190 (1904) 1 CLR 91 at 111; [1904] HCA 1. See also *Rizeq* (2017) 91 ALJR 707 at 718 [47]; 344 ALR 421 at 431.

191 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 135; [1992] HCA 45; *McGinty v Western Australia* (1996) 186 CLR 140 at 169; [1996] HCA 48.

192 See *ACTV* (1992) 177 CLR 106 at 134-135; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453 [389]; [2005] HCA 44; *McCloy v New South Wales* (2015) 257 CLR 178 at 283 [318]; [2015] HCA 34.

193 See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; [1956] HCA 10.

the matters in ss 75 and 76 had been identified as matters of "particular or special federal concern", and that Ch III of the Constitution made a "deliberate selection" of federal and State courts as the only bodies which could exercise judicial power in relation to those matters. In support of that contention, the Commonwealth relied on the notion that Ch III establishes an "integrated Australian judicial system for the exercise of the judicial power of the Commonwealth"[194], and submitted that such a system would be fragmented if entities other than State courts could exercise State judicial power in respect of the matters referred to in ss 75 and 76, insusceptible to the possibility of federal control. In the Commonwealth's submission, that structural argument produced a specific result in s 77(ii). In particular, s 77(ii) was said to be based on an assumption "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". Put another way, s 77(ii) recognised that, at the State level, courts, *and only courts*, could exercise jurisdiction (whether State or federal) in relation to matters within the scope of ss 75 and 76. This "negative" implication was said to arise because, were it otherwise, a State Parliament could circumvent an exercise of the power conferred by s 77(ii) by simply vesting in a non-judicial tribunal the jurisdiction that was withdrawn from State courts.

176 The Commonwealth's primary submission should be rejected. To invoke the observation that Ch III of the Constitution establishes an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth is not helpful in this context. It disregards the fact that (as was common ground between all parties and interveners except for Ms Corbett and Mr Gaynor) it has not been established, and it is not correct, that the Constitution posits that the matters within ss 75 and 76 should only be dealt with in the exercise of the judicial power of the Commonwealth. As s 77(ii) and (iii) make plain, it is the Commonwealth Parliament which may make laws defining the extent to which jurisdiction of any federal court shall be exclusive of that which belongs to, or is invested in, the courts of the States.

177 Nor is it determinative to characterise the matters in ss 75 and 76 as topics of "special" federal concern and to posit that the Constitution established a closed scheme in which courts alone could adjudicate on such matters. To say that there was such a "deliberate selection" is a statement of conclusion, not of reasoning.

178 The earlier discussion of the constitutional and statutory framework demonstrates that s 77 of the Constitution contemplates the possibility of "federal control" over the authority to adjudicate on matters within ss 75 and 76. But as

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194 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102; [1996] HCA 24.

Leeming JA recognised in the Court of Appeal[195], nothing in s 77 requires that matters within ss 75 and 76 – to the extent that jurisdiction in those matters belonged to the courts of the States at Federation – should be dealt with only in federal jurisdiction (that is, only through the judicial power of the Commonwealth) or otherwise be subject to some kind of federal control. Observing that s 77(ii) and (iii) do not require that a law made under those provisions should say that the relevant matters may be dealt with only in federal jurisdiction emphasises the relevant breadth of the power and control conferred by those provisions. In particular, it emphasises that s 77(ii) and (iii) support a law saying, in effect, that one or more of the matters of the relevant kinds may be dealt with only in federal jurisdiction and, hence, by a court having certain characteristics.

179 Section 77(ii) confers power on the Commonwealth Parliament to *exclude* State jurisdiction in relation to matters within ss 75 and 76. It is facultative. It follows that "federal control" over jurisdiction in relation to those matters is not pre-ordained by the Constitution, whether in s 77 or elsewhere. Such control depends on the Commonwealth Parliament exercising the powers conferred by s 77, as it did through ss 38 and 39 of the Judiciary Act. And as the Commonwealth's submissions in this Court recognised, there was more than one way in which the Commonwealth could have exercised (and did exercise) the powers in s 77 so as to develop and manage a system by which federal jurisdiction in matters within ss 75 and 76 *would be* exercised.

180 The issue about exclusivity of federal jurisdiction was to be decided by the Commonwealth Parliament and the resolution of that issue was to be, and is, expressed in legislation that that Parliament enacted – the Judiciary Act. Contrary to the Commonwealth's submissions about the constitutional implication, that issue was not, and is not, predetermined by some constitutionally mandated structure or implication. The tension of a State law permitting a State tribunal to exercise relevant federal jurisdiction arises because of the enactment of the Judiciary Act by the Commonwealth Parliament.

181 *The Commonwealth v Queensland* ("the *Queen of Queensland Case*")[196], in the context of a State law purporting to confer on the Judicial Committee of the Privy Council jurisdiction to provide advisory opinions in relation to laws in force in that State, is instructive. Gibbs J (with whom Barwick CJ, Stephen J and Mason J agreed) relevantly held that Ch III of the Constitution did not *of its own force* affect the jurisdiction of the Judicial Committee to entertain appeals from decisions of this Court (except upon any inter se question) or from decisions of

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195 *Burns* (2017) 343 ALR 690 at 705-706 [58]-[64].

196 (1975) 134 CLR 298; [1975] HCA 43.

the courts of the States in matters arising in the exercise of federal jurisdiction. However, the provisions of Ch III *enabled the Commonwealth Parliament* by appropriate legislation to achieve the result that all of the matters mentioned in ss 75 and 76 of the Constitution (except possibly inter se questions) should be finally decided in this Court and not the Judicial Committee[197]. That is, the power conferred by s 77 *enabled* the Commonwealth Parliament to enact legislation having the effect that no appeal could be brought to the Judicial Committee from the decision of a State court given in the exercise of federal jurisdiction, and that Parliament had done so, by s 39(2) of the Judiciary Act[198].

182 Importantly, it was because the Parliament had exercised its power to prevent any appeal being brought to the Judicial Committee from a decision of this Court or a State court on any such matter that Gibbs J held that it was implicit in Ch III that it was not permissible for a State by legislation to provide a procedure by which the Judicial Committee was enabled to consider any matter arising in the exercise of federal jurisdiction[199]. The point of present importance is that the result rested on the Parliament having enacted s 39(2) of the Judiciary Act, not on any constitutional implication. The reference Gibbs J made to what may be "implicit in Ch III" was, as his reasons explained[200], offered in support of the conclusions first expressed and which have been set out above, including, in particular, that Ch III did not of its own force affect the jurisdiction of the Judicial Committee but that Ch III gave to the Parliament the power to enact such a law.

183 Further, the reasoning in the *Boilermakers' Case*[201] did not and does not resolve the issue. The *Boilermakers' Case* did not establish a separation of powers for the States. The *Boilermakers' Case* did not deny the possibility that matters within ss 75 and 76 could be adjudicated on by a State tribunal. What the *Boilermakers' Case* did establish was that "Ch III … is an exhaustive statement of the manner in which the judicial power of the *Commonwealth* is or may be vested"[202] (emphasis added). The question which arises here is whether, prior to

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197 *Queen of Queensland Case* (1975) 134 CLR 298 at 314.

198 *Queen of Queensland Case* (1975) 134 CLR 298 at 313 citing *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175 at 209; [1945] HCA 11.

199 *Queen of Queensland Case* (1975) 134 CLR 298 at 314-315.

200 *Queen of Queensland Case* (1975) 134 CLR 298 at 314-315.

201 (1956) 94 CLR 254.

202 (1956) 94 CLR 254 at 270.

1903, jurisdiction like that of NCAT was removed by Ch III. The answer is no. It was agreed in these appeals that NCAT was not a court of the State. Even if NCAT were a State court, it would have retained its "belongs to" jurisdiction prior to the enactment of the Judiciary Act. Finally, there is nothing in the text of Ch III (or the *Boilermakers' Case*) to suggest that by reason of some "implication" the jurisdiction of a State tribunal was removed, just as there is nothing to suggest that by implication the jurisdiction of a State court was removed in relation to the matters within ss 75 and 76. In fact the language of s 77(ii) is expressly to the contrary. The existence of the High Court's constitutionally entrenched position identifies a question, it does not answer it.

184 Once it is accepted that the existence of a scheme according to which jurisdiction in relation to matters in ss 75 and 76 would be exclusively federal depended, and continues to depend, on the exercise of the power conferred by s 77(ii) and (iii), the concern about circumvention or fragmentation of such a scheme by States choosing to vest jurisdiction in non-judicial tribunals loses much of its force as a consideration in favour of the Commonwealth's primary submission[203]. Any concern about States circumventing a national scheme in relation to matters within ss 75 and 76 can only arise at the point at which the powers in s 77 are actually exercised. Logically, that concern could only provide clear support for the Commonwealth's primary submission if there were no other way in which such circumvention could be prevented once the powers were exercised. As will be seen when considering the Commonwealth's alternative submission, that is not so. The point may be amplified in this way. The sole concern that animated the Commonwealth's primary submission was that States would be "subject to Commonwealth control" insofar as they purported to invest courts with jurisdiction in matters within ss 75 and 76 of the Constitution, but would be "free to confer [jurisdiction] to do exactly the same thing in relation to the same subject matters on a State tribunal outside of that scheme". So articulated, the concern was that federal control might be circumvented. However, that federal control only arose at the point at which the Commonwealth exercised its powers in s 77(ii) and (iii). Between 1901 and 1903, there was only the *potential* for federal control, which was made *possible* by the availability of the power under s 77(ii) and (iii). Until that power was exercised, there was nothing inherently problematic about State tribunals exercising jurisdiction in matters between residents of different States. Once the power under s 77(ii) and (iii) was exercised to create some degree of federal control in relation to classes of matters within ss 75 and 76 of the Constitution, it may be argued that it became incoherent, or at least problematic, for the States to *continue* to be free to

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203 cf *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85 at 137-138 [222]; Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 313-314.

confer such jurisdiction on tribunals. But any such incoherence did not exist until the enactment of the Judiciary Act.

185 There is also no evident historical basis for the contention that the Constitution created a "closed scheme" in which courts alone could exercise jurisdiction in matters in ss 75 and 76 of the Constitution. Indeed, that contention arguably conflicts with the fact that bodies other than courts appear to have exercised judicial power prior to Federation without concern or objection. In this Court, reference was made to the Local Land Boards established by the *Crown Lands Act* 1884 (NSW) ("the 1884 Act")[204]. Although the Land Boards were not constituted as courts of record, some powers were conferred upon them by analogy to the Court of Petty Sessions[205]. They had no power to punish contempt; members had no security of tenure[206]; they had no obligation to determine disputes within their jurisdiction[207]; and, until the *Crown Lands Act* 1889 (NSW) ("the 1889 Act"), appeals lay to the Minister[208]. In these respects, the Land Boards were very different from the Land Court established by the 1889 Act, which was designated as a court of record[209] and had power to punish contempt[210].

186 Whether and to what extent the Land Boards and other administrative tribunals exercised judicial power with respect to the particular matters within ss 75 and 76 of the Constitution was not explored in any detail by the parties or intervening Attorneys-General in this Court. But the existence of bodies which were not recognised to be courts but were empowered to resolve disputes by using curial powers at least casts doubt on the proposition that the Constitution, merely by omitting to mention non-court tribunals in connection with the matters within ss 75 and 76 of the Constitution, was erecting a scheme which excluded State tribunals from exercising jurisdiction in those matters. In relation to

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204 See generally *Wilson v Minister for Lands* (1899) 20 LR (NSW) (L) 104.

205 s 14(i) and (ii) of the 1884 Act.

206 ss 11 and 14(viii) of the 1884 Act.

207 s 14(vii) of the 1884 Act.

208 ss 17 and 18 of the 1884 Act.

209 s 8 of the 1889 Act.

210 s 9 of the 1889 Act.

diversity matters in particular, it may be added that "there was no fear of partiality or bias on the part of state tribunals" before Federation[211].

187 In summary, the Commonwealth's primary submission overstates the significance of how the provisions of Ch III of the Constitution identify, and deal with the authority to adjudicate on, matters in ss 75 and 76. Sections 75 and 76 recognise that there are certain matters which are (or may be) appropriate to be adjudicated on by the High Court in its original jurisdiction. Section 77 recognises that those matters should in turn be amenable to some measure of federal control and provides the Commonwealth Parliament with power to achieve that control. It is not possible to reason on that basis: (1) that the Constitution presupposes a particular scheme for how jurisdiction in ss 75 and 76 matters could be conferred and exercised; or (2) that Ch III exhaustively identifies the actors which could participate in that scheme. The former is not consistent with the actual operation of ss 75, 76 and 77 of the Constitution; and the latter remains no more than a statement of conclusion, without a clear principled or historical foundation.

188 For those reasons, the Commonwealth's primary submission should be rejected. There was, and is, no basis for contending that, from Federation, tribunals other than State courts could not exercise judicial power with respect to any of the matters in ss 75 and 76 of the Constitution. The structural implication contended for by the Commonwealth is not logically or practically necessary for the preservation of the integrity of the constitutional structure envisaged by Ch III[212].

Inconsistency

189 Section 109 of the Constitution provides that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid". As noted earlier, where it is contended that a Commonwealth law and a State law are in conflict, "s 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in favour of the Commonwealth"[213].

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211 Cowen, "Diversity Jurisdiction: The Australian Experience", (1955-1957) 7 *Res Judicatae* 1 at 3.

212 *ACTV* (1992) 177 CLR 106 at 135; *McGinty* (1996) 186 CLR 140 at 168; *APLA* (2005) 224 CLR 322 at 409 [240], 453 [389].

213 *Jemena* (2011) 244 CLR 508 at 523 [37]; *Bell Group NV (In liq) v Western Australia* (2016) 90 ALJR 655 at 665 [50]; 331 ALR 408 at 422; [2016] HCA 21.

190 A conflict may arise in different ways[214]. Relevantly, a State law that "would *alter, impair or detract from* the operation of a law of the Commonwealth Parliament" is to that extent invalid (emphasis added)[215]. The inquiry into whether a State law alters, impairs or detracts from the operation of a Commonwealth law seeks to identify ways in which the State law *undermines* the Commonwealth law. The inquiry thus requires identification of a "significant and not trivial" alteration or impairment of, or detraction from, the operation of the Commonwealth law[216].

191 The application of s 109 depends not only on the purported operation of the Commonwealth law and the State law, but also on the scope of the respective powers of the Commonwealth Parliament and the State Parliament[217]. As noted earlier, s 109 is concerned with conflict between otherwise valid laws.

192 As has already been explained, in relation to those matters within ss 75 and 76 of the Constitution that are not dealt with by s 38 of the Judiciary Act, s 39(1) of the Judiciary Act makes the jurisdiction of the High Court exclusive of the jurisdiction of the State courts and s 39(2) conditionally reinvests those courts with federal jurisdiction. The upshot is that "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"[218] (emphasis added). To that extent, s 39 evinces an intention to bring about federal control over the exercise by State courts of jurisdiction in relation to matters within ss 75 and 76[219].

193 The fact that neither s 39(1) nor s 39(2) of the Judiciary Act expressly refers to non-judicial tribunals does not mean that there is no inconsistency between s 39 and the conferral of State jurisdiction on such tribunals.

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214 See *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [28]; [1999] HCA 12; *Dickson v The Queen* (2010) 241 CLR 491 at 502 [13]-[14]; [2010] HCA 30; *Bell Group* (2016) 90 ALJR 655 at 665-666 [51]; 331 ALR 408 at 422.

215 *Worthing* (1999) 197 CLR 61 at 76 [28] quoting *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630; [1937] HCA 82.

216 *Jemena* (2011) 244 CLR 508 at 525 [41]. See also *Bell Group* (2016) 90 ALJR 655 at 665-666 [51]; 331 ALR 408 at 422.

217 *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 628-629 [37]; [2004] HCA 19.

218 *Felton* (1971) 124 CLR 367 at 413.

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

Section 109 relevantly directs attention to whether such a conferral of jurisdiction alters, impairs or detracts from the operation of s 39 of the Judiciary Act. And if a State Parliament were free to confer upon State tribunals jurisdiction in relation to the matters on which s 39 of the Judiciary Act operates, without that conferral of jurisdiction needing to be subject to the conditions identified in s 39(2) of the Judiciary Act (or any other incidents of federal jurisdiction), that would plainly detract from the intended operation of s 39. That is because, to the extent that a State Parliament can respond to the limitations imposed by s 39 by vesting jurisdiction in a State tribunal that is not a court of the State, the efficacy of s 39 insofar as it operates on State *courts* is correspondingly reduced.

194 In this Court, the Attorneys-General for Queensland and Victoria (intervening) submitted that the Commonwealth Parliament did not have power to exclude or otherwise control the jurisdiction of State bodies other than courts in matters within ss 75 and 76, and that s 39 of the Judiciary Act could not operate with s 109 of the Constitution to invalidate a State law that conferred such jurisdiction on a State tribunal. Those submissions relied on the fact that neither s 77(ii) nor s 77(iii) of the Constitution expressly deals with the jurisdiction of State tribunals: in their terms, they empower the Commonwealth Parliament to withdraw jurisdiction from, and invest jurisdiction in, the courts of the States. And because the judicial power of the Commonwealth may be exercised only by a Ch III court[220], the Commonwealth Parliament also lacks power to vest State tribunals with jurisdiction in matters within ss 75 and 76.

195 That difficulty has been addressed earlier: s 77(ii) and (iii) support a law saying, in effect, that one or more of the matters of the relevant kinds may be dealt with only in federal jurisdiction and, hence, by a court having certain characteristics.

196 That difficulty may also be resolved by reference to the incidental power in s 51(xxxix) of the Constitution, and to its interaction with the grants of legislative power in s 77(ii) and (iii). Section 51(xxxix) directs attention to whether a matter is "incidental to the execution of the principal power or is necessary or proper to render the main grant of power effective"[221].

197 There is no difficulty in accepting that the power to prevent State tribunals from exercising jurisdiction in matters within ss 75 and 76 is necessary or proper for the effective operation of a scheme which is intended to, and does, ensure that the jurisdiction of the courts of the States in relation to those matters is exclusively federal. The power is "reasonably necessary"[222] to ensure that s 39 of

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220 See *Boilermakers' Case* (1956) 94 CLR 254 at 270 and the authorities there cited.

221 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 580 [122]; [1999] HCA 27.

222 cf *Re Wakim* (1999) 198 CLR 511 at 580 [122].

the Judiciary Act, as an exercise of legislative power under s 77(ii) and (iii) of the Constitution, is not undermined by the choice of a State Parliament to vest like jurisdiction in a non-judicial tribunal, which would not be constrained by the conditions in s 39(2) or by any other incidents of federal jurisdiction.

198 There may be other limitations on the scope of the incidental power[223]. No such limitations were pressed in oral argument. In its written submissions before the hearing, Victoria argued that s 51(xxxix) of the Constitution cannot be relied upon to grant a person "immunity" from State laws conferring rights and liabilities. But to the extent that s 39 of the Judiciary Act has the effect of preventing the conferral of jurisdiction on a State non-judicial tribunal, it confers no "immunity" on parties to a controversy. It excludes the authority of the tribunal to adjudicate on the dispute.

199 For those reasons, to the extent that the Parliament of New South Wales purported to confer on NCAT authority to adjudicate on a dispute under the AD Act between residents of different States, that conferral of jurisdiction was rendered invalid by reason of inconsistency with s 39 of the Judiciary Act. The inconsistency arises because that conferral of jurisdiction undermines the operation and intended purpose of s 39, being to ensure that jurisdiction in the matters in ss 75 and 76 to which it applies is exclusively federal.

200 For those reasons, NCAT had no jurisdiction to determine the complaints by Mr Burns against Ms Corbett and Mr Gaynor.

Other issues

201 By amended notices of contention, Ms Corbett and Mr Gaynor advanced several further arguments as to why the appeals to this Court should be dismissed. The contention that no State jurisdiction at all could be exercised in matters between residents of different States after Federation should be rejected for the reasons given earlier[224]. The remaining issues identified in the notices of contention were abandoned or otherwise not pressed at the hearing of the appeals. They need not be addressed in view of the conclusion reached on the principal issue in this Court.

Conclusion

202 Each appeal should be dismissed and orders made as proposed in the joint judgment of Kiefel CJ, Bell and Keane JJ.

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223 See generally *Davis v The Commonwealth* (1988) 166 CLR 79; [1988] HCA 63.

224 See [168]-[170] above.

EDELMAN J.

Introduction

203 Immediately before Federation, the Parliaments of Australian colonies had plenary legislative powers to pass laws for the peace, welfare and good government of the colony. By s 107 of the Constitution, these powers were to continue unless they were exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of a State. The primary submission by the Attorney-General of the Commonwealth in these appeals was that Ch III of the Constitution impliedly withdrew from State Parliaments part of these legislative powers. The implied withdrawal was said to be that State Parliaments would no longer have the power that colonial Parliaments had to confer jurisdiction on administrative tribunals over particular subject matters.

204 The facts and background to these appeals are described by Gordon J in her Honour's reasons and need not be repeated. It suffices to say that the power said by the Attorney-General of the Commonwealth to have been impliedly withdrawn was State legislative power to confer jurisdiction upon administrative tribunals to decide diversity cases. These are cases where one party is, or becomes, a resident of a different State. If accepted, this submission would not be confined to the implied removal of State legislative power to confer diversity jurisdiction upon tribunals. It would also mean that there was an implied removal of State legislative power to confer jurisdiction on tribunals over admiralty and maritime matters[225].

205 There was, and is, no necessity for this proposed constitutional implication. In the United States, the justification for including diversity jurisdiction as a head of federal jurisdiction remains controversial[226]. But, whatever the justification, there was no need in the United States to exclude State legislative power over this subject. This was because Congress had an implied power to make the matters described in Art III, §2 exclusive to federal courts[227]. The United States scheme was replicated in Australia in s 77(ii) of the Constitution. That sub-section provides the Commonwealth Parliament with an

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225 See Constitution, s 76(iii).

226 Friendly, "The Historic Basis of Diversity Jurisdiction", (1928) 41 *Harvard Law Review* 483; Yntema and Jaffin, "Preliminary Analysis of Concurrent Jurisdiction", (1931) 79 *University of Pennsylvania Law Review* 869. Discussed in Cowen, "Diversity Jurisdiction: The Australian Experience", (1955-1957) 7 *Res Judicatae* 1 at 3. Cf *Baltimore and Ohio Railroad Co v Baugh* 149 US 368 at 372-373 (1893), quoting *Burgess v Seligman* 107 US 20 at 33-34 (1883).

227 Kent and Lacy, *Commentaries on American Law*, rev ed (1889), vol 1 at 319.

express power to make matters, including those involving a diversity of parties, exclusive to federal courts. Section 77(ii) was "merely an explicit enactment of what in the Constitution of the United States [was] held to be implied"[228].

206 At the time of Australian Federation there were hundreds of State administrative tribunals in the United States exercising powers of adjudication, including in diversity cases. Their numbers were rapidly expanding. Likewise, in Australia, tribunals exercising diversity jurisdiction and admiralty or maritime jurisdiction proliferated. An implied withdrawal of State power to confer diversity, admiralty or maritime jurisdiction upon a tribunal would have meant that State Customs Commissioners no longer had power to determine a dispute if an importer or consignee in the dispute was a resident of a different State, or if the dispute with the shipper was within "Admiralty and maritime jurisdiction". It would have meant that the continuing jurisdiction of established tribunals, such as the local Land Boards or Boards of Railway Commissioners, would be reduced to exclude the resolution of disputes involving persons who became residents of another State. It would have meant that local Marine Boards would have had no maritime jurisdiction. In each case, the relevant State would have been required to transfer that jurisdiction to a State court. The implication would also have meant that Imperial Vice-Admiralty Courts in New South Wales and Victoria ceased to exist because they were not State courts.

207 No authority compels that this implication now be drawn from the Constitution 117 years after Federation. The implication was not made by this Court in *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case*")[229]. On the contrary, the assumption by the majority in the *Boilermakers' Case*[230], relying upon the approach taken in the United States, was that there was a separation of *federal* judicial power and *federal* executive power. It was, emphatically, not that there was a separation of State judicial power and State executive power. Since Federation, and until very recently, the States have assumed that, subject to exclusion by a Commonwealth law, they have legislative power to confer jurisdiction on tribunals in diversity, admiralty and maritime matters. That assumption is correct.

208 In the alternative, the Attorney-General of the Commonwealth submitted that ss 38 and 39 of the *Judiciary Act* 1903 (Cth) were, in part, an exercise of the Commonwealth power pursuant to s 77(ii) of the Constitution to exclude State diversity jurisdiction. He submitted that s 109 of the Constitution rendered

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

229 (1956) 94 CLR 254; [1956] HCA 10.

230 See (1956) 94 CLR 254 at 270, 274-275, 276.

inoperative any State law conferring jurisdiction over the same subject matter upon bodies other than State courts. The first part of that submission should be accepted. However, it is not necessary that the State law be understood as rendered inoperative by reason of s 109 of the Constitution. It can more simply be seen as rendered inoperative directly by the exercise by ss 38 and 39 of the *Judiciary Act* of the power to exclude in s 77(ii) of the Constitution.

209 The reasons for these conclusions are set out in more detail as follows below. I respectfully acknowledge the considerable assistance that I have derived from the lucid reasons in the Court of Appeal of the Supreme Court of New South Wales of Leeming JA, with whom Bathurst CJ and Beazley P agreed[231].

A. Pre-Federation and post-Federation history [210]

B. A new constitutional implication? [212]

(i) Section 77 of the Constitution and the proposed implication [212]

(ii) The implication is inconsistent with the United States model [216]

(iii) The text of s 77(ii) does not require the implication [218]

(iv) The implication is inconsistent with the historical context of s 77(ii) [225]

(a) Vice-Admiralty Courts [226]

(b) Local Marine Boards [228]

(c) Local Land Boards [234]

(d) Other State Commissioners and Boards [237]

(v) No principled basis for the implication [238]

(vi) No basis for any extension of the Boilermakers implication [244]

C. The effect of ss 38 and 39 of the *Judiciary Act* [252]

D. Conclusion [258]

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231 *Burns v Corbett* (2017) 343 ALR 690.

A. Pre-Federation and post-Federation history

210 The implication proposed by the Attorney-General of the Commonwealth relied heavily upon a narrow meaning of s 77(ii) of the Constitution. Apart from lacking a principled basis, that narrow meaning is inconsistent with the historical model and the historical context of s 77(ii) at Federation. In the discussion in Pt B of these reasons, the period before Federation is taken as the starting point from which to construe the meaning of s 77(ii) and any proposed implication from it and Ch III. The submissions of every counsel in this case properly accepted the relevance of legal history to the proposed constitutional implication. The submissions were based upon two assumptions. It would be a distraction from the issues in this case to debate the precise foundations and method of application of those assumptions. It suffices to say that they are both well-established. The first was that an understanding of the history and context of a provision, viewed objectively without personal prejudices or preferences of the construing judge, assists in the process of characterising the "contemporary [or, perhaps more accurately, contemporary *essential*[232]] meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged"[233]. The second assumption was that this enduring meaning of constitutional language, at the level of generality at which its context requires characterisation, is only one dimension of constitutional adjudication[234]. Another dimension is constitutional practice, which includes the "fit" that a proposed meaning would have with judicial decisions, with the reasoning supporting those

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232 *Attorney General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 560, 616; [1908] HCA 94; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375; [1909] HCA 36; *Hughes and Vale Pty Ltd v The State of New South Wales [No 2]* (1955) 93 CLR 127 at 224; [1955] HCA 28; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 608; [1960] HCA 10; *Davis v The Commonwealth* (1988) 166 CLR 79 at 96-97; [1988] HCA 63; *Cheatle v The Queen* (1993) 177 CLR 541 at 552, 560; [1993] HCA 44; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24]; [2000] HCA 57; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 123 [212]; [2001] HCA 22; *Brownlee v The Queen* (2001) 207 CLR 278 at 299 [58]; [2001] HCA 36; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 75 [187]; [2009] HCA 23; *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890 at 909 [79]; 347 ALR 350 at 369; [2017] HCA 33.

233 *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18.

234 Dworkin, *Justice in Robes*, (2006) at 117-118.

decisions[235], and with practice that relies upon clear, consistent, and longstanding professional opinion[236].

211 In the face of a powerful historical analysis in these appeals, particularly that presented by the Attorneys-General for New South Wales, Queensland, and Western Australia, the Attorney-General of the Commonwealth relied upon three post-Federation developments in this Court effectively in support of a constitutional practice underpinning the proposed implication and shaping the meaning of s 77(ii) despite the context in which it was enacted. These developments were the *Boilermakers' Case*, *The Commonwealth v Queensland* ("the *Queen of Queensland Case*")[237], and *K-Generation Pty Ltd v Liquor Licensing Court*[238]. As I explain below, none of these cases provides any real support for the recognition of this proposed new implication.

B. A new constitutional implication?

(i) Section 77 of the Constitution and the proposed implication

212 Section 77 of the Constitution established a scheme by which the Commonwealth Parliament had power to define the jurisdiction of federal courts other than the High Court (s 77(i)) and to invest any court of a State with federal jurisdiction (s 77(iii)). The federal jurisdiction with which a court of a State could be invested, or about which a federal court's jurisdiction could be defined, was "[w]ith respect to" any of the nine subject matters in ss 75 and 76.

213 Even without the exercise of power under s 77(i) or s 77(iii), prior to Federation the colonial courts already possessed jurisdiction with respect to some of the subject matters in ss 75 and 76. One instance, included in s 75(iv), was the authority of the colonial courts to decide matters "between residents of different States" (who were then residents of different colonies). That authority concerned "controversies well known in the anterior body of general jurisprudence in the colonies"[239]. Another, in s 76(iii), was "Admiralty and maritime jurisdiction". Those were two instances of that subject matter jurisdiction that belonged to the

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235 Winterton, "Popular Sovereignty and Constitutional Continuity", (1998) 26 *Federal Law Review* 1 at 2; *Re Lambie* (2018) 351 ALR 559 at 582 [79]; [2018] HCA 6.

236 Baker, *The Law's Two Bodies*, (2001) at 66.

237 (1975) 134 CLR 298; [1975] HCA 43.

238 (2009) 237 CLR 501; [2009] HCA 4.

239 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619 [25]; [2008] HCA 28.

colonial courts. There may have been more. They were matters about which State legislative power was continued by s 107 of the Constitution. In the United States, following Alexander Hamilton's essay, published in 1788 as *The Federalist* No 82, that State jurisdiction was described as "concurrent"[240]. In a passage quoted by Hart and Wechsler[241], Hamilton considered whether Art III, §2 of the United States Constitution, in vesting the judicial power of the United States in the Supreme Court and any federal court created by Congress, had impliedly excluded the legislative powers of the States in relation to the concurrent jurisdiction of State courts. He concluded that since this construction "would amount to an alienation of state power by implication", the alternative appeared to him to be "the most defensible construction"[242].

214 Following the United States, in Australia the language of "concurrent" State jurisdiction was also used to describe State jurisdiction that existed in relation to any of these matters[243], including in cl 7 of Ch III of the Draft Bill of 1891[244], which was the foundation for s 77(ii) of the Constitution. Section 77(ii) of the Constitution, following the United States model, provides that with respect to the matters in ss 75 and 76, the Commonwealth Parliament may make laws "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*" (emphasis added). The jurisdiction belonging to, or "vested"[245] in, the courts of the States was the concurrent State jurisdiction.

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240 *Martin v Hunter's Lessee* 14 US 304 at 337 (1816); Story, *Commentaries on the Constitution of the United States*, (1833), vol 3 at 622-623, §1749; Kent and Lacy, *Commentaries on American Law*, rev ed (1889), vol 1 at 319.

241 Fallon et al, *Hart and Wechsler's The Federal Courts and the Federal System*, 6th ed (2009) at 383.

242 *The Federalist* No 82, in *The Federalist, on the New Constitution*, (1802), vol 2 at 244.

243 *Official Report of the National Australasian Convention Debates*, (Sydney), 31 March 1891 at 528; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 784.

244 As extracted in Williams, *The Australian Constitution: A Documentary History*, (2005) at 307.

245 For which the Imperial Parliament substituted "invested", in a change described by Quick and Garran as *per incuriam*: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 801.

215 The Attorney-General of the Commonwealth submitted that the words emphasised above embodied an assumption that the concurrent State jurisdiction could only be exercised by courts. That submission and implication is inconsistent with the United States model, upon which s 77(ii) was based. It is not required by the text of s 77(ii). It is inconsistent with the historical context of s 77(ii). It has no principled basis. And it is not required by authority.

(ii) The implication is inconsistent with the United States model

216 Section 77(ii) of the Constitution made express that legislative power to exclude which was implied in the United States. At the time of Australian Federation it was clear that the concurrent State power in the United States was not limited to courts. Hamilton's reasoning that Art III, §2 of the United States Constitution had not impliedly alienated State power applied equally to the concurrent jurisdiction of State administrative tribunals.

217 The operation of the United States model, upon which s 77(ii) was based, had the effect that unless Congress were to legislate to make exclusive the authority to adjudicate upon diversity matters, that authority would remain shared between the United States and State bodies, including both courts and administrative tribunals. There were hundreds of State tribunals in the United States exercising powers of adjudication. The powers were exercised over diversity matters[246]. Their numbers were also rapidly expanding. In 1903 alone, about 140 new State tribunals were created in the United States[247]. It was said that, by 1938, the United States was "practically governed by administrative tribunals", which tried more cases than the courts, including the determination of "[i]mportant issues and affairs of vital moment, both to the individual and to the nation as a whole"[248].

(iii) The text of s 77(ii) does not require the implication

218 The text of s 77(ii) assumed importance in these appeals because the meaning of s 77(ii) is a crucial consideration in ascertaining whether the Commonwealth has power to exclude all State jurisdiction where it exists concurrently over subject matters contained in ss 75 and 76. On any view, a constitutional implication removing part of a State's concurrent power could not

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246 See, eg, *Madisonville Traction Co v Saint Bernard Mining Co* 196 US 239 (1905).

247 Bowman, "American Administrative Tribunals", (1906) 21 *Political Science Quarterly* 609 at 613.

248 Riedl, "Should Rules of Evidence Govern Fact-Finding Boards?", (1938) 23 *Marquette Law Review* 13 at 14.

be necessary if there is Commonwealth power to exclude the concurrent State power.

219 The Attorneys-General of the Commonwealth and Western Australia submitted that the Commonwealth has power to exclude State legislation conferring concurrent State jurisdiction over State administrative tribunals in diversity matters. That submission relied upon s 77(ii) in combination with s 51(xxxix). In effect, their submission was that the power to exclude in s 77(ii) went beyond the literal terms of that sub-section due to the incidental power. Although it may ultimately be a question of degree as to when the meaning of an expression will include matters that are impliedly incidental to it without regard to an express incidental extension, the power to exclude all State jurisdiction with respect to matters in ss 75 and 76 of the Constitution is best seen as arising from s 77(ii) itself without the need to rely upon s 51(xxxix).

220 The focus of s 77(ii) is upon a power to make exclusive the jurisdiction of any federal court. The expression "any federal court" in s 77(ii) includes the High Court (unlike in s 77(i), which excludes the High Court). The power therefore includes the ability to make the existing federal jurisdiction of the High Court over matters in ss 75 and 76 exclusive of "that which belongs to or is invested in the courts of the States". It is an immediate power to exclude.

221 The notion of exclusivity usually connotes jurisdiction exclusive of *all* other authority. This unsurprising proposition is supported by the drafting history of s 77(ii). The terms of 77(ii) were "substantially contained"[249] in cl 7 of Ch III of the Draft Bill of 1891[250]. That clause provided that original federal jurisdiction "may be exclusive, or may be concurrent with that of the Courts of the States". It continued, saying that "exclusive jurisdiction shall not be conferred on a Court except in respect of the following matters", which matters were the early draft of the heads of federal jurisdiction.

222 This drafting history emphasises that the purpose of the provision that became s 77(ii) was to provide the Commonwealth Parliament with a power to make federal jurisdiction exclusive of all other authority. The reference to the possibility of jurisdiction "concurrent with that of the Courts of the States" was merely descriptive of the alternative to exclusive authority (ie concurrent authority). That alternative did not confine the power to make federal jurisdiction exclusive. If the Commonwealth Parliament chose not to make federal jurisdiction exclusive, and instead vested in new federal courts a

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249 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 801.

250 As extracted in Williams, *The Australian Constitution: A Documentary History*, (2005) at 307.

jurisdiction that was concurrent with that of the State courts, then the new federal jurisdiction could also be concurrent with any existing State jurisdiction of State administrative tribunals.

223 Although the final text of s 77(ii) describes the power of the Commonwealth Parliament in terms of making the federal jurisdiction exclusive of the concurrent jurisdiction of the State courts, this phrase similarly need not be construed as assuming that the only repository of concurrent State jurisdiction is State courts and not State tribunals. It could equally be construed as based on the assumption, which was given effect by this Court in 2010 as an implication from which State Parliaments could not detract[251], that decisions of an administrative tribunal could generally be reviewed by a State court so that they were not "islands of power immune from supervision and restraint"[252]. Indeed, the assumption would be considerably narrower. It would be only that State administrative tribunals adjudicating with concurrent State jurisdiction over diversity, admiralty and maritime matters would not exist entirely independently of State courts so that the power to make federal jurisdiction exclusive of State courts would make the same jurisdiction exclusive of State administrative tribunals. That assumption would explain the focus of s 77(ii) on "courts of the States", because, by making federal jurisdiction exclusive of the courts of the States, the jurisdiction must also be capable of being made exclusive of the tribunals of the States in relation to those subject matters.

224 There is a further explanation for the failure of the drafters of s 77(ii) to specify "tribunals" as another type of body of which the jurisdiction of the federal courts could be made exclusive. As Fry LJ said, when considering common law immunity from suit, "tribunal" had no ascertainable meaning and its inclusion alongside "court" was legally embarrassing[253]. This explanation does not deny the fundamental importance of the legal distinction between federal courts and federal administrative bodies that emerged at least by the time of the *Boilermakers' Case*. It merely illustrates a contextual reason why the concurrent jurisdiction of the States was described by reference to courts rather than by reference to "courts and tribunals" or even, in more cumbersome language, "courts, or other bodies conferred with judicial power that might not fulfil the essential requirements for a court".

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251 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98]-[100]; [2010] HCA 1.

252 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [99].

253 *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431 at 446-447.

(iv) The implication is inconsistent with the historical context of s 77(ii)

225 As in the United States, there was a proliferation of administrative bodies in Australia including administrative bodies exercising judicial power over diversity, admiralty and maritime matters. In *The State of New South Wales v The Commonwealth* ("the *Wheat Case*")[254], Griffith CJ observed that it had "been the practice for many years in the United Kingdom and in the Australian Colonies and States to confer quasi-judicial powers upon officers of Government and administrative bodies". The existence of these colonial bodies having diversity, admiralty and maritime jurisdiction is evidence of a "common [assumption] tacitly made and acted upon"[255] that such bodies, having such jurisdiction, would continue in existence. That common assumption militates against the existence of an unexpressed background implication in Ch III of the Constitution that removed this jurisdiction. Further, at the time of Federation, in New South Wales and Victoria there were Vice-Admiralty Courts, with jurisdiction from the High Court of Admiralty. They were not courts of the States. It is convenient to begin with those Courts and then turn to the colonial tribunals to illustrate the strength of the common assumption at Federation.

(a) Vice-Admiralty Courts

226 From 1841[256], judges of the Supreme Courts of the colonies held concurrent commissions, by appointment from British Admiralty, as judges of the Vice-Admiralty Court[257]. This Court derived its authority from the English High Court of Admiralty[258]. Although the same Vice-Admiralty Courts had been abolished in the United States during independence[259], they remained in Australia until the *Colonial Courts of Admiralty Act* 1890 (Imp)[260]. That Act created

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254 (1915) 20 CLR 54 at 63; [1915] HCA 17.

255 *Boilermakers' Case* (1956) 94 CLR 254 at 296.

256 Ying, "Colonial and Federal Admiralty Jurisdiction", (1981) 12 *Federal Law Review* 236 at 241.

257 *The Yuri Maru and The Woron* [1927] AC 906 at 912. See also *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175 at 190; [1945] HCA 11.

258 Ying, "Colonial and Federal Admiralty Jurisdiction", (1981) 12 *Federal Law Review* 236 at 241.

259 Frank, "Historical Bases of the Federal Judicial System", (1948) 13 *Law and Contemporary Problems* 3 at 7.

260 53 & 54 Vict c 27.

Colonial Courts of Admiralty with jurisdiction exercised "within the structure of the ordinary judicial system"[261]. However, the Act did not take effect in New South Wales and Victoria until 1911, when an Order in Council appointed 1 July 1911 as the date of commencement[262]. As the Attorney-General for Western Australia submitted in oral argument, the existence, until 1911, of the Courts of Vice-Admiralty in New South Wales and Victoria is inconsistent with an implication that only "the courts of the States" could exercise admiralty jurisdiction. It would be no more accurate to assert that the Vice-Admiralty Courts stood outside the scheme of Ch III of the Constitution than it would be to assert that administrative boards and tribunals established under British legislation stood outside the scheme of Ch III of the Constitution. There is no principled basis for such a distinction.

227 As Quick and Garran observed, the Vice-Admiralty Courts could not be called "courts of the States"[263]. Yet, despite falling outside the words in s 77(ii), it does not seem ever to have been contemplated that these Courts might have been abolished by a negative implication flowing from Ch III generally or s 77(ii) specifically. On the contrary, it seemed "clear that the constitution of those courts [was] not in any way affected by the establishment of the Commonwealth"[264].

(b) Local Marine Boards

228 The *Merchant Shipping Act Amendment Act* 1862 (Imp)[265] vested the power[266] of cancelling or suspending the certificate of a master, mate, or engineer in the "Local Marine Board ... or other Court or Tribunal" by which the case was

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261 Ying, "Colonial and Federal Admiralty Jurisdiction", (1981) 12 *Federal Law Review* 236 at 241. See also *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175 at 189-191.

262 United Kingdom, *The Statutory Rules & Orders and Statutory Instruments Revised to December 31, 1948*, (1950), vol 4 at 697. See also Ying, "Colonial and Federal Admiralty Jurisdiction", (1981) 12 *Federal Law Review* 236 at 241.

263 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 799.

264 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 798.

265 25 & 26 Vict c 63, s 23(1).

266 A similar power existed in s 242 of the *Merchant Shipping Act* 1854 (17 & 18 Vict c 104).

to be investigated or tried. The "Board, Court, or Tribunal" was required by s 23(3) to state the decision in open court and to send a full report of the case to the Board of Trade. Before Federation, colonial Parliaments also enacted legislation creating courts or tribunals to exercise these powers[267]. These local tribunals exercised both colonial administrative power and colonial "Admiralty and maritime" jurisdiction.

229 In 1876, Sir James Martin CJ (with whom Hargrave J agreed) considered the New South Wales Marine Board's power to investigate the cause of a collision, saying that[268]:

> "I am clearly of opinion that the Board forms such a Court to which a prohibition will issue. It has all the elements of a Court – the power of summoning parties and witnesses, and punishing them if they disobeyed the summons – of hearing evidence on oath administered, and of deciding questions which might deprive persons of civil rights."

230 Although the New South Wales Marine Board might have been characterised as a court, in 1899 the New South Wales Parliament enacted legislation, which was reserved for Royal Assent, transferring the powers of the Marine Board to the Superintendent of the Department of Navigation, except for its powers to fix salaries or fees, to make or recommend the making of rules or regulations, and to appoint, suspend or dismiss officers, or recommend them for appointment, suspension or dismissal[269].

231 In Queensland, where the Marine Board was not described as a court, it was also recognised that some of the powers exercised by the Marine Board were judicial powers. In *Burrey v Marine Board of Queensland*[270], Harding J (with whom the Chief Justice and Real J agreed) described the Marine Board as a "tribunal for investigating certain things" and characterised the inquiry or investigation by the Marine Board into the suspension of Mr Burrey's certificate as a "judicial proceeding, where a man's conduct was called into question", and

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267 *Navigation Act* 1876 (Q) (41 Vict No 3), ss 5, 38; *Marine Board and Navigation Act* 1881 (SA) (44 & 45 Vict No 237), ss 134, 136; *Marine Act* 1890 (Vic) (54 Vict No 1165), ss 180, 183, replicating *Marine Board Act* 1887 (Vic) (52 Vict No 965), ss 133, 136; *Marine Boards Act* 1889 (Tas) (53 Vict No 34), ss 5, 6, 130, 159, 176, 179; *Navigation Act* 1871 (NSW) (35 Vict No 7), ss 5, 19.

268 *Ex parte Dalton* (1876) 14 SCR (NSW) (L) 277 at 281.

269 *Navigation (Amendment) Act* 1899 (NSW), s 2.

270 (1892) 4 QLJ 151 at 152-153.

said that the investigation under s 37(3) of the *Navigation Act* 1876 (Q)[271] was a "judicial investigation".

232 For their entire existence, in some cases for many decades after Federation, it was never suggested that any of the local State Marine Boards (or the New South Wales Superintendent) were invalidly constituted due to an implication from Ch III of the Constitution that prevented them from exercising State jurisdiction over admiralty and maritime matters. In contrast, when a Court of Marine Inquiry was established under the *Navigation Act* 1912 (Cth), the validity of that Commonwealth legislation was challenged on grounds which included that the Court of Marine Inquiry was not a court within the meaning of Ch III and, therefore, could not exercise judicial power[272].

233 In *R v Turner; Ex parte Marine Board of Hobart*[273], the issue was whether the proper court to conduct an inquiry was the one established under the *Marine Act* 1921 (Tas) or the Court of Marine Inquiry established under the *Navigation Act*. There was no dispute that the Tasmanian tribunal had the power to conduct the inquiry, subject to it being "superseded" by the Court of Marine Inquiry[274]. A majority of the Court held that the jurisdiction of the Court of Marine Inquiry did not extend to the circumstances of the inquiry[275]. However, in separate dissents, Isaacs and Higgins JJ turned to Tasmania's alternative argument that the Court of Marine Inquiry was exercising judicial power contrary to Ch III. Isaacs J held that the Court of Marine Inquiry was not a court within the meaning of Ch III of the Constitution and that, in any event, its functions were "not necessarily judicial"[276]. The particular power of inquiry was not a judicial power so there was no relevant invalidity, "whatever might be otherwise thought" about other provisions[277]. Higgins J also concluded that the holding of the inquiry was not an exercise of the judicial power of the Commonwealth[278].

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271 41 Vict No 3.

272 *R v Turner; Ex parte Marine Board of Hobart* (1927) 39 CLR 411 at 421-422; [1927] HCA 15.

273 (1927) 39 CLR 411.

274 (1927) 39 CLR 411 at 423-424.

275 (1927) 39 CLR 411 at 425.

276 (1927) 39 CLR 411 at 442.

277 (1927) 39 CLR 411 at 442.

278 (1927) 39 CLR 411 at 450.

(c) Local Land Boards

234 Another example of local tribunals that exercised judicial power, including in diversity matters, was local Land Boards. In Queensland, Griffith CJ described the Land Board established under the *Crown Lands Act* 1884 (Q)[279] as one "whose functions are partly judicial and partly advisory"[280]. In South Australia, Gwynne J described the powers of the laymen Real Property Act Commissioners as "very high judicial powers"[281]. Indeed, in Tasmania claims and applications for grants of land had been part of the jurisdiction of the Supreme Court since 1858[282].

235 In New South Wales, the Local Land Boards established pursuant to the *Crown Lands Act* 1884 (NSW)[283] sat and gave their decisions in open court with the power to compel the attendance of witnesses. As Leeming JA observed in the Court of Appeal in these appeals[284], Darley CJ had remarked in 1899 that the Boards were constituted by "men ... without any legal training or any possible knowledge of an abstruse equitable doctrine"[285]. Section 18 of the *Crown Lands Act* also gave the Minister the power to hear appeals.

236 Although Darley CJ had doubted "whether the Legislature could really have intended to impose upon a lay tribunal such as a Land Board the duty of determining questions of so great nicety and difficulty", in the Privy Council Lord Macnaghten said that it was enough to say that the language of the Act was "perfectly clear, and that both the inquiries referred to the Land Board by the Minister for Lands [were] within the express words of the section"[286].

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279 48 Vict No 28. Replaced by a newly constituted Land Court from 1 March 1898 by the *Land Act* 1897 (Q) (61 Vict No 25).

280 *Re Powell* (1893) 6 QLJ 36 at 38.

281 *Palmer v Andrews (Nominal Defendant)* (1874) 8 SALR 281 at 287.

282 *Claims to Grants of Land Act, No 3* 1858 (Tas) (22 Vict No 10), s 1.

283 48 Vict No 18, ss 11, 14.

284 *Burns v Corbett* (2017) 343 ALR 690 at 705 [59].

285 *Wilson v Minister for Lands* (1899) 20 LR (NSW) (L) 104 at 109.

286 *Minister for Lands v Wilson* [1901] AC 315 at 323.

(d) Other State Commissioners and Boards

237 Prior to, or around the time of, Federation, legislation in the colonies established various other Commissioners and Boards with an assortment of judicial powers. Those powers were exercised in a variety of circumstances, including in diversity cases. Some examples of these Commissioners and Boards were Railway Commissioners[287], the dental board of New South Wales, which in considering charges of infamous conduct was obliged to sit in open court[288], and Land Tax Commissioners[289]. Commissioners of Customs (in South Australia, named the Collector for Port Adelaide) had jurisdiction to determine disputes between an officer of Customs and other persons[290]. For instance, in Victoria the Commissioner of Trade and Customs determined various disputes arising in the port of Melbourne, including those between masters or owners of ships, importers, consignees, or exporters, and any officer of Customs[291]. In Tasmania these disputes could, in certain circumstances, be heard and finally determined by the Minister, with any orders for penalties or forfeiture given the force of an order of the Justices sitting in Petty Sessions[292]. Many of these disputes must have involved diversity jurisdiction or admiralty or maritime jurisdiction.

(v) No principled basis for the implication

238 The Attorney-General of the Commonwealth suggested one principled basis for the implication. His submission was that, unless the exercise of this power by tribunals was excluded, the States could easily defeat a Commonwealth attempt under s 77(ii) of the Constitution to make federal courts the exclusive repository for the exercise of judicial power over ss 75 and 76 subject matters. However, as the Solicitor-General properly accepted in oral submissions, such a basis "would not carry great weight" if Commonwealth legislation were capable of excluding the concurrent exercise of State judicial power over these subject matters by administrative tribunals. Commonwealth legislation under s 77(ii) is, indeed, so capable.

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287 *Railways Act* 1890 (Vic) (54 Vict No 1135), Pt II, Div 1; *Government Railways Act* 1901 (NSW), Pt II.

288 *Dentists Act* 1900 (NSW), ss 3, 9.

289 *Land Tax Act* 1877 (Vic) (41 Vict No 575), s 9.

290 *Customs Act* 1864 (SA) (27 & 28 Vict No 19), s 138; *Customs Regulation Act* 1879 (NSW) (42 Vict No 19), s 23; *Customs Act* 1890 (Vic) (54 Vict No 1081), s 38.

291 *Customs Act* 1890 (Vic) (54 Vict No 1081), s 38.

292 *Customs Act* 1897 (Tas) (61 Vict No 6), ss 19, 20.

239 Another potential basis for the proposed implication might be a need to ensure that only a State judge could exercise State diversity jurisdiction. But even federal diversity jurisdiction can be exercised by non-judges. A State "court" in s 77(iii), which can be invested with federal jurisdiction, has been described as "an organization for the administration of justice, consisting of judges and with ministerial officers having specified functions"[293]. Ministerial officers include Masters and Registrars[294]. The Master or Registrar can exercise federal diversity jurisdiction, subject to review, even if the Master[295] or Registrar[296] is not a member or constituent part of the court[297]. In *The Commonwealth v Hospital Contribution Fund*[298], Gibbs CJ (with whom Stephen J agreed) went so far as to suggest that "a court composed of laymen, with no security of tenure, might effectively be invested with jurisdiction under s 77(iii)".

240 A further reason for the proposed implication could be that State jurisdiction over diversity, admiralty and maritime matters was of such a nature that it could never be entrusted to bodies other than State courts. The Attorney-General of the Commonwealth properly abstained from making this submission. There are two basic problems with it.

241 First, a purported purpose that administrative tribunals could not be entrusted with diversity, admiralty or maritime jurisdiction would have to turn upon whether the tribunal could be described as a "court", a word of protean quality[299] which, at the State level, could not easily be differentiated from a non-

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293 *Kotsis v Kotsis* (1970) 122 CLR 69 at 91; [1970] HCA 61; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 58, 60; [1982] HCA 13.

294 See *Harris v Caladine* (1991) 172 CLR 84 at 92, 93-94, 121, 148-149, 163-164; cf at 108, 138-139; [1991] HCA 9.

295 *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, considering *Supreme Court Act* 1970 (NSW), s 25.

296 *Supreme Court Act* 1935 (WA), s 6; cf *Supreme Court Act* 1935 (SA), s 7; *Constitution Act* 1975 (Vic), s 75(2).

297 Constitution, s 79.

298 (1982) 150 CLR 49 at 57. See also at 66 per Murphy J ("subject to review or appeal").

299 *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77 at 81 [17]. See also *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64]; [2006] HCA 44.

court tribunal[300]. However important the distinction between courts and non-court tribunals at federal level is today, that distinction could not support a justification or purpose in 1901 that drew a sharp distinction at State level between the trust to be afforded to State administrative bodies compared with State courts. State courts included the many justices of the peace[301] and magistrates[302] of State courts, who exercised many administrative powers as members of the public service[303]. Further, all those exercising judicial power, whether as judges or not, and whether on courts or not, were required to do so in a judicial manner, that is, according to reason and justice[304].

242 Secondly, the historical record does not support this purported justification. At Federation there does not appear to have existed a clear distrust of administrative tribunals or decision makers as compared with courts. As I explained above, administrative decision makers proliferated and they adjudicated on admiralty and maritime matters and diversity matters, as well as general matters of national importance. In this respect, Australia was in the same position as the United States. Diversity jurisdiction was included as a head of federal jurisdiction not because it had any special importance requiring only a court to adjudicate upon it. As Mr Dixon KC observed in evidence before the Royal Commission on the Constitution in 1927, there was no better reason for inclusion in the Australian Constitution of diversity jurisdiction as a subject matter of federal jurisdiction "than the desire to imitate an American model"[305].

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300 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [69].

301 Jaffe and Henderson, "Judicial Review and the Rule of Law: Historical Origins", (1956) 72 *Law Quarterly Review* 345 at 363. See also *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248 at 271 [91]; 351 ALR 225 at 250; [2018] HCA 4.

302 *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77 at 89 [69].

303 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 165 [37]; [2004] HCA 31.

304 *Sharp v Wakefield* [1891] AC 173 at 179; *R v London County Council; Ex parte Akkersdyk; Ex parte Fermenia* [1892] 1 QB 190 at 195; *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431 at 445, see also at 452.

305 Australia, *Royal Commission on the Constitution of the Commonwealth: Minutes of Evidence*, (1927), pt 3 at 785. See also Cowen, "Diversity Jurisdiction: The Australian Experience", (1955-1957) 7 *Res Judicatae* 1 at 4.

243 There is one justification for the proposed implication that could be both principled and coherent. That justification would apply if the Constitution had been structured in such a way as to require a strict separation of powers at State level that mirrored the separation of powers at the federal level. If so, the exercise of State judicial power by an administrative tribunal in diversity, admiralty and maritime matters would infringe a strict separation of judicial and executive powers at State level. But, apart from limited and specific exceptions, the Constitution does not recognise or require a separation of powers at State level either generally or in relation to particular subject matters[306]. This Court's many statements that, by s 77 of the Constitution, the Commonwealth takes State courts as they are found (including with State non-judicial powers) assume the opposite, even if those statements are subject to particular exceptions[307].

(vi) No basis for any extension of the Boilermakers implication

244 The Attorney-General of the Commonwealth submitted that the proposed implication was recognised in the *Boilermakers' Case*. That case was concerned with the separation of powers at the federal level. It established, as had generally been accepted in relation to the United States Constitution, that Ch III of the Constitution is an exhaustive statement of the manner in which the judicial power of the Commonwealth may be vested[308]. As the majority noted, "the effect of the framework of Art III [of the United States Constitution] was known and it was intended that the same broad principles affecting the judicial power should govern the situation of the judicature in the Commonwealth Constitution"[309]. However, the effect of the Attorney-General of the Commonwealth's submission was that the *Boilermakers' Case* had, without any obvious reason for doing so,

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306 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598 [37]; [2004] HCA 46; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354 [53]; [2009] HCA 49; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [69].

307 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 599 [38], citing *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 313; [1912] HCA 42; *Le Mesurier v Connor* (1929) 42 CLR 481 at 496-498; [1929] HCA 41; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554-555; [1938] HCA 37; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37; [1943] HCA 13; *Kotsis v Kotsis* (1970) 122 CLR 69 at 109; *Russell v Russell* (1976) 134 CLR 495 at 516-517, 530, 535, 554; [1976] HCA 23; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 61.

308 *Boilermakers' Case* (1956) 94 CLR 254 at 270.

309 *Boilermakers' Case* (1956) 94 CLR 254 at 297.

established an implication contrary to that which had been accepted in the United States.

245 The Attorney-General of the Commonwealth submitted that the majority in the *Boilermakers' Case* recognised an implied limitation upon State legislative powers in relation to matters such as diversity, admiralty and maritime matters in the following passage[310]:

> "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. The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the judicature of the States must be secured from encroachment, 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."

The majority continued as follows:

> "The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained."

246 In this passage, when read as a whole, the majority were emphasising that the jurisdiction of federal courts "was not to be left to the general discretion of the Parliament of the Commonwealth, still less the legislatures of the States"[311]. It was the paramount responsibility of the federal judicature to determine the boundaries of federal judicial power, being those matters inside the boundaries of federal judicial power and those matters outside the boundaries of federal judicial power (the residuary power of the States). The majority were not making any observation, contrary to the approach taken in the United States, about a lack of State judicial power over matters that fell within concurrent State legislative power. On the contrary, and apart from the boundaries of federal judicial power, the majority said that the constitutional sphere of the judicature of the States must be secured from encroachment.

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310 (1956) 94 CLR 254 at 267-268.

311 *Gould v Brown* (1998) 193 CLR 346 at 422 [120]; [1998] HCA 6. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 574-575 [111]; [1999] HCA 27.

247 The Attorney-General of the Commonwealth also relied upon the *Queen of Queensland Case* as supporting the proposed implication. The simplest answer to that submission is that, as Leeming JA said in the Court of Appeal[312], there was no issue in that case about the capacity of a State Parliament to confer judicial power on a tribunal. More particularly, as Leeming JA also observed[313], the only comments in that case that might support the proposed implication were made by Jacobs J, with whom McTiernan J "substantially" agreed[314]. But, with respect to Jacobs J, the premise of his observations was simply wrong.

248 In the *Queen of Queensland Case* this Court considered the validity of legislation of the Queensland Parliament that purported to confer power upon the Attorney-General of Queensland to, in particular circumstances, apply to the Supreme Court for a certificate that would permit a question to be referred to the Judicial Committee of the Privy Council. If a certificate were granted, the Governor in Council was required to request that Her Majesty make the referral. All members of the Court held that the legislation was invalid. In these appeals, the Attorney-General of the Commonwealth relied upon a passage where Gibbs J, with whom Barwick CJ, Stephen and Mason JJ agreed, said that[315]:

> "It is implicit in Ch III that it is not permissible for a State by legislation to provide a procedure by which the Judicial Committee is enabled to consider an inter se question in the absence of a certificate of this Court ... Legislation passed by a State which had that effect would violate the principles that underlie Ch III – that questions arising as to the limits of Commonwealth and State powers, having a peculiarly Australian character, and being of fundamental concern to the Australian people, should be decided finally in this Court ... In other words, such legislation would be contrary to the inhibitions which, if not express, are clearly implicit in Ch III."

249 That passage was immediately preceded by his Honour's observation that Ch III enabled the Commonwealth Parliament to legislate so that all of the matters in ss 75 and 76, except possibly inter se questions, would be finally decided by the High Court and not the Judicial Committee[316]. The exercise of Commonwealth legislative power in that way meant, either expressly or

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312 *Burns v Corbett* (2017) 343 ALR 690 at 712 [89].

313 *Burns v Corbett* (2017) 343 ALR 690 at 711 [88].

314 *Queen of Queensland Case* (1975) 134 CLR 298 at 303.

315 (1975) 134 CLR 298 at 314-315.

316 (1975) 134 CLR 298 at 314.

impliedly, that the States could not legislate to achieve a different effect. This conclusion says nothing about the existence of State legislative power to confer State judicial power on a State tribunal prior to any exercise of Commonwealth legislative power.

250 On the other hand, the implication does derive some support from the reasoning of Jacobs J. His Honour said that "[t]he subject matters under [ss 75 and 76] of the Constitution may only be considered and determined in exercise of the kind of judicial power envisaged under Ch III of the Constitution"[317]. This observation is not correct. As explained above, the States retained their colonial jurisdiction at least in relation to diversity matters (s 75(iv)) and admiralty and maritime matters (s 76(iii)).

251 Finally, the Attorney-General of the Commonwealth relied upon comments made by five members of this Court in *K-Generation Pty Ltd v Liquor Licensing Court*[318]. There, Gummow, Hayne, Heydon, Crennan and Kiefel JJ said that 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'". The effect of the submission was that this statement implied that State legislatures could not confer judicial powers on a non-court tribunal in respect of subject matters in ss 75 and 76. As Leeming JA observed in the Court of Appeal, this submission involves a basic logical fallacy: to say that the street is wet when it is raining does not mean that the street is dry when it is not raining[319]. Even more obviously, to say that there is "no doubt" that the street is wet when it is raining says nothing about whether and when the street will be dry.

C. The effect of ss 38 and 39 of the *Judiciary Act*

252 The alternative submission by the Attorney-General of the Commonwealth was that ss 38 and 39 of the *Judiciary Act* invalidated the conferral by any State Parliament of State diversity jurisdiction upon a body other than a State court. That submission should be accepted.

253 For the reasons set out above, the power in s 77(ii) is not confined only to making exclusive of State courts the subject matters of federal jurisdiction. The power is to make federal jurisdiction exclusive of any and all State jurisdiction with respect to the subject matters in ss 75 and 76. The State jurisdiction that can be excluded is any concurrent State authority to exercise judicial power over

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317 (1975) 134 CLR 298 at 328.

318 (2009) 237 CLR 501 at 544 [153].

319 *Burns v Corbett* (2017) 343 ALR 690 at 713 [93].

those subject matters that had been vested in State courts or State tribunals which are subject to judicial review by State courts.

254 Commonwealth legislation that is an exercise of the power to exclude under s 77(ii), if intended to be "a complete statement"[320] of the circumstances in which jurisdiction over a particular subject matter can be exercised, does not require s 109 of the Constitution to render invalid any State legislative provision conferring authority over the same subject matter upon a State court or tribunal. Although an "accepted view" has been that State laws giving effect to the "belongs to" jurisdiction become inoperative by the operation of s 109[321], the invalidity, in the sense of inoperability, can also be seen as arising directly from the exclusionary effect required by s 77(ii), just as the invalidity of the legislation in the *Queen of Queensland Case* was held to flow directly from the exclusionary effect of the exercise by the Commonwealth of its power under s 74, so that matters in ss 75 and 76 would be finally decided by the High Court.

255 The only remaining question, then, is whether ss 38 and 39 of the *Judiciary Act* exercised, in full, the "power to exclude"[322] in s 77(ii). If they did fully exercise that power to exclude then they would have (i) taken away the authority of State courts and administrative tribunals to exercise judicial powers over all matters in which the High Court had exclusive jurisdiction, including diversity matters, and (ii) given new federal authority to the State courts only, by the power in s 77(iii), to exercise their powers over these matters, including diversity matters.

256 If the text of ss 38 and 39 were read literally, and without context, then those sections would apply only to courts and not to tribunals. However, one important matter of context is that the text of ss 38 and 39 borrowed from s 77 of the Constitution, including the phrase in s 39(1) of the *Judiciary Act* "exclusive of the jurisdiction of the ... Courts of the States". This is a strong indication that those sections should be construed in the same manner as s 77(ii), and as an exercise of the full breadth of its power. For the reasons expressed above in relation to ss 77(ii) of the Constitution, the description in ss 38 and 39(1) of the *Judiciary Act* of the jurisdiction of the High Court as "exclusive" should be

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320 *Victoria v The Commonwealth* ("the *Shipwrecks Case*") (1937) 58 CLR 618 at 630; [1937] HCA 82.

321 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619 [24], citing *Felton v Mulligan* (1971) 124 CLR 367 at 412-413; [1971] HCA 39; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471, 476; [1980] HCA 32.

322 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; [1907] HCA 76.

construed as being exclusive of all State jurisdiction of the nature of that concurrent jurisdiction invested in the several State courts.

257 There is also a significant purpose underlying the construction of ss 38 and 39 as a scheme which fully exercised the power in s 77(ii). The "whole object"[323] of the provisions was to place conditions upon the exercise of the previously concurrent State jurisdiction, including to ensure the existence of an appeal to this Court. If the State legislation in these appeals[324] could operate alongside these provisions of the *Judiciary Act* to confer authority upon a non-court tribunal to exercise its powers in diversity matters, there would be a significant detraction from this scheme. The same diversity dispute could be adjudicated by a tribunal but without the conditions imposed by the *Judiciary Act*, including the possibility of appeal to this Court. It is not to the point that in some cases there might, ultimately, be a route to special leave if there were a power to bring an appeal or an application for judicial review of the matter to the New South Wales Supreme Court. In other cases this might not be so. There is no condition that would require an appeal to this Court to be ultimately available, with special leave, from a decision of a non-court tribunal.

D. Conclusion

258 These appeals were conducted on the considered assumption by all parties and interveners that the Civil and Administrative Tribunal of New South Wales was not a court of the State. The Attorney-General of the Commonwealth justified that assumption on the basis that the legislation constituting the tribunal does not expressly designate it as a court[325], and that it lacks the minimum degree of independence and impartiality[326], being an implied requirement of a court referred to in Ch III. No submissions were made about the qualities of the tribunal, or the basis for, or operation of, this required minimum, which, on one

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323 *Booth v Shelmerdine Bros Pty Ltd* [1924] VLR 276 at 278.

324 *Anti-Discrimination Act* 1977 (NSW), Pt 9, Div 3, esp ss 95, 102-108; *Civil and Administrative Tribunal Act* 2013 (NSW), Sched 3, cl 3.

325 Cf *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 529 [85], 562-563 [219]-[221]; *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343 at 352 [12]; [2012] HCA 58.

326 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 81 [78].

view[327], includes the obligation of courts to act judicially, a longstanding characteristic of all bodies exercising judicial power[328].

259 No new constitutional implication should be recognised. The legislative power that States would otherwise have had to confer State diversity jurisdiction on State tribunals was not withdrawn at Federation. However, the effect of ss 38 and 39 of the *Judiciary Act* was to render inoperative the conferral by State Parliaments of concurrent State authority over matters in federal jurisdiction to bodies other than State courts.

260 There is a very significant practical difference between the conclusion I reach on this basis and the same conclusion reached on the basis of a constitutional implication. If the pre-Federation, colonial legislative power to confer jurisdiction on non-court tribunals in diversity, admiralty and maritime matters had been impliedly withdrawn by a constitutional implication, then it would require a referendum, under s 128 of the Constitution, for that legislative power to be returned to the States. The conclusion that this power, in significant use at Federation, had been impliedly withdrawn subject only to change by a referendum is not supported by the express or implied meaning of the constitutional text, read in its historical context and in light of its purpose. Nor is it required or justified by any decision or assumption since Federation. In contrast, the best construction of s 77(ii), having regard to its historical context and purpose and that of Ch III generally, supports a conclusion that leaves the power with the Commonwealth Parliament to exclude (as it did), or not to exclude, the exercise by a State of its concurrent legislative power in relation to its courts and tribunals. As Leeming JA said in the Court of Appeal, that construction "left it open to the Commonwealth Parliament to have a High Court with original jurisdiction confined to s 75 matters and otherwise not to exercise the powers to create federal courts or to invest federal jurisdiction in State courts"[329] or to exclude any concurrent State jurisdiction.

261 The appeals should be dismissed and orders made as proposed in the joint judgment of Kiefel CJ, Bell and Keane JJ.

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327 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 106 [181]-[183]; [2013] HCA 7.

328 *Leeson v General Council of Medical Education and Registration* (1889) 43 Ch D 366 at 379, 386; *R v London County Council; Ex parte Akkersdyk; Ex parte Fermenia* [1892] 1 QB 190 at 195; *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431 at 452; *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 737; [1906] HCA 73; *Goldsmith v Sands* (1907) 4 CLR 1648 at 1658; [1907] HCA 47.

329 *Burns v Corbett* (2017) 343 ALR 690 at 706 [63].