



BURNS V CORBETT

VICBAR / AAFL CPD



CONSTITUTION, s 75

75. Original jurisdiction of High Court

In all matters:

- (i) arising under any treaty;
 - (ii) affecting consuls or other representatives of other countries;
 - (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
 - (iv) between States, or between residents of different States, or between a State and a resident of another State;
 - (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
- the High Court shall have original jurisdiction.

CONSTITUTION, s 76

76. Additional original jurisdiction

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

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States.

CONSTITUTION, s 77

77. Power to define jurisdiction

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

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.

JUDICIARY ACT, s 38

Matters in which jurisdiction of High Court exclusive

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

- (a) matters arising directly under any treaty;
- (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
- (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

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

JUDICIARY ACT, s 39

Federal jurisdiction of State Courts in other matters

- (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.
- (2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:
 - (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.

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

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

Legislative responses to *Burns v Corbett*

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The scope of federal jurisdiction

Section 75 matters

- i. arising under any treaty;
- ii. affecting consuls or other representatives of other countries;
- iii. in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- iv. between States, or between residents of different States, or between a State and a resident of another State;
- v. in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

Section 76 matters

- 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.

Applying *Burns v Corbett* to the various State super tribunals

New South Wales – NCAT is not a ‘court’

- **Attorney General for New South Wales v Gatsby [2018] NSWCA 254**
- From headnote: most members of the Tribunal did not have the tenure and protection comparable to that held by judges under the *Act of Settlement 1701* (UK) and its equivalents, and lacked the necessary institutional independence and impartiality which were required for a body to be described as a “court of a State”: [184]-[192] (Bathurst CJ); [197] (Beazley P); [198], [201]-[205] (McColl JA); [223]-[228] (Basten JA); [279] (Leeming JA).

South Australia – SACAT is not a ‘court’

- **Raschke v Firinauskas [2018] SACAT 19**
- Ross J (Pres of SACAT) at [88]-[89]: “Its role as administrative decision-maker ... in combination with the lack of designation, the lack of enforcement powers and the significant component of function ... that entails the exercise of non-judicial power, I am led to the conclusion that the Tribunal is not a court.”
- **Attorney-General v Raschke [2019] SASCFC 83**
- Held: attempts to empower SACAT to exercise federal judicial power are invalid.

Western Australia – SATWA is not a ‘court’

- **GS v MS [2019] WASC 255**
- At [23]: ‘many of the features of the Tribunal that are intended to facilitate the effective exercise of its jurisdiction (including specialist lay membership, holding office for fixed terms) belie its characterisation as a court.’

Queensland – QCAT is indeed a ‘court’

- **Owen v Menzie [2012] QCA 170** (special leave to appeal refused: [2013] HCATrans 18)
- Key difference with QCAT is that its statute designates it as a ‘court of record’
- Note: the composition of QCAT is comparable to the super tribunals of other States. Whether this decision is good law is therefore unclear

Victoria – VCAT is not a ‘court’

- **Qantas Airways Ltd v Lustig [2015] FCA 253**
- Held: VCAT is not a ‘court’ because the nature of its composition means it lacks the defining characteristics of independence and impartiality.
- VCAT website pretends that there is no clear authority as to whether *Burns v Corbett* affects VCAT.

The NSW legislative response to *Burns v Corbett*

Civil and Administrative Tribunal Act 2013 (NSW) - Part 3A Federal Proceedings

- Section 34A:
 - "federal jurisdiction" means jurisdiction of a kind referred to in section 75 or 76 of the Commonwealth Constitution.
 - "authorised court" means any of the following: (a) the District Court, (b) the Local Court.
- Section 34B
 - person with standing to make an original application or external appeal may, with the leave of an authorised court, make the application or appeal to the court instead of the Tribunal.
 - Leave may be granted if:
 - Application was first made to the tribunal
 - Determination of the application would involve the exercise of federal jurisdiction
 - The tribunal would otherwise have had jurisdiction
- Section 34C
 - Court can exercise all of the functions that NCAT would have been able to exercise.
 - If the proceeding is in the District Court, the rules of practice and procedure of that court apply to the proceeding.
 - If the proceeding is in the Local Court, the rules of practice and procedure of that court apply to the proceeding **except that**:
 - **Rules of evidence not to apply.** If the rules of evidence would not have applied in NCAT then, if it the court considers in appropriate in the circumstances, the court may decide not apply the rules of evidence.
 - **Non-lawyers may represent a party** with the leave of the court, if non-lawyers would have had that right had the proceedings be heard by NCAT.
 - **No adverse costs orders.** Costs may only be awarded in the same circumstances that costs may be awarded by NCAT.

History of Part 3A

- **Version 1** inserted by *Justice Legislation Amendment Act (No 2) 2017* (NSW)
 - Enacted in response to NSWCA decision in *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3.
 - Applied only to proceedings arising in federal diversity jurisdiction (Constitution s 75(iv)).
- **Version 2 (current version)** inserted by *Justice Legislation Amendment Act (No 3) 2018* (NSW)
 - Enacted in response to HCA decision in *Burns v Corbett* [2018] HCA 15 and NSWCA decision in *Attorney General for New South Wales v Gatsby*[2018] NSWCA 254.
 - Extended Part 3A to all proceedings within federal jurisdiction (all of Constitution ss 75 and 76).

The South Australian legislative response to *Burns v Corbett*

- New Part 3A of the *South Australian Civil and Administrative Tribunal Act 2013* (SA)
 - Inserted by *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Act 2018* (SA)
 - Enacted in response to SACAT decision in *Raschke v Firinauskas* [2018] SACAT 19.
 - Broadly similar to NSW approach: transfers affected tribunal proceedings to Magistrates' Court.
 - **Problem**: applies only to proceedings in "federal diversity jurisdiction" (defined to mean jurisdiction of the kind referred to in *Constitution* s 75(iii) or (iv)).
 - **But**: the constitutional issue arises in respect of all of the jurisdictions referred to in *Constitution* ss 75 and 76
 - **South Australia has copied the NSW Version 1 mistake**
 - Further amendment will be necessary

Victoria hasn't done anything in response to *Burns v Corbett*!

- VCAT website:

In *Burns v Corbett*, the High Court found that the New South Wales Civil and Administrative Tribunal (NCAT) did not have authority to decide such matters.

The decision raises highly technical constitutional law issues. VCAT notes that it:

- is specific to NCAT proceedings, and it was conceded before the High Court that NCAT is not a court. **Whether VCAT's jurisdiction is affected is yet to be determined**
- does not apply to authorities, corporations or overseas residents
- only applies to 'matters' and not all VCAT proceedings can be considered 'matters'.

www.vcat.vic.gov.au/news/resolving-disputes-between-residents-of-different-australian-states

“Whether VCAT’s jurisdiction is affected is yet to be determined” is not really accurate

[Qantas Airways Ltd v Lustig, De Simone and Victorian Civil and Administrative Tribunal \(Attorney-General for Vic intervening\) \[2015\] FCA 253 \(Perry J\)](#)

4.3 VCAT cannot exercise the judicial power of the Commonwealth

Qantas and the State made detailed submissions in support of the propositions that:

- (a) VCAT was called upon to exercise judicial power in the resolution of the claims before it;
- (b) VCAT was not a “*court of a State*” for the purposes of Chapter III of the Constitution and could not therefore be vested with federal judicial power; and
- (c) VCAT had wrongly embarked upon an exercise of federal jurisdiction in considering the merits of the defence on which Qantas relied.

As I explain below, I consider that these submissions were correctly made.

The first and second respondents accept the proposition that VCAT is not a court. They also proceeded on the basis that VCAT could not exercise Commonwealth judicial power.

4.3.1 *The judicial power of the Commonwealth is invested only in Chapter III courts*

...

4.3.2 *VCAT is not a court within s 77(iii) of the Constitution*

I agree with Weinberg J that VCAT is plainly not a court of a State within s 77(iii) of the Constitution and cannot therefore be vested with the judicial power of the Commonwealth: *Director of Housing v Sudi* [2011] VSCA 266; (2011) 33 VR 559 at 591 [182] (Weinberg J (Warren CJ and Maxwell P not deciding)). Further, while lacking precedential value, this is also the position that VCAT itself has taken: *ABY, ABZ v Patient Review Panel (Health and Privacy)* [2011] VCAT 905 at [13] (Ross J (in his capacity as President)).

What *should* Victoria do?

- Obvious answer is to adopt the NSW Model and amend the VCAT Act to:
 - Transfer proceedings lodged in VCAT that arise within federal jurisdiction to the Magistrates' Court