IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S183 of 2017

BETWEEN:

GARRY BURNS
Appellant

and

TESS CORBETT
First Respondent

ATTORNEY-GENERAL FOR NEW SOUTH WALES
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S185 of 2017

BETWEEN:

GARRY BURNS
Appellant

and

BERNARD GAYNOR
First Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Second Respondent

STATE OF NEW SOUTH WALES
Third Respondent

ATTORNEY-GENERAL FOR NEW SOUTH WALES
Fourth Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Fifth Respondent

Intervener's submissions
Filed on behalf of the Attorney-General for the State of Queensland
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IN THE HIGH COURT OF AUSTRALIA **No. S186 of 2017**
SYDNEY REGISTRY

BETWEEN: **ATTORNEY-GENERAL FOR NEW SOUTH WALES**
Appellant

and

GARRY BURNS
First Respondent

TESS CORBETT
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA **No. S187 of 2017**
SYDNEY REGISTRY

BETWEEN: **ATTORNEY-GENERAL FOR NEW SOUTH WALES**
Appellant

and

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

NSW CIVIL & ADMINISTRATIVE TRIBUNAL
Fourth Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S188 of 2017

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Fourth Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

1. This submission is in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of New South Wales and those with a like interest.

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Statutory provisions

4. The applicable constitutional and statutory provisions are reproduced in Annexure A to each of the appellant's submissions in proceedings No S183, S185 and S186 of 2017, as well as Annexure A to the submissions of the Attorney-General of the Commonwealth ('the Commonwealth') in all five proceedings.

PART V: Submissions

Summary

5. As a matter of text and structure, Ch III of the *Constitution* does:

   (a) confer on the High Court jurisdiction with respect to the subject-matters identified in s 75,

   (b) give the Commonwealth Parliament power to confer jurisdiction on the High Court with respect to the subject-matters in s 76; and

   (c) further, give the Commonwealth Parliament a power to confer jurisdiction over the nine subject-matters in ss 75 and 76, as it sees fit, on other federal courts and State courts, but only on courts (s 77).

6. As a matter of text and structure, Ch III does not:

   (a) remove from State Parliaments the legislative prerogative to confer State judicial power on State non-courts in respect of the subject-matters in ss 75 and 76; or

   (b) confer on the Commonwealth Parliament a power to prevent the exercise of State judicial power by State non-courts, notwithstanding that the High Court has, or may be given, an original jurisdiction in respect of such subject-matters.

7. Those considerations reveal the following. First, the choice to impose a separation of powers on the Commonwealth, notwithstanding that the federating States were not themselves so limited, was deliberate. Second, and relatedly, that choice did not disturb the settled position that the States were not subject to a separation of powers and the States did not cede that defining feature of their polities at federation. Third, the choice to give to the Commonwealth Parliament a limited power in s 77 was deliberate. Section 77 is not a power with respect to the 'legal system'. Fourth, that s 77 was deliberate in its use of 'courts' reflects the fact that the Commonwealth Parliament was given power only to confer, define and invest federal jurisdiction in 'courts'. It was not given power to alter the prevailing position for the States in respect of State judicial power exercised by non-courts.

8. It follows that Leeming JA's first conclusion, that no implication can be drawn from Ch III, is correct. However, it also follows, respectfully, that, inconsistently with his Honour's second conclusion, that s 39(2) of the *Judiciary Act* does not prevent the exercise of judicial power by State non-courts. Section 77 of the *Constitution* does not provide a power for the Commonwealth to enact such a law.

9. The Attorney-General submits that the appeal in each matter should be allowed because:

   (a) no implication of the kind contended for by the Commonwealth arises from Ch III; and

   (b) s 39(2) of the *Judiciary Act 1901* (Cth) is not inconsistent with State legislation conferring judicial power on bodies or persons other than courts, to decide matters between residents of different States.

10 No implication from Ch III

10. The Commonwealth contends that 'there is an implied limitation on State legislative power the effect of which is that a State law that 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" is invalid to that extent'.[1]

11. In demonstrating that no implication of that kind arises from Ch III, these submissions focus on the following matters.

20 12. The Commonwealth submissions are to the effect that an implication arises from the text and structure of Ch III, and especially s 77(ii), which removed from the States at federation the legislative power to confer judicial power on non-courts in respect of matters which traverse at the outset, or which later come to traverse, the subject-matters in ss 75 and 76.

13. The implication is inconsistent with the long-settled position that the powers of State Parliaments are not limited by any doctrine of separation of powers. That in itself is sufficient to demonstrate that the implication is not 'securely based'.[2]

30 14. Two assumptions underpin the Commonwealth submissions in support of this implication:

   (a) first, an express assumption that Ch III vests in the Commonwealth Parliament the power to control the extent to which State judicial power is exercised by any State body over matters falling within ss 75 and 76;[3] and

   (b) second, an implicit assumption that the Commonwealth has no legislative power to give effect to this control in relation to State persons or bodies which are not 'courts'.[4]

40 15. The second assumption ought to be accepted: that is, it is correct that the Commonwealth does not have legislative power to deny to State bodies other than courts State judicial power to decide the matters falling within ss 75 and 76.

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[1] Commonwealth's notice of contention, ground 1(a).
[2] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134 (Mason CJ); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J).
[3] Commonwealth submissions, 8 [27].
[4] See, for example, Commonwealth submissions, 8 [27]-[28], 10 [33].

16. If, however, the second assumption is wrong (a proposition which must underpin the Commonwealth's alternative argument as to s 109 of the *Constitution*), there would be no secure basis – indeed, no basis at all – for making the implication for which the Commonwealth contends.

17. The first assumption should not be accepted, as:

    (a) first, the 'negative force' of Ch III generally, and s 77(ii) in particular, does not deny to State Parliaments power to confer State judicial power on persons or bodies other than courts; and

    (b) second, the control which the Commonwealth contends Ch III gives it is not necessary for the maintenance of an integrated Australian judicial system; and

    (c) third, it is not supported by authority.

18. It follows that the implication for which the Commonwealth contends is neither 'logically or practically necessary'[5] nor 'securely based'.[6] On the contrary, because the implication would be inconsistent with the deliberate selection of text and structure in the Constitution and the settled position that States are not bound by the separation of powers, it would undermine rather than enhance constitutional cohesion. It is not sufficient that the implication gives effect to a priori assumptions about what is thought to be desirable.[7] For these reasons, the implication for which the Commonwealth contends should not be drawn.

No inconsistency with s 39(2) of the *Judiciary Act*

19. The Commonwealth's alternative submission, that s 109 of the *Constitution* is engaged by s 39(2) of the *Judiciary Act*, to deny New South Wales Civil and Administrative Tribunal jurisdiction in respect of the matters identified in ss 75 and 76, also hinges upon the first assumption. As the first assumption cannot be made good, and because the second assumption is correct, the Commonwealth's alternative argument ought to be rejected.

Statement of argument

The implication is inconsistent with the separation of powers

20. The Commonwealth accepts that 'there is no separation of powers doctrine at the State level that prevents a State Parliament from conferring State judicial power on a State tribunal, or on any other State officer'.[8] However, it contends that:

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[5] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).
[6] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J).
[7] *Roach v Electoral Commissioner* (2007) 233 CLR 162, 215 [142] (Hayne J, albeit in dissent in the result). See also, by analogy in the context of statutory interpretation, *X7 v Australian Crime Commission* (2013) 248 CLR 92, 149 [142] (Hayne and Bell JJ).
[8] Commonwealth submissions, 6 [19].

> The question raised by these appeals is whether that general proposition extends to permit a State Parliament to confer judicial power on a tribunal or an administrative decision-maker in circumstances where it could not confer judicial power with respect to the same matter on its courts.
>
> [emphasis in original]

21. To state the 'question' in these terms suggests that the Commonwealth does not seek to challenge the settled position that the doctrine of the separation of powers does not apply to the States. In fact, for the reasons that follow, the Commonwealth cannot make good its argument without disturbing that settled proposition.

22. The Commonwealth accepts that diversity matters are within the 'belongs to' jurisdiction of the States.[9] Its characterisation of the 'question' can, therefore, only be correct if the effect of s 109 of the *Constitution*, as engaged by s 39(2) of the *Judiciary Act*, is to render State Parliaments incapable of making laws which confer judicial power to decide diversity matters on State courts. That, however, is a misunderstanding of the operation of s 109, which operates only upon valid laws.[10] For the same reason, the spectre regarding the potential conferral on a State Minister of a judicial power, described in paragraph [20] of the Commonwealth's submissions, is not constitutionally 'absurd' although it is exceedingly unlikely. These matters warrant further explanation.

23. The words 'belongs to' in s 77(ii) refer to the authority that State courts possess to adjudicate under the constitution and laws of the States.[11] Those words dictate the conclusion that State Parliaments may invest State courts with State jurisdiction in relation to at least some of the matters set out in ss 75 and 76[12] (albeit that an exercise of legislative power under s 77(ii) might, with s 109 of the *Constitution*, render such laws inoperative).

24. The class of matters within the 'belongs to' jurisdiction of State courts, however, is not exhausted by subject-matters which were 'well known in colonial jurisprudence'.[13] In particular, covering clause 5 has the result that State jurisdiction may include authority to

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[9] Commonwealth submissions, 4 [12.2].

[10] *Rizeq v Western Australia* (2017) 91 ALJR 707, 718 [47] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[11] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619 [23] (Gleeson CJ, Gummow and Hayne JJ). It is submitted that the words 'or is invested in' also refer to jurisdiction invested *by State law*. This was the view of Quick and Groom who said that 'The words "belongs to or invested in" must refer to jurisdiction inherently belonging to, or, by State law invested in, the State courts': John Quick and Littleton Groom, *The Judiciary Power of the Commonwealth* (G Partridge & Co, 1904) 164. Given s 77(iii), the Commonwealth has, in any event, control over the extent to which the jurisdiction of a federal court is exclusive of that which it has invested in a State court.

[12] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619 [25] (Gleeson CJ, Gummow and Hayne JJ); Commonwealth submissions, 4-5 [12].

[13] Cf Commonwealth submissions, 4 [12.2].

adjudicate matters 'arising under the laws made by the Parliament' (in s 76(ii))[14] and 'arising under this Constitution, or involving its interpretation' (in s 76(i)).[15]

25. That conclusion is reinforced by the following considerations. First, s 76 is a mere power to confer federal jurisdiction.[16] If it had gone unexercised, and the subject matters in s 76(i) and (ii) were not within the 'belongs to' jurisdiction, then those matters would not have been capable of adjudication by *any* court, unless they happened also to fall within s 75.[17] Secondly, if s 76(i) and (ii) matters were not within the 'belongs to' jurisdiction, there would be a fracturing of the 'single composite body of law' which is applicable in the exercise of State jurisdiction, in the same way it is applicable in the exercise of federal jurisdiction.[18]

26. It is unnecessary to decide the boundaries of the 'belongs to' jurisdiction in these proceedings, given that it is accepted that matters between residents of different States fall within it.[19] The considerations above demonstrate, however, two matters of present significance. First, the matters in ss 75 and 76 should not be treated as a single, undifferentiated class. Secondly, with respect, it is not correct to say, as the Commonwealth does,[20] that a State 'plainly could not empower its own Supreme Court' to decide a matter involving the validity of legislation dealing with betting exchanges under the Commonwealth Constitution. A State could legislate in that way, although such a law would be rendered inoperative by s 109 of the *Constitution*, given s 39(1) of the *Judiciary Act*. However, the fact that the Commonwealth has exercised its legislative power in s 77(ii) so as to render one State law inoperative does not make the existence of State legislative power to make a different law 'absurd'.

27. Further, to the extent the Commonwealth seeks to 'conjure up' the 'grim spectre'[21] of members of the executive deciding constitutional questions,[22] several responses may be made. First, it is well established that, when considering whether a polity has power to enact a particular law, it is wrong to take into account 'extreme examples and distorting

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[14] *Rizeq v Western Australia* (2017) 91 ALJR 707, 712 [6] (Kiefel CJ); *South Australia v Totani* (2010) 242 CLR 1, 44-45 [65] (French CJ); *Felton v Mulligan* (1971) 124 CLR 367, 394 (Windeyer J). Alfred Deakin, *Opinion No 20: Federal Jurisdiction of State Courts source and nature: Actions for compensation for land acquired by Commonwealth*, 9 October 1901.

[15] John Quick and Robert Garran, The Annotated Constitution of the Australian Commonwealth (Legal Books, first published 1901, 1976 ed) 802, § 336; Harrison Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 2nd ed, 1910) 211-212; Inglis Clark, *Studies in Australian Constitutional Law* (G Partridge & Co, 1901) 177; Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002), 196; KH Bailey, 'The Federal Jurisdiction of State Courts' (1939-1941) 2 *Res Judicata* 109, 110-111.

[16] *New South Wales v Commonwealth* (2006) 229 CLR 1, 343 [820] (Callinan J).

[17] So, for example, the s 109 questions which arose in *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 would not have been justiciable in any court.

[18] *Rizeq v Western Australia* (2017) 91 ALJR 707, 719 [56] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Fencott v Muller* (1983) 152 CLR 570, 607 (Mason, Murphy, Brennan and Deane JJ).

[19] Commonwealth submissions, 5 [14].

[20] Commonwealth submissions, 6 [20].

[21] *Western Australia v Commonwealth* (1975) 134 CLR 201, 271 (Mason J).

[22] Commonwealth submissions, 6 [20].

possibilities'[23] which amount to no more than a mere 'exercise in imagination'.[24] Arguments that are no more than 'in terrorem' are to be rejected.[25]

28. Second, in each State there is a powerful *political* doctrine of the separation of powers, perhaps rising to the status of a constitutional convention.[26] The political force of that doctrine is such that the Commonwealth is unable to point to a real, as opposed to imagined, example of a State conferring upon a body or person a judicial power to determine matters in relation to which that body or person is clearly conflicted.

10 29. Third, the historical examples of Ministers being conferred with judicial power without controversy points to the strength of that convention. In Queensland, from at least 1886 until 1991, '[e]very member of the Executive Council' was a justice of the peace and authorised to exercise judicial power in that capacity.[27] That Ministers refrained from taking an active part in the administration of justice – unlike, for example, the Lord Chancellor in the United Kingdom, who until relatively recently both sat in Cabinet and presided as head of the English judicial system[28] – reveals how remote the risk is of Ministers determining the constitutional limits of their own, or the legislature's, authority.

30. Fourth, although it is not articulated, at base the problem with the conferral of such a
20 power upon a Minister appears to be the likelihood that the Minister would make a decision based on the political or other interests of the executive, rather than the law. The fact that the Minister's decision cannot be immunised from review for jurisdictional error by the Supreme Court,[29] and that the Supreme Court's decision would necessarily be subject to appeal to the High Court,[30] ensures that any decision would be capable of correction. Despite the Commonwealth's denial that the constitutional difficulty is the potential emergence of 'islands of power',[31] it is difficult to see how these entrenched features of Ch III do not alleviate the constitutional 'absurdity' said to arise.

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[23] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43 [32] (Gleeson CJ, Gummow and Hayne JJ); *XYZ v Commonwealth* (2006) 227 CLR 532, 549 [39] (Gummow, Hayne and Crennan JJ).

[24] *Western Australia v Commonwealth* (1975) 134 CLR 201, 271 (Mason J).

[25] *Sue v Hill* (1999) 199 CLR 462, 480 (Gleeson CJ, Gummow and Hayne JJ). See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 380 [87] (Gummow and Hayne JJ).

[26] Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 349; *Wainohu v New South Wales* (2011) 243 CLR 181, 200 [27] (French CJ and Kiefel J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 77-78 (Dawson J, Brennan CJ agreeing); *Gilbertson*
40 *v South Australia* (1976) 15 SASR 66, 85 (Bray CJ), 141-142 (Wells J).

[27] *Justices Act 1886* (Qld) s 10, repealed and replaced by *Justices of the Peace Act 1975* (Qld) s 9(i), in turn repealed by *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 1.03 (as enacted).

[28] See *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372, 416 (Priestley JA); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 118 fn 233 (McHugh J). Cf position now: *Constitutional Reform Act 2005* (UK) c 4, pt 2.

[29] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [98]-[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1, 27 [26] (French CJ), 62 [128] (Gummow J), 78 [193] (Hayne J), 105 [268] (Heydon J), 153 [415] (Crennan and Bell JJ).

[30] *Commonwealth Constitution*, s 73.

[31] Commonwealth submissions, 9 [31].

31. The Commonwealth accepts that matters between residents of different States are matters within the 'belongs to' jurisdiction of State courts.[32] The Commonwealth's position is, therefore, that a State Parliament may (subject to s 109) confer jurisdiction to adjudicate matters between residents of different States on a court, but may not confer the same power on a body other than a court. If accepted, that submission would amount to a substantial, but hitherto unrecognised, qualification on the well-settled position that the doctrine of the separation of powers does not restrict the legislative powers of the States. Respectfully, this Court should not disturb such a deeply entrenched feature of the Australian constitutional system by a side-wind.

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32. As French CJ observed in *Totani*, '[t]here was at Federation no doctrine of separation of powers entrenched in the constitutions of the States'.[33] To the extent the issue was touched on in the course of the Convention Debates, those debates indicate an understanding that the Commonwealth would be subject to restrictions which did not apply to the colonial legislatures, and would not apply to the successor State legislatures.[34]

33. The position that the State legislatures were not restricted by any doctrine of separation of powers did not change with the decision of this Court in *Boilermakers*, nor when the Privy Council decided *Liyanage v The Queen*.[35] In *Kable*, this Court affirmed that the States are
20 not subject to the separation of powers, whether by some implication drawn from State Constitutions[36] or by virtue of Ch III of the Commonwealth Constitution.[37] Indeed, the *Kable* doctrine presupposes the absence of a separation of powers at the State level.[38]

34. The position was put succinctly in the joint judgment in *Public Service Association*:[39]

> The doctrine of the separation of powers developed and applied in *R v Kirby; Ex parte Boilermakers' Society of Australia* in respect of the Commonwealth Court of Conciliation and Arbitration does not apply to the States.

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[32] Commonwealth submissions, 5 [14].
[33] *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ).
[34] See, for example: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 358 (Henry Higgins), 356 (Sir John Forrest), 364 (Josiah Symon).
[35] *Liyanage v The Queen* [1967] 1 AC 259, 287-292 (Lord Pearce delivering the advice of the Privy Council). For the failed attempts to derive a similar implication in State Constitutions, see: *Clyne v East* (1967) 68 SR (NSW) 385, 395 (Herron CJ), 396-400 (Sugerman JA, Asprey JA agreeing); *Nicholas v Western Australia* [1972] WAR 168, 173 (Jackson CJ, Virtue SPJ agreeing), 175 (Burt J); *Gilbertson v South Australia* (1976) 15 SASR 66, 85 (Bray CJ), 110 (Zelling J), 141-142 (Wells J); *Gilbertson v South Australia* [1978] AC 772, 783 (Lord Diplock delivering the advice of the Privy Council); *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ), 400-401
40 (Kirby P), 419 (Mahoney JA), 419 (Priestley JA, Glass JA agreeing); *Collingwood v Victoria [No 2]* [1994] 1 VR 652, 662-663 (Brooking J, Southwell and Teague JJ agreeing); *Queensland v Together Queensland* [2014] 1 Qd R 257, 276 [59] (Holmes, Muir and White JJA).
[36] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 65 (Brennan CJ), 77-78 (Dawson J), 93-94 (Toohey J), 109 (McHugh J).
[37] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 66-67 (Brennan CJ), 80 (Dawson J), 96 (Toohey J), 103 (Gaudron J), 109-110, 118 (McHugh J), 132, 142 (Gummow J).
[38] *Queensland v Together Queensland* [2014] 1 Qd R 257, 274 [51] (Holmes, Muir and White JJA).
[39] *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343, 368 [57] (Hayne, Crennan, Kiefel and Bell JJ).

35. This Court has consistently restated this orthodoxy.[40]

36. One consequence of that deeply entrenched position is that State legislatures have been afforded 'a degree of institutional and procedural flexibility'[41] to cut across the lines drawn by political theorists where expedient and 'establish institutional structures, blending judicial and non-judicial power'.[42] Because of that latitude, it has not been considered necessary for State legislatures to consider, when conferring a power upon a body, whether the power is 'judicial' and whether the body is a 'court'. Nor has it been considered necessary for the body exercising the power to clearly delineate whether it is exercising judicial or administrative functions.[43] Consequently, at the State level, the distinction between courts and tribunals is not always drawn easily.[44] Indeed, in pursuit of constitutional cohesion, this Court took into account the difficulty of distinguishing State courts and tribunals when moulding the contours of jurisdictional error in *Kirk*.[45]

37. Any overhaul of the settled understanding that States are not subject to a strict separation of powers will have far-reaching consequences for the way tribunals go about performing their functions as well as for the institutional design of State courts and tribunals. If the Commonwealth's submissions are accepted, a State tribunal will need to clearly identify whether it is exercising judicial power, not only when a matter falls within the subject-matters identified in ss 75 or 76, but at all times, because those subject-matters may be encountered at any point in a proceeding. A party may raise a constitutional question, or rely on a Commonwealth law in a defence, for example.[46] Equally, a party might move interstate and thus bring the tribunal's jurisdiction into question, whether unwittingly or strategically. The efficiency of tribunal proceedings and avoidance of undue technicality will be compromised by the need for constant surveillance of the nature of the power it is

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[40] As to the absence of a separation of powers derived from State Constitutions, see: *Medical Board of Victoria v Meyer* (1937) 58 CLR 62, 106 (Evatt J); *Kotsis v Kotsis* (1970) 122 CLR 69, 76 (Barwick CJ); *Mabo v Queensland* (1988) 166 CLR 186, 202 (Wilson J); *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 614 [86] (Gummow J); *South Australia v Totani* (2010) 242 CLR 1, 45 [66] (French CJ), 81 [201], 86 [221] (Hayne J); *Wainohu v New South Wales* (2011) 243 CLR 181, 192 [7], 197-198 [22] (French CJ and Kiefel J); *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343, 362 [35] (French CJ). As to the absence of a separation of powers at the State level derived from Ch III, see: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 560 [63] (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37] (McHugh J), 655-656 [219] (Callinan and Heydon JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 625 [146], 629 [159], 632 [168], 639 [187] (Keane J).

[41] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 [88] (French CJ).

[42] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 617 [117] (Gageler J).

[43] See *Momcilovic v The Queen* (2011) 245 CLR 1, 66 [92] (French CJ) ('The distinction does not have the same relevance in relation to State courts exercising jurisdiction conferred on them by State law').

[44] *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 430 [82] (Heydon J).

[45] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [69] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[46] Doing so would bring the proceeding within the purportedly 'protected' subject-matters in s 76(i) or (ii), unless the claim was 'colourable': *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 499 (Gibbs J); *Hopper v Egg & Egg Pulp Marketing Board (Vic)* (1939) 61 CLR 665, 673 (Latham CJ), 677 (Starke J), 681 (Evatt J).

exercising, and whether the subject-matter of the proceeding has strayed into the territory supposedly guarded by ss 75 and 76.

38. Moreover, State legislatures will effectively only have one option to prevent the jurisdiction of their tribunals from being thwarted: the reallocation of any judicial power traversing the subject-matters in ss 75 and 76 from tribunals to courts. Yet the subject-matters in ss 75 and 76 are not discrete topics for adjudication or resolution, in the way that a tribunal's jurisdiction is normally allocated, for example, complaints of discrimination. Rather, they cut across and may arise in potentially any topic for adjudication. State legislatures cannot avoid them when conferring judicial power on tribunals; they are a latent potentiality in the exercise of any judicial power in Australia. Thus, if State legislatures are to avoid the risk of undue complexity, uncertainty and delay in State tribunals, they will need to reallocate *all* State judicial power to courts, thereby inaugurating a de facto separation of powers at the State level. This would radically alter the structure of State courts and tribunals as we know them and have known them since well before federation. As Gageler J noted in *NAAJA*, 'the doctrine of separation of powers has implications for institutional design which extend well beyond considerations of personal liberty'.[47]

The first assumption underpinning the Commonwealth's grounds should not be accepted

39. As outlined above, central to both of the Commonwealth's grounds is an assumption that Ch III vests in the Commonwealth Parliament the power to control when State judicial power might be exercised over the subject-matters identified in ss 75 and 76.

40. The essential steps in the Commonwealth's reasoning in support of that implication appear to be:

    (a) first, Ch III gives the Commonwealth power to control when State judicial power might be exercised by any State body, over matters falling within ss 75 and 76;

    (b) secondly, Ch III does not give the Commonwealth legislative power to prevent the exercise of State judicial power by bodies other than courts;

    (c) thirdly therefore, in respect of the subject-matters in ss 75 and 76, there must be an implication which prevents State Parliaments from conferring judicial power on bodies other than courts.

41. Although, respectfully, the second step is not clearly articulated in the Commonwealth's submissions, if that step is not made, there can be no basis on which to reach the conclusion that an implied limitation on State Parliaments is necessary, or 'securely based'.[48] The reasons of Leeming JA in the Court of Appeal demonstrate why that is so.[49]

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[47] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 617 [117] (Gageler J).
[48] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389] (Hayne J).
[49] *Burns v Corbett* (2017) 316 FLR 448, 462-463 [58], 464 [64] (Leeming JA).

42. However, unless there is some independent reason to support the making of the first step, the second step in that reasoning (that the Commonwealth lacks legislative power) does not lead to the third step (that there is an implied limit on State Parliaments). Instead, in the absence of an independent basis upon which to conclude that the first step is right, the fact that the Commonwealth lacks legislative power demonstrates that the first step is wrong.

43. For at least the following reasons, the first step – the assumption that Ch III gives the Commonwealth power to control when State judicial power might be exercised by any State body over matters identified in ss 75 and 76 – has not been made good.

The 'negative force' of s 77(ii) does not deny to State Parliaments power to confer State judicial power

44. The Commonwealth's reliance on the 'negative force' of affirmative words in Ch III is, with respect, flawed.

45. It is settled that the 'exclusory operation' of Ch III has the effect that States cannot add to or detract from the federal jurisdiction conferred on the High Court, a federal court or a State court.[50] States are also incapable of enacting laws which would affect the exercise of federal jurisdiction.[51] Those propositions follow clearly from the fact that 'the entire subject-matter of the conferral and exercise of federal jurisdiction is a subject-matter of legislative power that is, by Ch III of the *Constitution*, "exclusively vested in the Parliament of the Commonwealth" '.[52]

46. Federal jurisdiction is, of course, 'the authority to adjudicate derived from the Commonwealth Constitution and laws' made under it.[53] As the High Court recently reaffirmed, Ch III makes a distinction between 'federal jurisdiction' and 'State jurisdiction'. It is 'a distinction as to the available sources of authority to adjudicate controversies'.[54] Hence:[55]

> 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.

47. As the Commonwealth concedes, the phrase 'federal jurisdiction' does not mean jurisdiction with respect to the subject-matters in ss 75 or 76.[56] Yet the Commonwealth seeks to extend the 'exclusory operation' of Ch III such that it would deny the capacity of State Parliaments to confer *State* judicial power on bodies other than courts in relation to those subject-matters. Such a proposition is difficult to reconcile, however, with the

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[50] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 575 [111] (Gummow and Hayne JJ); *Rizeq v Western Australia* (2017) 91 ALJR 707, 718 [60] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[51] *Rizeq v Western Australia* (2017) 91 ALJR 707, 718 [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[52] *Rizeq v Western Australia* (2017) 91 ALJR 707, 718 [61] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[53] *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J).
[54] *Rizeq v Western Australia* (2017) 91 ALJR 707, 718 [49] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[55] *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J).
[56] Commonwealth submissions, 4 [12].

settled position that Ch III is an exhaustive statement about 'the conferral and exercise of federal jurisdiction' (properly understood, in the sense of a federal source of the authority to decide, rather than the subject matters in ss 75 or 76).

48. In support of the implication for which it contends, the Commonwealth relies, in particular, on s 77(ii), and seeks to apply to the words of that section, the reasoning of the majority in *Boilermakers*.[57] As is well known, in *R v Kirby; Ex parte Boilermakers' Society of Australia*,[58] the majority said that 'to study Ch III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested'. It therefore followed that '[n]o part of the judicial power [of the Commonwealth] can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Ch III'. This was an application of the principle, 'established very early in the development of the principles of interpretation', that 'affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise'.[59]

49. Section 77(ii) confers on the Commonwealth Parliament power to 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'. It may be accepted that the negative force of these words 'forbid the doing', of what s 77(ii) permits, 'otherwise'. Hence the Commonwealth Parliament may not rely on any other head of power to deprive State courts of the jurisdiction which 'belongs to' them.[60] The result is, as Quick and Garran explained, that '[t]he exclusion of State jurisdiction must be founded on the establishment of federal jurisdiction'.[61]

50. Further, by stipulating 'courts', the 'negative force' of s 77(ii) denies to the Commonwealth Parliament legislative power to deprive State bodies other than courts any jurisdiction which 'belongs to' them. That is, it does the opposite of what the Commonwealth contends.

51. The Commonwealth's preferred reading[62] of s 77(ii), respectfully, assumes the point it seeks to prove: that Ch III prevents States from permitting their tribunals to decide, by the exercise of State judicial power, matters between residents of different States (and other matters identified in ss 75 and 76). Yet s 77(ii) is not directed to the Parliaments of the States, and its words do not appoint or limit an order or form of things to be done by those Parliaments. Accordingly, and accepting that Ch III is an 'exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested', it is difficult to see how the 'negative force' of s 77(ii) 'forbids the doing' of anything by State Parliaments in relation to *State* judicial power.

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[57] Commonwealth submissions, 7-9 [25]-[30].
[58] (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
[59] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
[60] *Rizeq v Western Australia* (2017) 91 ALJR 707, 720 [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[61] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1976 ed) 803, § 336.
[62] Commonwealth submissions, 8-9 [29]-[30]

52. The Commonwealth submits that because its 'negative' implication in s 77(ii) manifests so clearly, evidence of State bodies other than courts exercising judicial power at the time of federation tends to indicate that the drafters designedly excluded such bodies from the national scheme.[63] The purported 'negative' implication is anything but manifest. The fact that it was well-known prior to federation that State bodies other than courts exercised judicial power[64] can only point to the conclusion that the drafters used 'court' advisedly, but not in the way contended for by the Commonwealth.

53. That judicial power had been conferred on non-courts in the colonies, and that States continued that practice, was well known. So, for example, Quick and Groom observed in 1904 that '[t]he question may arise as to whether "Justices" sitting in Petty Sessions, exercising summary jurisdiction, constitute "Courts" within the meaning of sec 39(2) [of the *Judiciary Act*] so as to be invested with federal jurisdiction'.[65] They referred to decisions of the Victorian Supreme Court from the 1890s which drew a marked distinction between Justices sitting and acting as such, and a Court of Petty Sessions composed of Justices,[66] but both exercised judicial functions. The same issue was recognised by the *Service and Execution of Process Act 1901* (Cth), which, in s 3, defined 'Court' to include a 'Justice of the Peace acting judicially'.[67]

54. This contemporary recognition of the variety of bodies in which States regularly vested judicial power makes it inherently unlikely that s 77(ii), which refers only to courts, was intended to divest non-courts of the State judicial power otherwise invested in them, but to do so only partially. Such a partial divestment would have resulted then (as today) in significant difficulty and complexity in the exercise of State judicial power outside courts. Further, it would have disturbed the position, settled even then, that the States were not bound by the separation of powers.

The integrated Australian judicial system

55. The Commonwealth submits that the implication for which it contends is necessary to prevent the 'fragmentation' of the integrated system for the exercise of the judicial power

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[63] Commonwealth submissions, 10-11 [35]-[36].

[64] In addition to the authorities cited by New South Wales in its submissions in S186 of 2017 at 7-8 [31]-[32], see, for example, s 13 of the *Justices Act 1886* (Qld), which until 1975 provided that 'Justices of the peace shall have and may exercise ... the several powers and authorities conferred upon them by this Act or any other Act'. The *Justices Act* drew a distinction between justices acting in accordance with s 13, and two or more justices sitting as a Court of Petty Sessions (ss 19 and 22). An example of an Act which conferred judicial power upon a justice acting alone was the *Sunday Observance Act 1841* (NSW) (applying in Queensland upon separation), which provided in s 1 that 'any person who shall be found engaged in shooting at any pigeon match or for pleasure sport or profit of any kind whatever on a Sunday ... shall be deemed guilty of a misdemeanour and on conviction before any Justice of the Peace shall forfeit and pay a penalty or sum of not more than five pounds nor less than forty shillings'. Similarly, the *Prisons Act 1890* (Qld) in ss 27(5) and 28, gave a single visiting justice power to 'hear and determine in a summary manner all complaints in respect of any of the minor offences committed within the prison'.

[65] Quick and Groom did not suggest, however, that s 39(2) would affect the exercise of judicial power by State Justices of the Peace.

[66] *Benalla v Wallder* (1890) 16 VLR 681; *Hannan v Simpson* (1896) 22 VLR 532.

[67] See *Buckingham v Weatherup* (1903) 29 VLR 381, 382-383. Section 3 continued to define 'Court' in this way until the repeal of the *Service and Execution of Process Act 1901* (Cth) in 1992: see *Service and Execution of Process (Transitional Provisions and Consequential Amendments) Act 1992* (Cth) s 3.

of the Commonwealth for which Ch III provides.[68] Respectfully, the exercise of the judicial power of a State, by a tribunal or other non-court, could not have that effect, given that State judicial power is, as the Commonwealth suggests, 'an assertion of sovereign adjudicative authority of the State polity'.[69] The exercise of such judicial power is necessarily 'different and distinct'[70] from the exercise of Commonwealth judicial power, the latter being, conversely, an assertion of the sovereign adjudicative authority of the Commonwealth.

56. However, the 'integrated system' for which Ch III provides is not limited to the exercise of the judicial power of the Commonwealth. It has more recently been said that Ch III provides for an 'integrated national court system'.[71] Whilst that is undoubtedly correct, it is submitted that Ch III does more: it provides for an integrated system for the exercise of judicial power, irrespective of the polity which has authorised its exercise or the body in which it is vested.

57. In this context, as in others, it is necessary to bear steadily in mind the 'fundamental propositions' set out by Gummow and Hayne JJ in *Wakim*:[72]

> First, the compact is a *federal* compact with all the attendant advantages and disadvantages of such arrangements. Secondly, the subject of the judicial power of the Commonwealth is dealt with in the Constitution as a subject that is different and distinct from the judicial power of the States. Thirdly (and, in part, this is a corollary of the second point) the Constitution does not provide for a single or unitary system of courts. The Commonwealth Parliament does not have power to make laws with respect to 'courts' or 'the legal system'. Fourthly, when 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.
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> (emphasis in original)

58. Their Honours' fourth proposition, as to what is meant by references to an 'integrated' or 'unified' Australian judicial system, was central to this Court's decision in *Kirk*. In *Kirk*, after noting the place of s 73 in the *Constitution*, the joint judgment held:[73]

> There is but one common law of Australia. ... To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'.

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[68] Commonwealth submissions, 7 [24]
[69] Commonwealth submissions, 8 [28]. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 573 [108] (Gummow and Hayne JJ).
[70] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574 [110] (Gummow and Hayne JJ).
[71] *Rizeq v Western Australia* (2017) 91 ALJR 707, 712 [5] (Kiefel CJ), 718 [49] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[72] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574 [110] (Gummow and Hayne JJ) (emphasis in original, reference omitted).
[73] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (references omitted).

59. Coupled with s 73 of the *Constitution*, the principle in *Kirk* gives effect to the need to ensure all avenues of appeal from *any* exercise of judicial power, lead to the High Court.[74] In turn, that ensures the coherence of the single common law of Australia.[75] *Kirk* thereby ensures that the exercise of State judicial power by a body or person other than a court is brought within the 'integrated system' and is capable of correction.[76] By these means the High Court may execute its 'constitutional duty of supervising the nation's legal system' and 'of maintaining a unified system of common law'.[77] As *Kirk* demonstrates, the High Court's constitutional duty in that respect is not limited the subject-matters mentioned in ss 75 and 76.

60. Against that background, it is difficult to understand the Commonwealth's assertion that, although the implication for which it contends is necessary for the protection of the 'integrated system',[78] 'the issue is not the possible existence of "islands of power".'[79] The 'constitutional concern' is instead said to be with:

> the undermining of the legislative power conferred by Ch III to provide for uniformity in the exercise of a jurisdiction that is 'national' in nature,[80] and which is essential for the preservation of the federal compact.

61. However, what is 'national in nature' is 'federal jurisdiction'.[81] To the extent the identified 'concern' suggests that *any* exercise of adjudicative authority over the subject-matter in s 75(iv) is necessarily 'national' in nature, it is inconsistent with the settled position that such controversies might, but for s 39 of the *Judiciary Act*, have been decided in State jurisdiction by State courts.[82]

62. The 'constitutional concern' identified by the Commonwealth is, therefore, in essence a restatement of the assumption the Commonwealth makes, that Ch III vests in it control over the exercise of any judicial power in relation to the subject-matters in ss 75 and 76. It does little to illuminate *why* such an assumption should be made. The Commonwealth's proposition does not find support in the text of s 77.

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[74] *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Rizeq v Western Australia* (2017) 91 ALJR 707, 718 [49] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[75] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 114 (McHugh J), 138 (Gummow J).

[76] This is particularly so given that the label 'jurisdictional error' is 'at bottom one of policy' and 'almost entirely functional': *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 568 [57], 570 [64] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[77] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 113, 114 (McHugh J).

[78] Commonwealth submissions, 7 [24].

[79] Commonwealth submissions, 9 [31].

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

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

[82] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619 [23]-[25] (Gleeson CJ, Gummow and Hayne JJ).

63. The identification of the 'constitutional concern'[83] in those terms reveals, however, that the Commonwealth's concern is not, in fact, with the undermining of the integrated system for which Ch III *itself* provides. Instead, its concern is with the frustration of the '*intention* that the Commonwealth have *power to create* a coherent and uniform national scheme for the exercise of [any] judicial power with respect to the ss 75 and 76 subject-matters'.[84] Again, that submission assumes rather than demonstrates that such an intention inheres in Ch III.

64. The Commonwealth notes that Ch III 'accommodate[s] the latitude accorded to the Commonwealth Parliament both as to what (if any) federal courts would be created, and as to the extent to which federal jurisdiction would be invested in State courts'.[85] Yet in addition to the two 'end[s] of the spectrum' the Commonwealth identifies,[86] Ch III clearly contemplates that the Commonwealth Parliament might leave entirely unexercised the legislative powers in ss 76 and 77. State courts would then be left to decide the kinds of matters mentioned in ss 75 and 76 in the exercise of State jurisdiction (with the exception of the limited class of matters outside their 'belongs to' jurisdiction, including s 75(v) matters[87]). In those circumstances, a *constitutional* implication cannot arise, to stop State tribunals doing the same, in order to give effect to the *potential* for Commonwealth control.

65. These considerations demonstrate that the implication for which the Commonwealth contends is not 'logically or practically necessary'[88] for the protection of the integrated system for which Ch III itself provides. That system accommodates the potential exercise of State and federal judicial power over the matters in ss 75 and 76. To the extent State Parliaments may choose to confer State judicial power on bodies other than courts, the integrity of the integrated system for which Ch III provides is protected by the principles arising from *Kirk*.

66. Finally, the suggestion that the implication is necessary to avoid the fragmentation and undermining of the system provided for by Ch III is irreconcilable with the practical consequences of that implication, outlined at [36] to [38] above. As the Hon Duncan Kerr has suggested:[89]

> The coherence of the integrated national scheme created by Chapter III and the *Judiciary Act* would be damaged, rather than enhanced, by such an outcome. The seamless capacity of both state courts and tribunals to each individually resolve disputes including intermingled federal and state law and parties would be lost. State administrative proceedings would be at risk of becoming a labyrinth trapping those subject to them in a maze of complexity.

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[83] And the Commonwealth's elaboration of it at 10 [33] of its submissions.
[84] Commonwealth submissions, 10 [33] (emphasis added).
[85] Commonwealth submissions, 8 [26].
[86] Commonwealth submissions, 8 [26].
[87] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 620 [26] (Gleeson CJ, Gummow and Hayne JJ), quoting *Studies in Australian Constitutional Law* (G Partridge & Co, 1901) 177-178.
[88] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 169 (Brennan CJ).
[89] Duncan Kerr, 'State Tribunals and Ch III of the Australian Constitution' (2007) 31 *Melbourne University Law Review* 622, 644-645. See also *Owen v Menzies* [2013] 2 Qd R 327, 348 [60] (McMurdo P).

Authorities relied upon by the Commonwealth

67. The comment of five judges in *K-Generation*[90] indicates neither acceptance nor rejection of the submission made by the Commonwealth in that case.

68. The Commonwealth relies on the reasons of Spigelman CJ in *Attorney-General (NSW) v 2UE Sydney Pty Ltd*,[91] and Kenny J in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*[92] as 'persuasive'. As the Commonwealth acknowledges, those reasons have been criticised for denying the existence of the States' 'belongs to' jurisdiction. In *2UE Sydney*, Spigleman CJ said:[93]

> A State cannot confer on a court, let alone on a tribunal, judicial power with respect to any matter referred to in s 75 or s 76 of the *Constitution*.

69. Justice Kenny reached a similar conclusion in *Anti-Discrimination Tribunal (Tasmania)*, setting out Spigelman CJ's statement above.[94] In defence of the reasoning adopted by Spigelman CJ and Kenny J, the Commonwealth submits[95] that such statements describe the 'cumulative effect' of s 39 of the *Judiciary Act* (in respect of courts) and the implication arising from Ch III (in respect of tribunals). That reading of those judgments, however, is difficult to reconcile with Spigelman CJ's and Kenny J's reliance on the comments of Jacobs J in *Commonwealth v Queensland*.[96] Jacobs J said:

> 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 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

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[90] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
[91] (2006) 226 FLR 62.
[92] (2008) 169 FCR 85.
[93] (2006) 226 FLR 62, 73 [56].
[94] *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85, 137 [220].
[95] Commonwealth submissions, 12 [41].
[96] (1975) 134 CLR 298, 327-328. With the possible exception of McTiernan J who 'substantially agreed' with Jacobs J, none of the other judges adopted this reasoning.

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.

70. After setting the above passage, Kenny J said:[97]

> I accept, as indeed, the above passage indicates, that Ch III of the Constitution is the sole source of Commonwealth judicial power, which is the only power exercisable when federal jurisdiction is attracted. Federal jurisdiction is attracted whenever there is an exercise of judicial power in respect of a matter of the kind described in ss 75 and 76 of the Constitution. Furthermore, Ch III precludes the existence of residuary State judicial power in respect of any such matter. It follows from this that a State Parliament cannot confer State judicial power on either a State court or tribunal in respect of a matter in ss 75 and 76 of the Constitution, because these matters attract federal jurisdiction in which only Commonwealth judicial power is exercisable.

71. The Commonwealth submits[98] that Jacobs J did not deny the existence of the 'belongs to' jurisdiction because, 'on a fair reading', his comments were only to the effect that States could not confer judicial power with respect to the subject-matters in ss 75 or 76 of a 'kind' that the Commonwealth could not confer. If that reading of Jacobs J's comments is accepted, however, it is difficult to understand their relevance to the reasons given by Spigelman CJ and Kenny J. Their Honours were not dealing with any question about the 'kind' of judicial power conferred.

72. Further, whatever might be the 'correct' reading of the passage from Jacobs J's reasons, Spigelman CJ and Kenny J appear to have relied on it to support the proposition that, leaving aside s 39 of the *Judiciary Act*, States cannot confer judicial power on courts or tribunals with respect to any matter within ss 75 and 76. A proposition of that kind denies the existence of the 'belongs to' jurisdiction and for that reason, is of little persuasive force.

Section 39(2) – No inconsistency

73. Critical to the Commonwealth's primary argument is the assumption that it lacks legislative power to control the exercise of State judicial power by tribunals. Chapter III, so the argument goes, envisages that the Commonwealth Parliament will have 'comprehensive power over the extent to which State judicial power can be exercised with respect to the matters addressed in ss 75 and 76',[99] yet Ch III fails to give that comprehensive power by failing to authorise the Commonwealth Parliament to remove judicial power from State tribunals. Accordingly, on the Commonwealth's account, s 77(ii) must itself do implicitly what it does not expressly authorise the Commonwealth Parliament to do.[100]

74. In pivoting to its alternative argument regarding s 109, which depends on the Commonwealth having legislative power to control State tribunals, the Commonwealth

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[97] *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85, 137 [222].
[98] Commonwealth submissions, 13 [42].
[99] Commonwealth submissions, 8 [27].
[100] Commonwealth submissions, 8-9 [29]-[30].

has difficulty in articulating the source of its legislative power. Nowhere does the Commonwealth reverse its initial assumption by asserting that s 77(ii) gives it express authorisation to remove judicial power from State tribunals. Instead, the Commonwealth submits that its legislative power is to be derived from s 77's place in 'a constitutional design whereby Parliament is given power to create a system of "uniform laws" governing the exercise of [any] sovereign adjudicative authority in respect of the matters referred to in ss 75 and 76.'[101] That is, it seeks to displace its initial assumption that it does not have legislative power over tribunals by reference to its other assumption that Ch III vests it with power to control when and how any judicial power might be exercised over matters falling within ss 75 and 76. Both assumptions are required to do too much.

75. For the reasons given above, Ch III does not give the Commonwealth 'comprehensive power' to regulate all judicial power with respect to the matters in ss 75 and 76. Indeed, the Commonwealth's exhortation to read s 77(ii) in light of the construction adopted in *Boilermakers' Case* leads to the conclusion that 'courts of the States' in s 77(ii) carries the negative implication that it means *only* 'courts of the States'. It therefore cannot be the source of a power to regulate the institutions of States other than their courts.

76. Further, the incidental power in s 51(xxxix) cannot be relied upon to enact a law outside the 'purpose of the main power, the power vested in the Federal judicature.'[102] A law denying State tribunals the power to exercise State jurisdiction is not 'incidental to the exercise of a power of adjudication conferred or vested in a court by or under Ch III or necessary or proper to make the exercise of such a power of adjudication effective'.[103] To the extent that s 39(2) of the *Judiciary Act* purports to regulate State tribunals exercising State judicial power, it is beyond power. However, as the Commonwealth notes, s 39(2) mentions courts and not tribunals because it 'follows the contours of the constitutional text pursuant to which it was enacted'.[104] Section 39(2) should therefore be read as applying only to the courts of the States, in line with the language it uses and the scope of the power under which it was made.[105] It follows that there is no inconsistency between s 39(2) and the conferring of State judicial power on State tribunals over matters falling within ss 75 and 76 of the Constitution.

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[101] Commonwealth submissions, 14 [49].
[102] *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 587 (Dixon and Evatt JJ).
[103] *Rizeq v Western Australia* (2017) 91 ALJR 707, 717 [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).
[104] Commonwealth submissions, 17 [62].
[105] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 604 [76] (Gageler J); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 381 [66] (Gageler J); *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

PART VI: Estimate of time

77. The Attorney-General estimates that no more than 15 minutes will be required for the presentation of oral argument.

Dated 24 August 2017.

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