Commonwealth. This would also be the case for the other matters listed in ss 75 and 76. Any matters which are the subject of federal jurisdiction by the operation of the *Constitution* can *not* be the subject of State judicial power. This would include, for example, matters between States or residents of different States, or matters arising under the Constitution or involving its interpretation.

The potential ramifications of the decision on the quite extensive tribunal systems in the States are as yet unknown. I offer a couple of hypothetical scenarios and comment on their impact on our system of governance.

The position could be left as it is currently. The Commonwealth has a decision (albeit of a single judge of the Federal Court) that it is not bound by State tribunals exercising State judicial power. The law really requires the consideration of the High Court to gain clarity on this point. During the course of the argument, the Full Court urged counsel for the Commonwealth to seek instructions to apply to remove the matter to the High Court for exactly this type of resolution. These instructions were not forthcoming and the Full Court, somewhat grudgingly, continued to hear the matter. Given the outcome of the case in favour of the Commonwealth, it is unlikely that Mr Nichols will appeal the decision; his condition is terminal and he has limited means.

Nonetheless, if Kenny J's position is confirmed, either in this case or in another vehicle, it will undermine both Commonwealth policy and the fundamental precepts of the rule of law. It creates an anomalous situation whereby the Commonwealth is not subjected to State law, despite its intention that it should apply, and that other citizens are subject to it. It places the Commonwealth in a privileged position: above the law. An implication in the *Constitution*, which is itself based upon the 'assumption' of the rule of law and which results in this type of outcome, seems incongruous.

A second option may be for the States to remove the contested jurisdiction from the tribunal systems to the courts, or make the tribunals courts of the State by increasing tenure and remuneration guarantees. While a more preferable course of action, this option is still less than ideal. Tribunals offer an efficient, cost effective and flexible forum in a wide range of matters, including anti-discrimination, to complement the more formal court system. The removal of this complementary system would be to the detriment of those seeking quick, efficient and effective redress.

GABRIELLE APPLEBY teaches law at the University of Adelaide

CONSUMER AFFAIRS

Privacy invasion under the guise of changes

NOAM SHIFRIN examines bid information in South Australia's property auctions

Imagine the following scenario. You are in the market to purchase a property. You have attended and unsuccessfully bid at a number of auctions and suddenly you receive a flood of direct-mail brochures and telemarketer calls for goods and services connected with your property hunt.

Implausible? Well, if you live in South Australia you are now one small step away from being subjected to just such a deluge. The State government has recently passed the *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA) ('the Act') requiring real estate agents to not only register every bidder at every auction[1] but also record the value of each bid.[2] The only protection from disclosure of that information to third parties, and therefore use for purposes other than those defined in the legislation, is the threat of a $10 000 fine for each breach.[3] You might think to yourself that that is sufficient protection but the legislation goes on to provide each real estate agent with a ridiculously easy-to-prove (and complete) defence to any prosecution brought for such a breach. All section 37B of the Act requires is for an agent to prove, on the balance of probabilities, the offence was not committed intentionally and didn't result from a failure to take reasonable care to avoid the commission of the offence.

Another concern is the period for which information must be retained. The legislation mandates a period of five years for which records must be kept but remains silent as to what is to be done after that time.[4] Should those records be destroyed? If so, what method of deletion would be acceptable in the case of electronic records? Theoretically a complete historical record of every single bid at every single auction may be kept in perpetuity. To be fair the scheme is in good company. Legislation passed by New South Wales,[5] Queensland,[6] and the Australian Capital Territory [7] require some form of bidding record to be kept for three, five and three years respectively.

Where South Australia differs from any other Australian jurisdiction is in the type of information to be recorded. NSW and the Australian Capital Territory require either the highest [8] (if passed in) or winning bid to be recorded.[9] Queensland makes no provision for the recording of any bids and instead simply

REFERENCES

1. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 24K(1)(a) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
2. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 24J(1)(h) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
3. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 24J(3) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
4. *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 37A(1)(a) amended by *Statutes Amendment (Real Estate Industry Reform) Act 2007* (SA).
5. *Property, Stock and Business Agents Act 2002* (NSW) s 68(4).
6. Property Agents and Motor Dealers (Auctioneering Practice Code of Conduct) Regulation 2001 (Qld) reg 32(6).
7. *Civil Law (Sale of Residential Property) Act 2003* (ACT) s 25(3).
8. *Property Stock and Business Agents Regulation 2003* (NSW) reg 15(1)(h); *Civil Law (Sale of Property) Regulation 2004* (ACT) reg 14(1)(h).
9. *Property, Stock and Business Agents Regulation 2003* (NSW) reg 15(1)(g); *Civil Law (Sale of Property) Regulation 2004* (ACT) reg 14(1)(g).
10. Queensland Department of Tourism, Fair Trading and Wine Industry Development, 'Outcomes of the review of the *Property Agents and Motor Dealers Act 2000*' (2004).

focuses on the identity of each bidder. South Australia, on the other hand, requires all bids to be recorded — presumably in order to provide the maximum possible assistance to investigators trying to stamp out dummy bidding and collusive practices. While that appears to enhance consumer protection, the large amount of resultant data will make it more — rather than less — difficult for the Office of Consumer and Business Affairs to mount effective investigations. More investigators will be needed and the chance of a critical error occurring will increase. Is there something in South Australia which sets them apart from other jurisdictions, one of which has reviewed the operation of its legislation[10] and still saw fit not to require all bids to be recorded?

The South Australian government ought to abolish the requirement to record every bid at every auction. No other state has seen fit to provide for such a practice and I doubt if its Office of Consumer and Business Affairs believes that, by obtaining a record of every bid at every auction, it will be able to more effectively regulate the industry and stamp out dummy bidding. At the very least, the government ought to require that records be destroyed to a requisite standard after the mandatory five year retention period elapses. Anything less is a needless violation of its citizens' privacy for very little benefit.

NOAM SHIFRIN is a Melbourne barrister.

HUMAN RIGHTS

Victoria's *Abortion Law Reform Act*

RACHEL BALL explains the history of Victoria's ground-breaking abortion legislation

Victoria's *Abortion Law Reform Act* ('the Act') completed its passage through Parliament on 10 October 2008. This landmark legislation allows women to obtain an abortion at any time during the first 24 weeks of pregnancy, and later with the agreement of two doctors.

Unsurprisingly, the Act provoked a storm of controversy in Parliament and dominated the media cycle for days. One aspect of the debate that was somewhat unexpected was the extent to which the language of human rights and the provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') were invoked by both supporters and opponents of the Act.

Section 48 of the Charter — included on account of the Catholic Church's lobbying efforts — provides that the Charter will not affect any law applicable to abortion.[1] Nevertheless, human rights standards were used as a framework within which much of the debate was conducted. Unfortunately, the human rights analysis of the Act was often ill-conceived or incomplete. Contrary to some of the views expressed as the legislation made its way through Parliament, the Act complies with both the Charter and international human rights law.

The Act gives rise to two issues of contention: the availability of abortion services and the legal obligations of medical practitioners who hold a conscientious objection to abortion. While related, these two issues should be distinguished and addressed separately.

Availability of abortion services

In August 2007 the Victorian Law Reform Commission ('VLRC') was asked to provide advice on options which would remove abortion offences from the Criminal Code when performed by a qualified medical practitioner and which would reflect current clinical practice and community standards. After widespread consultation the VLRC produced a final report including recommendations that formed the basis of the Act.[2]

The Act establishes a regime under which abortion is a private decision for a woman in consultation with her medical practitioner when she is 24 weeks pregnant or less.[3] After 24 weeks, abortion is only available where two registered medical practitioners believe that an abortion is appropriate in all the circumstances.[4]

Human rights jurisprudence has not yet recognised a right to access abortion services in all circumstances and at all stages of pregnancy. However, there is growing support for the argument that the full realisation of women's human rights requires legal and safe access to abortion on request. Of particular significance are the rights to life, health, privacy, liberty, freedom from torture and cruel, inhuman or degrading treatment or punishment and non-discrimination.[5] However, while these rights generally require the provision of safe and legal abortion services, human rights bodies have tended to grant some leeway (or a 'margin of appreciation') to states in this area.[6]

For example, while the Act restricts women's rights to the extent that it requires the consent of two doctors before a woman can obtain an abortion after 24 weeks of pregnancy, it is likely that a human rights body examining the provisions would find that they lie within an acceptable margin of appreciation.

Human rights jurisprudence has taken a more prescriptive approach to defining states' obligations in particular circumstances. For example, human rights

REFERENCES

1. ABC News, 'Catholic Maternity Wards 'Face Closure' if Abortion Law Passes', 24 September 2008, <abc.net.au/news/stories/2008/09/23/2372460.htm> at 16 October 2008.

2. Victorian Law Reform Commission, *Law of Abortion: Final Report*, Report No. 15 (May 2008).

3. *Abortion Law Reform Act 2008* (Vic), s 4.

4. *Abortion Law Reform Act 2008* (Vic), s 5.

5. See, generally, Christina Zampas and Jaime M. Gher, 'Abortion as a Human Right – International and Regional Standards' (2008) 8 *Human Rights Law Review* 249.

6. See, eg, *Vo v France* (2004) Eur Court HR, No 53924/00, para 92; *Brualla Gómez de la Torre v Spain* (1997) VIII Eur Court HR 2955, para 33.