# CATS, COURTS AND THE *CONSTITUTION*: THE PLACE OF SUPER-TRIBUNALS IN THE NATIONAL JUDICIAL SYSTEM

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*In* Burns v Corbett *(2018) 92 ALJR 423, the High Court determined that judicial power with respect to federal matters may only be vested in federal and state 'courts'. This decision has far-reaching implications, particularly with respect to 'super-tribunals'. Despite their important role in the Australian justice system, the place of super-tribunals under ch III of the* Constitution *has received scant scholarly attention. This article examines existing jurisprudence concerning the characterisation of state tribunals as courts for the purposes of ch III, discerns the framework that emerges from this jurisprudence, and critiques its doctrinal and political implications. It argues that High Court intervention is sorely needed to address three areas of doctrinal incoherence but that, in the meantime, state governments ought to (re)constitute their super-tribunals as courts of the state.*

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## I Introduction

Since the creation of the Victorian Civil and Administrative Tribunal ('VCAT') in 1998, most state and territory governments have taken the step of amalgamating their networks of discrete subject-matter tribunals to create 'super-tribunals'. The Queensland Civil and Administrative Tribunal ('QCAT'), for example, was established on 1 December 2009 and 'absorbed virtually all the tribunals in Queensland'[1] including the Anti-Discrimination Tribunal ('ADT'), Fisheries Tribunal, Guardianship and Administrative Tribunal, Commercial and Consumer Tribunal, and a further 15 Queensland tribunals.[2] Similar amalgamations led to the creation of VCAT, as well as the New South Wales Civil and Administrative Tribunal ('NCAT'), South Australian Civil and Administrative Tribunal ('SACAT'), Australian Capital Territory Civil and Administrative Tribunal ('ACAT'), Northern Territory Civil and Administrative Tribunal ('NTCAT'), and the State Administrative Tribunal of Western Australia ('WASAT'). Only Tasmania has, to date, resisted the temptation to introduce a super-tribunal of its own, instead

[1] Justice Alan Wilson, 'Reform of the NSW Tribunal System' (2013) 73 *AIAL Forum* 12, 12.

[2] 'Former Tribunals', *Queensland Civil and Administrative Tribunal* (Web Page, 27 March 2012) <https://www.qcat.qld.gov.au/about-qcat/former-tribunals>, archived at <https://perma.cc/PY45-95WB>.

maintaining ten discrete subject-matter tribunals, including the Tasmanian ADT, Mental Health Tribunal, and Guardianship and Administration Board.[3]

The Commonwealth has also embraced the trend towards amalgamation. Indeed, '[t]he creation of the Commonwealth [Administrative Appeals Tribunal ('AAT')] has informed much of the subsequent development of tribunals in Australia'.[4] However, the creation of a federal super-tribunal analogous to the state Civil and Administrative Tribunals ('CATs') has been impeded by the strict fetters that ch III of the *Constitution* places on the combination of judicial and non-judicial powers in a single federal institution[5] — a combination that fundamentally characterises the nature and work of state and territory super-tribunals.

Australian super-tribunals are responsible for hearing and resolving a staggering number of administrative and civil disputes. For example, in the 2017–18 financial year, a total of 31,229 cases were lodged in QCAT alone, of which 16,210 were characterised as minor civil disputes.[6] One of the primary attractions of a super-tribunal lies in its focus on the resolution of a wide range of matters in a way that is 'accessible, fair, just, economical, informal and quick'.[7] An outcome of this approach is affordability, with QCAT reporting that the average cost per matter in 2017–18 was just $717.[8] Moreover, super-tribunals reflect a flexible attitude to the formalities and technicalities of legal dispute resolution, such as legal representation and the rules of evidence.[9]

[3] 'Tribunals', *Tasmanian Government: Department of Justice* (Web Page) <https://www.justice.tas.gov.au/tribunals>, archived at <https://perma.cc/HWZ6-QUL2>.

[4] Judge Kevin O'Connor, 'Appeal Panels in Super Tribunals' (2013) 32(1) *University of Queensland Law Journal* 31, 31.

[5] See especially *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

[6] Queensland Civil and Administrative Tribunal, *2017–18 Annual Report* (Report, 28 September 2018) 14 ('*QCAT Annual Report (2017–18)*').

[7] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3(b) ('*QCAT Act*'). See also *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8(1) ('*SACAT Act*'); *State Administrative Tribunal Act 2004* (WA) s 9 ('*WASAT Act*').

[8] *QCAT Annual Report (2017–18)* (n 6) 10.

[9] For instance, all super-tribunals are expressly not bound by the rules of evidence: *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 8 ('*ACAT Act*'); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2) ('*NCAT Act*'); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 53(2)(b) ('*NTCAT Act*'); *QCAT Act* (n 7) s 28(3)(b); *SACAT Act* (n 7) s 39(1)(b); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(b) ('*VCAT Act*'); *WASAT Act* (n 7) s 32(2)(a).

But what is the place of the super-tribunals in the Australian justice system? Are they courts, or not? Do such technical concerns even matter? Constitutionally, the characterisation of a body as a 'court of a State'[10] is vitally important. The primary consequence of this classification is that the capacity to exercise judicial power with respect to federal matters may *only* be vested in 'courts' under ch III of the *Constitution*.[11] Federal matters encompass not only the resolution of questions of federal law, but also the jurisdiction to determine constitutional questions, and to resolve disputes between residents of different states, and against the Commonwealth.[12] Secondly, the *Kable* doctrine[13] operates to grant constitutional protection to the independence, impartiality and institutional integrity of state courts, but not necessarily to other state bodies.[14]

Existing case law indicates that, despite their fundamental similarities, QCAT is a court but NCAT, VCAT and SACAT are not. The primary factor behind this distinction is the express statutory designation of QCAT as a court of record and the lack of any similar designation attaching to the other tribunals.[15] At present, the constitutional character of WASAT, ACAT, NTCAT and a host of smaller tribunals operating across Australia remains open.

This article focuses on super-tribunals on the basis of their uniquely broad and significant role in the national justice system; however, the analysis has a larger impact across all state decision-making bodies capable of being vested with judicial powers. It is important to note that the impact of ch III on the territory tribunals is particularly complex. Whilst the conclusions in this article may impact the territories, the present analysis is confined to the states. This reflects the controversial relationship between territory jurisdiction and

[10] *Constitution* s 77(iii).

[11] *Burns v Corbett* (2018) 92 ALJR 423, 435 [43] (Kiefel CJ, Bell and Keane JJ, Gageler J agreeing at 441 [69]) ('*Burns*').

[12] *Constitution* ss 75–6.

[13] *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

[14] See ibid 94, 98 (Toohey J), 102–4, 107 (Gaudron J), 116–17, 121 (McHugh J), 127–8, 142–3 (Gummow J). *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*') extended this protection to judges in a personal capacity where their actions impact the integrity of the relevant Supreme Court: at 210 [47] (French CJ and Kiefel J), 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ). See generally Rebecca Welsh, '"Incompatibility" Rising? Some Potential Consequences of Wainohu v New South Wales' (2011) 22(4) *Public Law Review* 259, 262.

[15] *QCAT Act* (n 7) s 164(1).

federal jurisdiction, a field engaging not only ch III but also ss 109 and 122 of the *Constitution*, and to which this article could not hope to do justice.[16]

This article considers existing jurisprudence on whether a state tribunal qualifies as a 'court of a State' for the purposes of ch III, and examines its practical and doctrinal implications. In Part II, I outline the constitutional framework by which ch III creates an 'integrated national court system'[17] and explain why the identification of a tribunal as a 'court of a State' is so crucial. In Part III, I examine how federal and state courts have grappled with and resolved the question whether a tribunal is a 'court of a State', focusing on recent jurisprudence most applicable in the context of super-tribunals. In Part IV, I discuss the implications of this jurisprudence for state governments and super-tribunals around Australia. The framework that emerges from the disparate case law is incoherent in a number of respects, signalling a need for High Court intervention. Nonetheless, this article argues that state governments should consider taking the surprisingly uncomplicated step of (re)constituting their super-tribunals as courts of the state.

## II Chapter III and the Integrated Judicial System

Chapter III of the *Constitution* establishes the High Court of Australia and sets the parameters of its jurisdiction. It also lays the foundation for federal courts. Chapter III empowers the federal Parliament to create federal courts, define their jurisdiction, and determine the number of judges on those courts.[18] Those judges must, under s 72, be appointed by the Governor-General in Council on particular terms, and are only subject to removal 'by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.

The primary occupation of ch III is federal courts. State courts are generally the concern of state governments, just as colonial courts were the domain of the respective colonies. Thus evolved the principle that the federal govern-

[16] See Stephen McDonald, 'Territory Courts and Federal Jurisdiction' (2005) 33(1) *Federal Law Review* 57; Tom Pauling and Sonia Brownhill, 'The Territories and Constitutional Change' (2007) 28(1) *Adelaide Law Review* 55; Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) ch 5.

[17] *Kable* (n 13) 138 (Gummow J), quoted in *Rizeq v Western Australia* (2017) 262 CLR 1, 22 [49] (Bell, Gageler, Keane, Nettle and Gordon JJ), *Burns* (n 11) 432 [20] (Kiefel CJ, Bell and Keane JJ).

[18] *Constitution* ss 71, 77–9.

ment takes state courts as it finds them,[19] and the understanding that state courts are not subject to the strict separation of powers principles that emanate from the rigid federal *Constitution*.[20] But ch III is not silent as to the existence of state courts. Section 77(iii) empowers the federal Parliament to vest federal jurisdiction in 'any court of a State'. As a result, state courts concurrently exercise federal and state jurisdiction, giving rise to the notion of an 'integrated' Australian judicial system.[21] This part outlines the text and structure of ch III of the *Constitution*, focusing on its creation of an integrated national judicial system consisting of federal and state 'courts'.

Chapter III opens with a seemingly straightforward statement that has led to countless pages of consideration and reconsideration in the Commonwealth Law Reports:

> The judicial power of the Commonwealth shall be vested in … the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.[22]

As to the content of federal jurisdiction, ss 75 and 76 list those 'matters' capable of forming the original jurisdiction of the High Court. Five classes of matter are constitutionally prescribed to form the original jurisdiction of the High Court. These are 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;

[19] *Federated Sawmill, Timberyard and General Woodworkers' Employés' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313 (Griffith CJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 75 [61] (Gummow, Hayne and Crennan JJ) ('*Forge*'). However, as Basten JA noted in *A-G (NSW) v Gatsby* (2018) 99 NSWLR 1 ('*Gatsby*'), s 79 of the *Constitution* permits 'the curious and somewhat ambiguous power … to prescribe the number of judges who may exercise federal jurisdiction': at 42–3 [214]. See generally Lee Aitken, '"The Great *Gatsby*": What's the "Matter"? What's in a Name? Basten JA Ponders Federal Jurisdiction, Judicial Power, and the Operation of State "Courts" and Tribunals' (2019) 47 *Australian Bar Review* 86, 92.

[20] *Fardon v A-G (Qld)* (2004) 223 CLR 575, 598 [36] (McHugh J) ('*Fardon*'), quoted in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 529 [84] (French CJ) ('*K-Generation*').

[21] *Kable* (n 13) 101 (Gaudron J). See, eg, *Wainohu* (n 14) 192 [7] (French CJ and Kiefel J); *South Australia v Totani* (2010) 242 CLR 1, 47 [69] (French CJ), 81 [201] (Hayne J) ('*Totani*').

[22] *Constitution* s 71.

(iv) between States, or between residents of different States, or between a State and a resident of another State [(the 'diversity jurisdiction')];

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth …[23]

Federal Parliament may enlarge the scope of federal jurisdiction only in respect of 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.[24]

Section 77 empowers federal Parliament to confer this jurisdiction on federal courts[25] and on 'any court of a State'.[26] Parliament may also define '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'.[27]

Parliament exercised its s 77 powers in enacting provisions of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). Section 39 of the *Judiciary Act* first excludes the jurisdiction of state courts over matters outlined in ss 75 and 76 of the *Constitution*, then vests state courts with that jurisdiction subject to certain conditions. As Kiefel CJ, Bell and Keane JJ explained in *Burns v Corbett* ('*Burns*'):[28]

> The effect of these provisions [ss 38 and 39] 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.[29]

[23] Ibid s 75.

[24] Ibid s 76.

[25] Ibid s 77(i).

[26] Ibid s 77(iii).

[27] Ibid s 77(ii).

[28] *Burns* (n 11).

[29] Ibid 433 [26] (Kiefel CJ, Bell and Keane JJ). See also *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1137–8 (Griffith CJ, Barton and O'Connor JJ); *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 21 [53] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

Section 73 of the *Constitution* grants the High Court appellate jurisdiction to hear and determine appeals, including from all courts vested with federal jurisdiction. Together with the concurrent exercise of federal and state jurisdiction by state courts, this creates an 'integrated' Australian judicial system with the High Court at the apex.[30] This reasoning supported the High Court's landmark decision in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')[31] in 1996, which extended constitutional protection to the independence and institutional integrity of state courts.[32] It also supported subsequent decisions such as *Forge v Australian Securities and Investments Commission* ('*Forge*'),[33] grounded in the identification of defining and essential constitutional characteristics of state courts — two of which are independence and impartiality.[34]

The cases of *Kable* and *Forge* must be understood against the background of the *federal* separation of judicial powers derived from ch III. In the early years of the federation, the High Court established that the 'judicial power of the Commonwealth' is vested exclusively in federal courts.[35] This rule reflects a narrow but direct interpretation of the conferral of judicial power on courts in s 71.[36] Then, in the seminal 1956 case of *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*'),[37] the Court elevated the negative implication of s 71's conferral of judicial powers on federal courts by restricting those courts to the exercise of judicial power, and incidental or ancillary

[30] *Kable* (n 13) 101 (Gaudron J); *Wainohu* (n 14) 209–10 [45] (French CJ and Kiefel J); *Totani* (n 21) 47 [69] (French CJ), 81 [201] (Hayne J); *Burns* (n 11) 432 [20] (Kiefel CJ, Bell and Keane JJ), quoting *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 574 [110] (Gummow and Hayne JJ) ('*Re Wakim*').

[31] *Kable* (n 13).

[32] Ibid 94 (Toohey J), 107 (Gaudron J), 121 (McHugh J), 127–8 (Gummow J).

[33] *Forge* (n 19).

[34] Ibid 76 [63]–[64] (Gummow, Hayne and Crennan JJ). See also *Fardon* (n 20) 591 [15] (Gleeson CJ); *K-Generation* (n 20) 569 [247] (Kirby J); *Wainohu* (n 14) 208 [44] (French CJ and Kiefel J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 164 [32] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Bradley*').

[35] The rule was suggested in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ) ('*Huddart Parker*'). See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte The Brisbane Tramways Co Ltd [No 1]* (1914) 18 CLR 54, 75 (Isaacs J); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 441–2 (Griffith CJ) ('*Alexander's Case*').

[36] *Alexander's Case* (n 35) 442 (Griffith CJ); *Boilermakers'* (n 5) 269–70 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22(2) *Public Law Review* 113, 119–21.

[37] *Boilermakers'* (n 5).

non-judicial functions.[38] The result of these two 'limbs' of *Boilermakers'* is that there may be no mingling of judicial and non-judicial powers in the same federal body, except in strictly limited circumstances.[39]

The identification of a power as judicial or non-judicial turns upon its alignment with a set of characteristics or 'indicia'. The classic starting point for understanding the content of judicial power in the *Constitution* is Griffith CJ's definition in the 1908 case of *Huddart, Parker & Co Pty Ltd v Moorehead* ('*Huddart Parker*'):[40]

> [T]he words 'judicial power' as used in [s] 71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[41]

The determination of whether a power is judicial or non-judicial is a notoriously difficult and unpredictable balancing exercise, weighing present indicia against absent and contrary indicia and incorporating, sometimes determinative, references to principled and historical considerations.[42]

As state courts are outside the direct ambit of the federal separation of powers, it had been accepted that there were few restrictions on the Parliaments' powers with respect to these courts.[43] Then, in 1996 a majority of the

[38] Ibid 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), affd *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540–1 (Viscount Simonds for the Court) (Privy Council).

[39] Such as in the case of ancillary or incidental functions mentioned above and certain historical functions. See generally James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) 252–3.

[40] *Huddart Parker* (n 35).

[41] Ibid 357. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374–5 (Kitto J).

[42] Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39(1) *Monash University Law Review* 66, 74 ('Purposive Formalism'); Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12(1) *Deakin Law Review* 1, 9–11; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 15 (Aickin J); *R v Davison* (1954) 90 CLR 353, 366–7 (Dixon CJ and McTiernan J) ('*Davison*'); George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) 597–603 [14.27]–[14.41].

[43] See, eg, *S (a Child) v The Queen* (1995) 12 WAR 392, 402 (Steytler J, Kennedy J agreeing at 394, Rowland J agreeing at 394–5); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 390 (Kirby P); *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652, 661–3 (Brooking J,

High Court in *Kable* found that, to the extent state courts may be vested with federal jurisdiction and form part of an integrated national court system, their independence and integrity are entitled to constitutional protection.[44] Accordingly, state courts may not be vested with functions that are incompatible with the independence or integrity of the judicial institution.[45] The *Kable* doctrine also has the capacity to extend to proceedings that are presided over by a judge in their personal capacity.[46] However, any such application may be substantially weaker in effect, depends ultimately on the effect of the law on the integrity of *courts*, and remains largely untested.

Whilst ch III has been interpreted to protect the independence and institutional integrity of state courts, it is well accepted that state courts are not subject to the same strictures that apply to federal courts. Put otherwise, the national judicature created by ch III may be unified, but it is not uniform.[47] State courts may exercise a mixture of judicial and administrative powers. Moreover, judges of state courts are not subject to the requirements of s 72 of the *Constitution* as to appointment, tenure or remuneration. These aspects of judicial independence are provided for in regular state legislation.[48] This

Southwell J agreeing at 671, Teague J agreeing at 671); *Mabo v Queensland* (1988) 166 CLR 186, 202 (Wilson J); Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35(2) *University of Western Australia Law Review* 227, 230.

44 *Kable* (n 13) 94 (Toohey J), 102–4 (Gaudron J), 116–17 (McHugh J), 127–8 (Gummow J). See also *Fardon* (n 20) 591 [15]–[16] (Gleeson CJ), 655 [219] (Callinan and Heydon JJ); *K-Generation* (n 20) 529–30 [88] (French CJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 579–81 [95]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

45 Welsh, 'Purposive Formalism' (n 42) 85–6.

46 *Wainohu* (n 14) 210 [47] (French CJ and Kiefel J), 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ).

47 *Burns* (n 11) 432 [20] (Kiefel CJ, Bell and Keane JJ), quoting *Re Wakim* (n 30) 574 [110] (Gummow and Hayne JJ); *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148, 163 [64] (Perry J) ('*Lustig*'), quoting *K-Generation* (n 20) 529 [88] (French CJ). As McHugh J observed in *Fardon* (n 20) 598 [36]:

> It is a serious constitutional mistake to think that either *Kable* or the *Constitution* assimilates State courts or their judges and officers with federal courts and their judges and officers. The *Constitution* provides for an integrated court system. But that does not mean that what federal courts cannot do, State courts cannot do. Australia is governed by a federal, not a unitary, system of government.

48 See, eg, *Constitution of Queensland 2001* (Qld) ss 59–60, 62. However, these aspects of state legislation may be (and occasionally have been) entrenched by compliance with manner-and-form provisions: Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive: A First-Principles Review of the Australian Cases' (2014) 40(3) *Monash University Law Review* 593, 604.

facilitates considerable flexibility and variation across the federation as to the composition, role and powers of state courts.

Like state courts, other state institutions such as administrative tribunals may exercise a mixture of judicial and administrative powers.[49] For some time, the 'knotty constitutional problem' of whether state administrative bodies were capable of being vested with jurisdiction over federal matters remained unresolved.[50] In the 'much-awaited'[51] 2018 case of *Burns*, this question was unanimously resolved in the negative.

*Burns* concerned a constitutional challenge to the *Civil and Administrative Tribunal Act 2013* (NSW) ('*NCAT Act*'), insofar as it operated to confer diversity jurisdiction on NCAT. The case proceeded on the basis of certain assumptions that were accepted by the parties and the Court without argument. One such assumption was that NCAT was not a 'court of a State' for the purposes of ch III. This avoided a live question. Earlier that year, the NCAT Appeal Panel in *Johnson v Dibbin* ('*Dibbin*')[52] had determined that NCAT was a court of a state.[53] However, the following month in *Zistis v Zistis* ('*Zistis*'),[54] the Supreme Court of NSW held otherwise.[55] It was not until after *Burns* that the NSW Court of Appeal overruled *Dibbin*, in *Attorney-General (NSW) v Gatsby* ('*Gatsby*'),[56] and confirmed the status of NCAT as an administrative tribunal, not a court of a state. I return to these cases in Part III below.

In *Burns*, Kiefel CJ, Bell and Keane JJ, with whom Gageler J agreed on this point, echoed the general sentiment in *Boilermakers'* that ch III is exhaustive with respect to its allocation of powers and jurisdiction.[57] In this respect, their Honours reasoned that the text, structure and purpose of ch III give rise to an implication that the capacity to exercise *judicial power* with respect to federal matters, as outlined in ss 75 and 76, may only be vested in federal courts and

[49] *Burns* (n 11) 440–1 [63] (Kiefel CJ, Bell and Keane JJ).

[50] Talitha Fishburn, 'If NCAT Is Not a Court It Has No Standing to Hear Interstate Party Disputes' [2018] (Spring) *Bar News* 33, 33.

[51] Ibid.

[52] [2018] NSWCATAP 45.

[53] Ibid [3] (Wright J, Boland ADCJ and Senior Member Renwick), overruled in *Gatsby* (n 19) 36 [184] (Bathurst CJ, Beazley P agreeing at 39 [197], McColl JA agreeing at 39 [198], Leeming JA agreeing at 60 [279]), 46–7 [228] (Basten JA).

[54] (2018) 97 NSWLR 782 ('*Zistis*').

[55] Ibid 796–7 [72]–[73] (Latham J).

[56] *Gatsby* (n 19) 36 [184] (Bathurst CJ, Beazley P agreeing at 39 [197], McColl JA agreeing at 39 [198], Leeming JA agreeing at 60 [279]), 46–7 [228] (Basten JA).

[57] *Burns* (n 11) 436 [45] (Kiefel CJ, Bell and Keane JJ), 447 [96]–[99] (Gageler J).

'any court of a State'.[58] For their Honours, this reading of ch III was not decisively impacted by considerations of the pre-Federation jurisdiction of state institutions, which had undoubtedly extended to diversity jurisdiction.[59]

On the other hand, Nettle J, Gordon J and Edelman J adopted reasoning processes similar to Leeming JA's preceding Court of Appeal decision, with which Bathurst CJ and Beazley P had agreed.[60] For their Honours, there was no basis from which to draw an implication from ch III that the pre-Federation diversity jurisdiction of state courts *or administrative tribunals* was necessarily withdrawn upon Federation, when diversity jurisdiction became a head of federal jurisdiction.[61] However, Nettle J, Gordon J and Edelman J held that the *Judiciary Act* limited conferrals of federal jurisdiction to state *courts* and, therefore, overruled the inconsistent provisions of the *NCAT Act*, which purported to confer federal jurisdiction on that administrative tribunal.[62] Accordingly, though the ch III argument was upheld by a narrow majority, the Court was unanimous in finding that federal jurisdiction could not be vested in state bodies that fail to meet the constitutional description a 'court of a State'. Or, as Lee Aitken put it, where federal matters are involved, 'the claims and contentions of the parties must be resolved in a "court" by a "proper judge" exercising "federal jurisdiction"'.[63]

The impact of *Burns* is that a valid conferral of federal jurisdiction on a state administrative body — such as NCAT — would require constitutional amendment. However, if the reasoning of Leeming JA, Nettle J, Gordon J and Edelman J had prevailed, a valid conferral of federal jurisdiction on a state administrative body could have been achieved by amending the *Judiciary Act*.[64] Ultimately, *Burns* prohibits state administrative bodies from being vested with or exercising judicial power with respect to federal matters. It

[58] Ibid 440 [61] (Kiefel CJ, Bell and Keane JJ).

[59] Ibid 440–1 [63]. Cf at 479–80 [259]–[260] (Edelman J).

[60] See, eg, ibid 468 [209] (Edelman J), citing *Burns v Corbett* (2017) 96 NSWLR 247.

[61] *Burns* (n 11) 452–5 [123]–[137] (Nettle J), 461 [169] (Gordon J), 467–8 [206]–[207] (Edelman J). See generally at 468–78 [210]–[251] (Edelman J).

[62] Ibid 456–7 [143]–[146] (Nettle J), 465–7 [189]–[200] (Gordon J), 478–80 [252]–[260] (Edelman J). Nettle J and Gordon J supported their decisions by reference to s 109 of the *Constitution*. For Edelman J, recourse to s 109 was unnecessary, as state laws conferring jurisdiction over federal matters '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*': at 468 [208].

[63] Aitken (n 19) 88.

[64] *Burns* (n 11) 479 [257], 479–80 [259]–[260] (Edelman J).

must be noted that it does not limit these bodies' capacities to exercise non-judicial powers with respect to federal matters.[65]

Chapter III thus creates an integrated national judicial system comprised of federal courts and the courts of the states. The identification of a state institution as a 'court of a State' or otherwise is of crucial constitutional importance. It carries, in the words of Spigelman CJ, both 'positive and negative constitutional requirements'.[66] To summarise, first, only a court of a state is capable of exercising judicial power with respect to federal matters. In practical terms, this means that disputes that raise constitutional questions, involve parties from different states, or are otherwise listed in ss 75 or 76 of the *Constitution*, may be determined by the *courts* of the states but *not* by state administrative tribunals. Secondly, the courts of the states are bound by the *Kable* doctrine. The capacity to exercise judicial power over federal matters comes with constitutional strings attached, namely that legislation will be invalid to the extent that it undermines the independence, impartiality or institutional integrity of the court.[67]

## III The Constitutional Character of Super-Tribunals

It has been observed that the word 'court' has 'a protean quality'.[68] In *Forge*, Gummow, Hayne and Crennan JJ declared: 'It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court.'[69] It follows that a determination of whether a particular body is a court or not 'will depend on … many applicable factors',[70] including contextual and historical considerations. In this part, I examine how various courts have approached the question whether or not a tribunal is a court of a state for the purposes of ch III and discern whether a doctrinal framework arises from the jurisprudence. I begin with a brief outline of the key cases in this area.

The cases concerning super-tribunals arise from a diverse range of fact scenarios. The 2006 case of *Attorney-General (NSW) v 2UE Sydney Pty Ltd*

[65] See ibid 440–1 [63] (Kiefel CJ, Bell and Keane JJ), 451 [119] (Gageler J).

[66] *Trust Co of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77, 86 [47] ('*Skiwing*').

[67] See *Owen v Menzies* [2013] 2 Qd R 327, 343–4 [45] (McMurdo P) ('*Owen*').

[68] *Skiwing* (n 66) 81 [17] (Spigelman CJ), quoted in *Lustig* (n 47) 163 [63] (Perry J).

[69] *Forge* (n 19) 76 [64].

[70] *Owen* (n 67) 344 [48] (McMurdo P).

('*2UE Sydney*')[71] and the 2012 case of *Owen v Menzies* ('*Owen*')[72] both stemmed from homosexual vilification complaints under state anti-discrimination laws. In each case, the respondent to the complaint alleged that the relevant provisions contravened the implied freedom of political communication derived from the *Constitution*.[73] In *2UE Sydney*, the NSW Court of Appeal determined that the NSW ADT was an administrative tribunal and therefore lacked jurisdiction to resolve the constitutional challenge.[74] Conversely, in *Owen*, the Queensland Court of Appeal held that QCAT was a court of Queensland, capable of resolving the whole matter.[75]

*Trust Co of Australia Ltd v Skiwing Pty Ltd* ('*Skiwing*')[76] concerned a starkly different scenario, namely a retail lease dispute before the NSW ADT. The plaintiff argued that the lessor had not only breached the *Retail Leases Act 1994* (NSW) but also s 52 of the federal *Trade Practices Act 1974* (Cth) ('*TPA*').[77] In 2006, not long before *2UE Sydney* was handed down, the NSW Court of Appeal held that the NSW ADT was not a court of the State capable of resolving the *TPA* dispute.[78] Questions of federal law may also arise in defence to a claim, as in *Qantas Airways Ltd v Lustig* ('*Lustig*'),[79] in which Qantas invoked provisions of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) to defend a claim lodged in VCAT under the *Fair Trading Act 1999* (Vic).[80] In 2015, the Federal Court held that VCAT was an administrative tribunal and lacked jurisdiction to determine the matter.[81]

Federal matters not only include disputes arising under federal law or the *Constitution*; they extend to all matters to which the Commonwealth is a party.[82] Thus, in *Commonwealth v Anti-Discrimination Tribunal (Tas)* ('*Nich-*

71 (2006) 226 FLR 62 (New South Wales Court of Appeal) ('*2UE Sydney*').

72 *Owen* (n 67).

73 Ibid 338–9 [22]–[23] (McMurdo P); *2UE Sydney* (n 71) 65–6 [9], 67 [18] (Spigelman CJ).

74 *2UE Sydney* (n 71) 76–7 [75]–[80] (Spigelman CJ, Hodgson JA agreeing at 83 [117], Ipp JA agreeing at 83 [118]).

75 *Owen* (n 67) 338 [20] (de Jersey CJ), 345 [49] (McMurdo P).

76 *Skiwing* (n 66).

77 Ibid 79–80 [1]–[8] (Spigelman CJ).

78 Ibid 89 [65] (Hodgson JA agreeing at 92 [79], Bryson JA agreeing at 92 [84]).

79 *Lustig* (n 47).

80 Ibid 152 [1]–[2] (Perry J).

81 Ibid 164–5 [68]–[73].

82 *Constitution* s 75(iii); Brendan Gogarty and Benedict Bartl, 'Binding the Monolith: Can State Tribunals Still Hold the Commonwealth to Account following Nichols' Case?' (2009) 34(4) *Alternative Law Journal* 260, 261.

*ols' Case*'),[83] Kenny J, sitting on the Full Court of the Federal Court, found that the Tasmanian ADT lacked jurisdiction to resolve Rodney Nichols' discrimination complaint against Centrelink (a federal department), despite it being grounded in Tasmanian law.[84] Kenny J's decision that the Tasmanian ADT was not a court of a state was obiter dicta and stood in contrast to the earlier decision of Heerey J of the Federal Court in *Commonwealth v Wood* ('*Wood*').[85] *Wood* arose from the tragic suicide of Eleanor Tibble, a 15-year-old member of the Air Force Cadets.[86] Military investigations revealed that disciplinary proceedings against Eleanor had been badly mismanaged by her supervisors, and that the mismanagement had more than 50% contributed to the girl's suicide.[87] Her mother complained to the Tasmanian ADT on her and her daughter's behalf, alleging age and gender/sex discrimination.[88] An issue arose as to whether the Commonwealth was the proper party against whom the claims should be made and, relatedly, the capacity of the Tasmanian ADT to exercise this jurisdiction.[89] For Heerey J, the ADT was a court of Tasmania capable of determining a claim against the Commonwealth.[90] Though *Wood* and *Nichols' Case* concerned the Tasmanian ADT and not a super-tribunal, they represent important precedent (though, as will be discussed, Kenny J's obiter dicta has been widely favoured over Heerey J's earlier decision).

The most recent string of cases in which the constitutional character of a super-tribunal has been considered involve s 75(iv) diversity jurisdiction — specifically, the capacity of NCAT and SACAT to resolve cross-border residential tenancy disputes. In 2018, first in *Zistis* and then in *Gatsby*, the NSW Court of Appeal held that NCAT was an administrative tribunal lacking diversity jurisdiction and therefore incapable of resolving a dispute between

[83] (2008) 169 FCR 85 ('*Nichols' Case*').

[84] Ibid 142 [236], 145 [246]–[248].

[85] (2006) 148 FCR 276 ('*Wood*').

[86] Ibid 279 [1] (Heerey J).

[87] Human Rights and Equal Opportunity Commission, *Report of an Inquiry into Complaints by Ms Susan Campbell that the Human Rights of Her Daughter Were Breached by the Commonwealth of Australia under the Convention on the Rights of the Child* (Report No 29, March 2005) <https://www.humanrights.gov.au/our-work/hreoc-report-no-29>, archived at <https://perma.cc/YZ8M-PLK5>.

[88] *Wood* (n 85) 279 [1] (Heerey J).

[89] Ibid 280 [2].

[90] Ibid 296 [82]. See also Duncan Kerr, 'State Tribunals and Chapter III of the *Australian Constitution*' (2007) 31(2) *Melbourne University Law Review* 622, 628–9.

landlords in Queensland and their tenants in NSW.[91] Later that year, a similar conclusion was reached in respect of SACAT by its own President in the case of *Raschke v Firinauskas*,[92] a dispute between a landlord resident in Victoria and a tenant resident in South Australia. The Appeal Panel's decision was appealed to the Full Court of the Supreme Court of South Australia in *Attorney-General (SA) v Raschke* ('*Raschke*');[93] however, the appeal solely concerned the character of the *power* exercised by SACAT, specifically whether it was judicial or non-judicial power with respect to a federal matter.[94] The parties before the Supreme Court accepted the Appeal Panel's finding that SACAT was not a court of the State.[95]

The constitutional character of a super-tribunal may also be relevant where there is no federal aspect to the matter. *Director of Housing v Sudi* ('*Sudi*')[96] arose from the eviction of Warfa Sudi from his deceased mother's public housing accommodation, a decision made under the *Residential Tenancies Act 1997* (Vic) ('*Residential Tenancies Act*').[97] In VCAT, Sudi invoked provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*')[98] to argue that the eviction decision was unlawful. It fell to the Victorian Court of Appeal to determine whether VCAT had the requisite power to resolve the *Charter* issue.[99] Resolving the scope of VCAT's judicial review power in this respect involved a close consideration of the *Residential Tenancies Act*, the *Charter*, and the nature of VCAT under its constitutive statute.[100] Warren CJ was satisfied that VCAT was an administrative tribunal and not a court as 'generally understood in administrative law', without expressing an opinion as to VCAT's constitutional character.[101] Weinberg JA, on the other hand,

[91] *Zistis* (n 54) 796–7 [72]–[73] (Latham J); *Gatsby* (n 19) 36 [184] (Bathurst CJ, Beazley P agreeing at 39 [197], McColl JA agreeing at 39 [198], Leeming JA agreeing at 60 [279]), 46–7 [228] (Basten JA).

[92] [2018] SACAT 19, [89] (Hughes P) ('*Raschke (SACAT Appeal)*').

[93] (2019) 133 SASR 215 ('*Raschke*').

[94] Ibid 218–19 [7]–[9] (Kourakis CJ).

[95] Ibid.

[96] (2011) 33 VR 559 ('*Sudi*').

[97] Ibid 561 [1]–[2] (Warren CJ).

[98] Ibid 582 [108] (Weinberg JA). See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 13(a), 38(1).

[99] *Sudi* (n 96) 586–7 [143] (Weinberg JA).

[100] Ibid 567 [32] (Warren CJ).

[101] Ibid 566 [29].

reasoned that VCAT was '[s]elf-evidently' not a court of a state under ch III.[102] Whilst the *constitutional* character of VCAT did not squarely arise in this case, *Sudi* demonstrates that the character of a tribunal may affect the scope of both its federal and state jurisdiction.

The High Court has rarely considered the character of state bodies as courts or otherwise. In *Forge*, the Court held that the appointment of acting judges to the Supreme Court of NSW under s 37 of the *Supreme Court Act 1970* (NSW) did not deprive that body of its essential character as a state court under ch III or, relatedly, undermine its constitutionally protected independence or institutional integrity.[103] Subsequently, *K-Generation v Liquor Licensing Court* ('*K-Generation*')[104] concerned a constitutional challenge to provisions of the *Liquor Licensing Act 1997* (SA), which provided for secret evidence in proceedings under the Act, including before the Licensing Court in its reviews of decisions made by the Liquor and Gambling Commissioner.[105] The constitutional challenge was based on the *Kable* doctrine, alleging that the provisions impermissibly undermined the independence and integrity of the Licensing Court.[106] However, *Kable* applied only if the Licensing Court was a 'court of a State' under ch III.[107] The High Court was unanimous in finding that the Licensing Court was a court of South Australia, and that its independence and institutional integrity were protected by operation of the *Kable* doctrine.[108] However, the High Court upheld the provisions as constitutionally valid.[109]

The cases are clear that the relevant inquiry concerns whether the institution *as a whole* is a court of a state under ch III. Attempts to argue that a super-tribunal may be composed of administrative and judicial divisions, some of which have the character of a 'court' and others which are purely

[102] Ibid 591 [182]. See generally at 591–4 [182]–[203].

[103] *Forge* (n 19) 68–9 [43]–[47] (Gleeson CJ), 86–8 [93]–[102] (Gummow, Hayne and Crennan JJ).

[104] *K-Generation* (n 20).

[105] Ibid 511–12 [4]–[7] (French CJ).

[106] Ibid 512 [7].

[107] Notably, the Court rejected submissions that the conferral of functions undermining the Licensing Court's independence and impartiality would have so altered the character of the Licensing Court as to render it no longer a '"court of a State" which might exercise federal jurisdiction': ibid 543–4 [152]–[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[108] Ibid 529 [85]–[86] (French CJ), 535 [113]–[114] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 562–4 [218]–[224] (Kirby J).

[109] Ibid 532 [99] (French CJ), 543 [149] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 580 [258]–[259] (Kirby J).

administrative, have failed.[110] This approach recognises the integrated quality of super-tribunals.[111] However, it undoubtedly complicates the exercise of identifying these 'hybrid'[112] institutions as *either* administrative or curial in nature, and appears to rule out the option of responding to *Burns* by internally segmenting super-tribunals into judicial and non-judicial parts.[113]

A close consideration of the cases gives rise to a general framework that might helpfully guide the characterisation of a tribunal as a court of a state or otherwise. It also reveals fundamental inconsistencies in the present doctrine. I begin by examining the interpretive methodologies by which courts have determined the constitutional character of state tribunals, before focusing on the key factors that have determined this exercise and, finally, discussing the framework that arises from the case law.

### A *Methodology*

Two distinct approaches have emerged by which the constitutional character of a state tribunal may be determined. The 'balance sheet' approach focuses on interpreting the statute that constitutes the relevant body.[114] The alternative approach gives constitutional, rather than statutory, construction primacy. In *Gatsby*, Bathurst CJ described these two methodologies (both of which his Honour went on to apply) as follows:

> [E]ach of the parties approached the question of whether the Tribunal was a 'court of a State' for the purpose of Ch III of the *Constitution* in a somewhat different fashion. The applicant and the Commonwealth approached it as a matter of construing the legislation which established the body, while the contradictors suggested that, if all the indispensable features of a 'court' were present, then it was a 'court of a State' … irrespective of whether the State legislature intended to create it as such.[115]

[110] See, eg, *Skiwing* (n 66) 84–6 [30]–[42] (Spigelman CJ).

[111] Ibid 85–6 [37]–[41].

[112] *Sudi* (n 96) 595 [208] (Weinberg JA).

[113] See generally Anna Olijnyk and Stephen McDonald, 'The High Court's Decision in *Burns v Corbett*: Consequences, and Ways Forward, for State Tribunals' (2019) 95 *AIAL Forum* 10, 20–2.

[114] See, eg, *Skiwing* (n 66) 81 [18] (Spigelman CJ); *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282, 292 [52] (Ipp JA) ('*Orellana-Fuentes*'); *P v P* (1994) 181 CLR 583, 633–5 (McHugh J).

[115] *Gatsby* (n 19) 33 [172].

By considering each of these approaches in turn it becomes apparent that, whilst the preferred approach may impact the outcome of the case, they nonetheless may be reconciled. However, a further methodological concern, namely the proper place of history in the analysis, presents a thornier issue.

1 *The Balance Sheet Approach*

Generally speaking, the once 'orthodox'[116] balance sheet approach emphasises parliamentary intention and involves close construction of the tribunal's constitutive statute to arrive at two lists. One list sets out the characteristics that support the classification of the body as a court, and a second list supports the opposite conclusion. In *Nichols' Case*, Kenny J observed that '[t]his can be a useful approach, especially where the character of a body is doubtful'.[117] Where the character of the body is stipulated in the statute, as in the case of QCAT, the balance sheet approach is heavily weighted in favour of that designation.

The straightforward nature of the balance sheet approach is demonstrated in *Skiwing*. In this case, Spigelman CJ set out two lists of characteristics[118] before concluding that, although 'finely balanced'[119] and demonstrating 'sufficient … characteristics of a court to answer a *statutory* provision relating to "courts"',[120] a balancing of the two lists revealed that the NSW ADT did not meet the constitutional conception of a court.[121]

A more closely reasoned application of the balance sheet approach was undertaken by de Jersey CJ in *Owen*. The appropriate methodology to determine the character of QCAT had been the subject of argument before the Court of Appeal.[122] For the Chief Justice, it was plain that 'the character of QCAT falls to be determined by reference to the legislation which constitutes it'.[123] Importantly, s 164 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('*QCAT Act*') designated QCAT to be a court of record. His Honour set out a list of ten factors identified by counsel as weighing against the characterisation of QCAT as a court of record despite its statutory designation. These factors ranged from QCAT not being bound by the rules of

116 Kerr (n 90) 625.

117 *Nichols' Case* (n 83) 143 [241].

118 *Skiwing* (n 66) 83–4 [26]–[27].

119 Ibid 84 [28].

120 Ibid 84 [29] (emphasis added).

121 Ibid 89 [66].

122 *Owen* (n 67) 338 [16].

123 Ibid 338 [15].

evidence and being unable to enforce its own orders, to senior and ordinary members being subject to removal for inefficiency or conduct that would warrant removal from the public service, and members holding office on conditions set out in their instruments of appointment. The Chief Justice dismissed each factor in turn before concluding that QCAT was a court of Queensland, just as designated by the *QCAT Act*.[124]

2 *The Constitutional Expression Approach*

The alternative methodology begins with constitutional interpretation. It focuses on the meaning of the term 'court of a State', which 'must be understood as a constitutional expression',[125] and derives certain essential and defining characteristics of courts from this analysis.[126] A similar emphasis on constitutional requirements was adopted in *Forge*, in which Gleeson CJ observed: 'For a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality.'[127] Indeed, this approach aligns with a trend in High Court jurisprudence towards focusing on the defining and essential characteristics of courts,[128] a trend that has attracted significant scholarly attention.[129] In *Skiwing*, Spigelman CJ held that the 'constitutional expression' approach to determining the constitutional character of a tribunal 'in the context of Commonwealth legislation, [is] entitled to primacy'.[130]

3 *A Reconcilable Framework?*

Whilst the balance sheet and constitutional expression approaches adopt distinct starting points and have been the subject of debate, they are not necessarily irreconcilable. In *Gatsby*, Bathurst CJ observed: 'It will be unusual to find that the legislature created a body with all the essential characteristics of a "court" for the purpose of Ch III of the *Constitution* while not intending it

124 Ibid 335–8 [15]–[20].

125 *Skiwing* (n 66) 86 [44] (Spigelman CJ).

126 See, eg, ibid 86–9 [44]–[66]. See also *Nichols' Case* (n 83) 139 [226] (Kenny J): 'The expression "court of a State" refers to a body that has "the essential character of a court" that can receive and exercise the judicial power of the Commonwealth'.

127 *Forge* (n 19) 67 [41]. See also at 76 [64] (Gleeson CJ), 82–3 [82]–[85] (Gummow, Hayne and Crennan JJ).

128 See, eg, *Wainohu* (n 14) 208–9 [44] (French CJ and Kiefel J); ibid 76 [63] (Gummow, Hayne and Crennan JJ); *K-Generation* (n 20) 571 [253] (Kirby J).

129 See, eg, Brendan Lim, 'Attributes and Attribution of State Courts: Federalism and the Kable Principle' (2012) 40(1) *Federal Law Review* 31.

130 *Skiwing* (n 66) 86 [44], 89 [66].

to be a "court" in some other sense.'[131] Thus, in both *Skiwing* and *Gatsby* the NSW Court of Appeal expressed that an approach giving primacy to either statutory or constitutional construction would yield the same result.[132]

Adopting a balance sheet approach will not avoid the constitutional requirement for a 'court' to exhibit the essential and defining characteristics of courts under the *Constitution*. And a determination of whether a body satisfies the constitutional conception of a 'court of a State' will require close consideration of its constitutive statute. Either approach will, in fact, fall short if it ignores the other.

The balance sheet approach recognises the high degree of control and flexibility that state governments have traditionally enjoyed with respect to state institutions, and the principle that the Commonwealth takes state courts 'as it finds them'. However, it carries the greater risk of incomplete or deficient analysis — specifically, the risk of undervaluing constitutional considerations in determining the constitutional character of the tribunal. This is a distinct exercise from determining whether the body meets the description of a court under, for example, statute or administrative law.[133] First, the balance sheet approach might invite cursory or vague analysis by, for example, simply setting out two competing lists without explaining why each factor weighs for or against the designation of the body as a court, or the respective weighting of each factor in context.[134] Second, by giving primacy to parliamentary intention, it might seem to lead to a foregone conclusion when the body is expressly designated to be a court of record.

Alternatively, a primary focus on the constitutional expression would place parliamentary intent in a more appropriate context, secondary to constitutional requirements and substantive construction of the statute to determine the character of the body for the purposes of ch III. Whilst parliamentary intention has a role to play, it is necessary that the body is capable of meeting the constitutional description of a court of a state.

Against this background, a framework emerges. First, the *Constitution* gives rise to a range of essential and defining characteristics of courts. If they are not satisfied, then the body is not a court of a state for the purpose of ch III. Beyond this, a determination of whether a body is a court of a state is a

131 *Gatsby* (n 19) 33 [173].

132 Ibid; *Skiwing* (n 66) 89 [66] (Spigelman CJ).

133 See *Skiwing* (n 66) 84 [29] (Spigelman CJ); *Sudi* (n 96) 566 [29] (Warren CJ).

134 See, eg, *Skiwing* (n 66) 83–4 [26]–[27] (Spigelman CJ). It should be noted that the Chief Justice's reasons were primarily grounded in an application of the constitutional expression approach: at 86–9 [44]–[66].

balancing exercise, weighing indicia for its characterisation as a constitutional 'court' against contrary indicia.[135] The essential characteristics and relevant indicia of a court of a state are outlined in the remainder of this part. Whilst I advance this as a preferred framework, in the case law to date the express designation of the body has emerged as a primary, framing concern — sometimes accompanied by a clear preference for the balance sheet approach. In the remainder of this part, I identify the framework that emerges from the cases, returning to issues of a preferred framework in Part IV.

4 *The Role of History*

A further methodological tension arises in the case law: the familiar debate in constitutional interpretation over the emphasis to be placed on history. In their Honours' judgment in *K-Generation*, Gummow, Hayne, Heydon, Crennan and Kiefel JJ drew upon Kenny J's observation in *Nichols' Case* that

> the long-standing acceptance of the capacity of courts of summary jurisdiction to receive federal jurisdiction emphasises the role of history, and institutional and governmental arrangements, in the assessment of constitutional institutional independence.[136]

In *Forge*, Heydon J had gone further than this simple acknowledgment of the relevance of historical practice, quoting Barwick CJ's conclusion that the words 'court of a State' in ch III 'bear the meaning "they bore in the circumstances of their enactment by the Imperial Parliament in 1900"'.[137] Conversely, in *Skiwing*, Spigelman CJ observed that

> the meaning of a constitutional expression is not fixed as at 1900, save with respect to essential features. Institutions referred to in the *Commonwealth Constitution* had, to the knowledge of the drafters, developed and changed over time, were continuing to develop at the time of federation and were expected to continue to develop thereafter. It may well be that a magistrates' court composed of persons who held such office in 1900 would no longer be regarded as a 'court of a State' within s 77(iii), just as a jury which excluded women would no longer satisfy the requirements of s 80.[138]

[135] An exercise resonant of the determination of the nature of judicial *power* under ch III of the *Constitution* in applying the *Boilermakers'* test.

[136] *K-Generation* (n 20) 537 [126], quoting *Nichols' Case* (n 83) 141 [231].

[137] *Forge* (n 19) 141 [256], quoting *King v Jones* (1972) 128 CLR 221, 229.

[138] *Skiwing* (n 66) 89 [69].

The proper role and emphases to be ascribed to historical practice in interpreting the meaning of 'court of a State' (and ch III more generally) remains contested. This tension accounts for at least some of the confusion arising from the case law to date. At present, all that can be said is that historical practice has proved relevant but not determinative across the case law. Different judges and courts place differing emphases on historical considerations in determining whether a particular body is a court of a state under ch III, and the related questions whether it is independent, impartial, and composed of 'judges'.[139] The strong division on the High Court in *Burns* as to the role of history in interpreting the impact of ch III on state tribunals suggests that this debate is unlikely to be conclusively resolved in the near future.

### B *Parliamentary Intent: A Court Is Called a Court*

The clearest way that a parliament can signal that a body is intended to be a court of a state forming part of the national judicial system is to expressly designate it to be 'a court of record'. It might also choose to name the body a court, such as the Licensing Court considered in *K-Generation*. The designation of the body as a court (or as a tribunal) cannot be conclusive as to its constitutional character.[140] Nonetheless, an express 'court' or 'court of record'[141] designation provides 'an obvious guide' to legislative intention.[142] As such, it will constitute a 'very strong consideration'[143] in determining whether the body is a court of a state under ch III. When the constitutional

[139] See below Part III(C).

[140] *A-G v British Broadcasting Corporation* [1981] AC 303, 348 (Lord Edmund-Davies) ('*A-G v BBC*'), quoted in *Skiwing* (n 66) 82 [23] (Spigelman CJ). See also *Lustig* (n 47) 165 [70] (Perry J). The other factors that supported Perry J's finding that VCAT was not a court of a state concerned independence, impartiality, and whether the members of VCAT were 'judges': at 165 [71]–[73].

[141] The phrase 'court of record' is common, but abstract. In *K-Generation* (n 20), Gummow, Hayne, Heydon, Crennan and Kiefel JJ linked the designation to a limited power to punish for contempt: 'Subject to any particular provisions which might be found in the Act, that expression, if it stood alone, would carry with it a power to punish by fine or imprisonment any contempt committed in the face of the Licensing Court, but would carry no broader contempt power': at 538 [129] (citations omitted). Beyond this, the exact implications of the designation are unclear. On the lack of clarity around the implied and inherent powers of Australian courts, see Rebecca Ananian-Welsh, 'The Inherent Jurisdiction of Courts and the Fair Trial' (2019) 41(4) *Sydney Law Review* 423, 424–30.

[142] See *Nichols' Case* (n 83) 145 [247] (Kenny J).

[143] *K-Generation* (n 20) 562 [219] (Kirby J), quoted in *Owen* (n 67) 334 [10] (de Jersey CJ).

character of a designated court has been challenged, it has been held to be a court of a state.

*Owen* and *K-Generation* concerned challenges to the status of QCAT and the Licensing Court respectively. Each was designated by statute to be a court and each case resulted in a finding that the body was a court of a state. At present, QCAT is the only super-tribunal designated to be a court of record in its constitutive statute.[144] It is also the only super-tribunal that has been held to be a court of a state.

The characterisation of QCAT as a court of a state rested on the Queensland Court of Appeal distinguishing matters in which similar tribunals in other states were held not to be 'courts' under ch III.[145] The Court in *Owen* relied on the 'compelling factor'[146] of QCAT's court of record designation to distinguish those cases, then placed this factor at the forefront of its analysis. McMurdo P summarised her reasons as follows:

> Despite QCAT's nomenclature as a tribunal and the many other matters raised by Mr Owen, the following factors in combination persuade me that it is a Queensland court, albeit an inferior court of summary jurisdiction. First, as already noted, QCAT is a court of record. Second, it is an independent tribunal resolving disputes between parties. … Third, QCAT's decisions bind the parties and are enforceable. … QCAT hearings are ordinarily in public and it must give reasons for its decisions. Its decisions as a court of summary jurisdiction are subject to appeal and to the Supreme Court's supervisory and appellate jurisdiction.[147]

Of the three factors relied upon by McMurdo P, it is arguable that only the court of record designation stands out as a feature that distinguishes QCAT from other super-tribunals (close attention is given to McMurdo P's other factors below).[148] This reasoning underpinned Bathurst CJ's observation in *Gatsby* that 'it may be that, in some respects, the reasoning in that case [*Owen*] is inconsistent with *Skiwing*, *Sudi*, *Lustig* and [*Nichols' Case*]'.[149] However, echoing McMurdo P in *Owen*, Bathurst CJ distinguished *Owen*

144 *QCAT Act* (n 7) s 164.

145 *Owen* (n 67) 344–5 [48] (McMurdo P).

146 Ibid 345 [48].

147 Ibid 345 [49] (citations omitted).

148 See below Parts III(C)(1), (E).

149 *Gatsby* (n 19) 37 [191].

from his consideration of NCAT on the basis that QCAT (but not NCAT) was expressly designated to be a court of record.[150]

The High Court has also given weight to the court of record designation. In *K-Generation*, both French CJ and Kirby J identified the statutory court of record designation as a key factor supporting their Honours' characterisation of the Licensing Court as a court of a state.[151] However, the factor was given less emphasis by the remaining Justices.[152]

Not only does the court of record designation weigh in favour of a body being a court of a state, but a failure to designate the body to be a court of record is 'indicative' of its character as an administrative body.[153] In *Lustig*, Perry J cited three main factors supporting her Honour's finding that VCAT was not a court of a state. First among these, 'while not necessarily determinative', was that VCAT was not designated to be a court of record in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).[154] Similarly, in *Gatsby*, Bathurst CJ recognised that NCAT was not designated to be a court of record and was reticent to read any such legislative intention into, for example, the granting of a limited contempt power under the *NCAT Act*.[155]

Fundamentally similar bodies — NCAT, VCAT and QCAT — have been the subject of different characterisations that rest on a primary distinguishing factor: the court of record designation. A hint as to how these cases might be reconciled lies in Kirby J's judgment in *K-Generation*, where his Honour observed: 'There is insufficient reason to doubt the accuracy and applicability of the title assigned to the Licensing Court in this instance.'[156] This statement suggests, and the cases indicate, that the court of record designation has become a frame of reference that sets the tone for the subsequent analysis. In the face of a clear legislative intention to create a court of a state, the body will be a court of a state unless there are strong reasons to find otherwise. This is a

[150] Ibid.

[151] Kirby J observed that, while not conclusive, the designation of a body as a court of record may constitute a 'very strong consideration': *K-Generation* (n 20) 562 [219]. Similarly, French CJ reasoned: 'In my opinion and particularly having regard to its designation as a court of record by the State legislature, the Licensing Court of South Australia should be regarded as a "court of a State" for the purposes of receiving federal jurisdiction under s 77(iii)': at 529 [85].

[152] Ibid 535 [115] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[153] *Skiwing* (n 66) 87 [51] (Spigelman CJ), quoted in *Gatsby* (n 19) 34 [178] (Bathurst CJ).

[154] *Lustig* (n 47) 165 [70].

[155] *Gatsby* (n 19) 36 [185]. See below nn 242–6 for discussion of the relevance of contempt powers.

[156] *K-Generation* (n 20) 562 [219].

very different exercise to determining whether a body that lacks a court of record designation, and is perhaps even called a 'tribunal', is nonetheless a court of a state for the purposes of ch III. This latter exercise is likely to result in a finding that the body is an administrative tribunal in the absence of compelling characteristics to indicate that it is in fact a court. This conclusion resolves apparent inconsistencies in the case law, but presents doctrinal issues to which I return in Part IV.

### C *The Essential Characteristics of Courts*

#### 1 *A Court of a State Is Independent and Impartial*

In *Forge*, Gleeson CJ famously observed that '[f]or a body to answer the description of a court it must satisfy minimum requirements of independence and impartiality. That is a stable principle, founded on the text of the *Constitution*.'[157] The cases uniformly emphasise the essential requirement derived from ch III that a court of a state must be constituted in a way that ensures its independence and impartiality.[158] This is closely related to the *Kable* principle, which renders constitutionally invalid statutory provisions that undermine a court's independence, impartiality or institutional integrity. In some circumstances, it may be unclear whether a body lacks sufficient independence and impartiality to be characterised as a court, or whether it is a court and therefore the compromise to its independence and impartiality is invalid by application of the *Kable* principle.[159]

Independence and impartiality are essential characteristics of courts under ch III of the *Constitution*. But what do these vague notions require? Some judges have relied on the existence of general requirements, legislative or otherwise, that the tribunal behave independently and impartially to satisfy ch III. In *Owen*, de Jersey CJ reasoned:

> The legislature has ordained QCAT a court of record, and has militated independence and impartiality, hallmarks of the judicial process, as mandatory for

[157] *Forge* (n 19) 67 [41].

[158] See, eg, *Owen* (n 67) 343–4 [45], 346 [53] (McMurdo P); *Lustig* (n 47) 165 [71]–[72] (Perry J); *Gatsby* (n 19) 37 [190] (Bathurst CJ).

[159] See, eg, *K-Generation* (n 20), in which the plaintiff submitted that the secret evidence provisions infringed the *Kable* doctrine by undermining the perceived impartiality of the Licensing Court: at 534 [108], 535 [111] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). However, it was also (unsuccessfully) submitted that the effect of the provisions was to render the Licensing Court an administrative body: at 543–4 [152]–[153].

> QCAT. … Ultimately there is the assurance that this Tribunal is to apply the law, and to do so in the manner in which courts traditionally operate, that is, independently and impartially. That is enough to justify calling this Tribunal a 'court of the State' within the meaning of the *Constitution* …[160]

Conversely, in *Nichols' Case*, Kenny J set out an expansive list of considerations to be weighed in order to determine whether the essential characteristics of independence and impartiality are satisfied:

> Whether or not a decision-making body will be relevantly independent and impartial in this constitutional sense does not always admit of an easy answer. Much will often depend on the powers and functions of the body, the provisions for appeal and review of its decisions, its pre- and post-federation history, and the nature of the constitutional or legislative 'institutional arrangements and safeguards' for securing independence and impartiality. … Whether or not particular institutional arrangements will ensure the requirements for independence and impartiality are met will depend on the interrelationship of numerous provisions, constitutional conventions, and the history that attaches to them.[161]

Throughout the cases, courts have determined whether a body has the requisite independence and impartiality by reference, primarily, to the conditions concerning its members.[162] In this way, this question has been merged with the question whether the body is constituted by 'judges'. Before turning to that factor, it must be acknowledged that no matter how the essential characteristics of independence and impartiality are approached, they remain essential. A court of a state will only be such if it is independent and impartial. Likewise, a super-tribunal that lacks the minimum requirements of independence and impartiality cannot be a court of a state.

2 *A Court of a State Is Composed of Judges*

In *Skiwing*, Spigelman CJ favoured the 'constitutional expression' approach to characterising a court of a state.[163] Drawing upon ss 72 and 79 of the *Constitu-*

[160] *Owen* (n 67) 338 [19]–[20].

[161] *Nichols' Case* (n 83) 140 [228]–[229], quoting *Forge* (n 19) 68 [43] (Gleeson CJ).

[162] See, eg, *Lustig* (n 47) 165 [71]–[72] (Perry J).

[163] *Skiwing* (n 66) 86 [44], 89 [66].

*tion*,[164] the Chief Justice observed that ch III 'assumes that a "court of a State", like any other court exercising the judicial power of the Commonwealth, will be composed of "judges"'.[165] Spigelman CJ then declared that 'an essential feature of a court, as that word in used in Ch III, [is] that it be an institution composed of judges'.[166] This sentiment echoed the view of Windeyer J in *Kotsis v Kotsis*,[167] to the effect that the word 'court' in s 77(iii) means 'an existing institution, an organization for the administration of justice, *consisting of judges* and with ministerial officers having specified functions'.[168] Isaacs J had, in 1929, stated the position even more strongly, saying: 'A Court consists, then, of the Judges, and of them only.'[169]

These statements invite a number of questions. First, does a court need to be entirely composed of judges to qualify as a court of a state, or is mere oversight by a judicial member sufficient? Secondly, what is a 'judge' within the meaning of ch III?

In the wake of *Forge*, it is clear that ch III permits the appointment of acting judges to courts; that is, the appointment of acting judges to a court will not necessarily deprive it of its essential character as a court of a state.[170] However, Gleeson CJ acknowledged that in 'extreme' scenarios where, for instance, the practice of appointing acting judges became so widespread that a court was constituted *predominantly* by them, the very character of even the

[164] Section 72 of the *Constitution* concerns the appointment, tenure and remuneration of federal judges, and s 79 provides that '[t]he federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes'.

[165] *Skiwing* (n 66) 88 [58].

[166] Ibid 88 [59], citing *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1925) 35 CLR 422, 444 (Rich J), *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 116 (Evatt J), *Davison* (n 42) 365 (Dixon CJ and McTiernan J), *Boilermakers*' (n 5) 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), *Harris v Caladine* (1991) 172 CLR 84, 94 (Mason CJ and Deane J), 108 (Brennan J), 116, 121 (Dawson J) ('*Harris*').

[167] (1970) 122 CLR 69.

[168] Ibid 91 (emphasis added). Windeyer J's statement has been adopted in several subsequent cases: *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 60 (Mason J); *Harris* (n 166) 92 (Mason CJ and Deane J); *Skiwing* (n 66) 88 [62] (Spigelman CJ); *Gatsby* (n 19) 34 [177] (Bathurst CJ).

[169] *Le Mesurier v Connor* (1929) 42 CLR 481, 511, quoted in *Skiwing* (n 66) 88 [60] (Spigelman CJ). See also *Ex parte Coorey* (1944) 45 SR (NSW) 287, 302 (Jordan CJ): 'The essential factor which brings the new Court into actual existence as an operative entity is the appointment of a Judge or Judges.'

[170] *Forge* (n 19) 68 [42] (Gleeson CJ, Callinan J agreeing at 136 [238]), 76–7 [65], 88 [102] (Gummow, Hayne and Crennan JJ), 149–50 [277] (Heydon J).

Supreme Court of a state as a 'court' capable of being vested with the power to determine federal matters would be undermined.[171]

In *Skiwing*, Spigelman CJ also looked to the predominant composition of the NSW ADT to determine whether it met the constitutional requirements of a court of a state. His Honour went arguably further than the High Court in *Forge* to hold: 'One aspect of a court of law is that it is comprised, probably exclusively although it is sufficient to say predominantly, of judges.'[172] This factor proved determinative: the NSW ADT was not a court of a state because its membership was 'not predominantly composed of judges'.[173] Spigelman CJ's approach in *Skiwing* has been controversial but influential.[174] For Bathurst CJ in *Gatsby*, for example, the fact that NCAT was not composed 'predominantly' of judges was more important than the lack of designation as a court of record in determining that NCAT was not a court of a state.[175]

The composition of the court goes beyond a mere calculation, however. Even Spigelman CJ acknowledged that

> [t]he powers of a court, including the judicial power of the Commonwealth, may be exercised by the non-judicial officers of a court. However, the performance of such functions, in the case of a Federal court must be subject to effective control by judges.[176]

In *Owen*, McMurdo P observed that Spigelman CJ's approach to defining a court by reference to its composition 'becomes a "chicken and egg" argument as it raises the question of what is a judge'[177] and perhaps seeks to define a judge by reference to a court.[178] Indeed, the apparent clarity of the requirement that courts be predominantly composed of judges becomes murky when one considers the plasticity of the term 'judge' — first in the colonies, then in the states, and, especially, if the constitutional phrase is 'not fixed' but evolves over time.[179]

[171] Ibid 69 [46]. Gummow, Hayne and Crennan JJ also stressed that the Supreme Court in that matter was not predominantly composed of acting judges: at 79 [72], 84 [86].

[172] *Skiwing* (n 66) 87 [52], quoted in *Gatsby* (n 19) 34 [178] (Bathurst CJ).

[173] *Skiwing* (n 66) 89 [65].

[174] Kerr (n 90) critiques this approach: at 634–9.

[175] *Gatsby* (n 19) 36 [185]–[186].

[176] *Skiwing* (n 66) 88–9 [63] (citations omitted).

[177] *Owen* (n 67) 345 [50].

[178] See Kerr (n 90) 638.

[179] *Skiwing* (n 66) [69] (Spigelman CJ).

Just as a court of a state may be named a 'tribunal', judicial officers may bear titles such as 'member' or 'magistrate'.[180] The title 'judge' may also be misleading. As Bathurst CJ reasoned in *Gatsby*:

> The fact that, from time to time, the members of the Tribunal may exercise judicial powers and might colloquially be described in those circumstances as 'judges in substance', does not alter the fact that the Tribunal is not 'predominantly' composed of judges in the sense described in the authorities.[181]

Moreover, as Gleeson CJ observed in *Forge*: '[F]or most of the twentieth century, many of the judicial officers who exercised federal judicial power, that is to say, State magistrates, were part of the State public service'.[182] It is not even clear whether a retired judge will qualify as a 'judge' for the purpose of characterising the relevant tribunal, a question expressly left open by the High Court in *K-Generation*.[183]

So how does one identify whether a tribunal is composed of judges? In *Nichols' Case*, Kenny J adopted the submissions of the Commonwealth to the extent that '[t]he question whether a tribunal member is a "judge" may be no more than another way of framing the question whether a tribunal meets the minimum criteria of independence and impartiality so that it can be a "court" within Chapter III'.[184] For Kenny J, as well as for the NSW Court of Appeal in *Gatsby* and for Perry J in *Lustig*, this approach reconciles Spigelman CJ's determination in *Skiwing* that a court is composed of judges, with the later case of *Forge*, 'without doing violence to either'.[185] Moreover, merging the essential constitutional characteristics to form a single inquiry addresses McMurdo P's 'chicken and egg' concern.

Thus, the clearest position that emerges from the case law is that a determination of whether a body meets the essential characteristics of, first, independence and impartiality and, second, being predominantly composed of judges, involves an overlapping (if not identical) exercise. The assessment looks to the conditions surrounding the composition of the tribunal and its individual members in order to determine whether they have the minimum

[180] See *Owen* (n 67) 345–6 [50] (McMurdo P); *Totani* (n 21) 39–40 [54] (French CJ).

[181] *Gatsby* (n 19) 36 [186].

[182] *Forge* (n 19) 66 [36].

[183] *K-Generation* (n 20) 538 [128] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

[184] *Nichols' Case* (n 83) 142 [237].

[185] Ibid 142–3 [237]; *Gatsby* (n 19) 35–6 [180] (Bathurst CJ); *Lustig* (n 47) 165 [73].

standards of independence and impartiality and are judges in the constitutional sense.

### D *The Independent and Impartial Judge: Appointment, Tenure and Remuneration*

The appointment, tenure and remuneration of judges are crucial to ensuring their independence and impartiality, particularly from the executive government. Globally, these factors are the primary focus of most discussions on judicial independence and have given rise to 'both a larger body of work and greater international consensus than other aspects of judicial independence'.[186] These factors have also received considerable attention in the case law concerning the constitutional character of state tribunals. However, the relevant rules and principles deriving from this jurisprudence are far from clear or coherent.

#### 1 *A Snapshot of Existing Protections*

Before turning to the case law, it is valuable to briefly outline how existing legislation protects the independence of super-tribunal members from, particularly, the executive government. These protections are similar but not identical across the super-tribunals. Super-tribunals are led by a President appointed from within the judiciary, and sometimes a Deputy President who is also a judge.[187] Super-tribunals are otherwise composed of various non-presidential members who may be lawyers of some standing, or non-lawyers

[186] Ananian-Welsh and Williams (n 48) 598. See, eg, Chief Justices of the Australian States and Territories, 'Declaration of Principles on Judicial Independence' [1997] (April) *Balance* 6; *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, opened for signature 19 August 1995, art 4; United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007) 39–78; Judicial Integrity Group, *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (22 January 2010) pt 2; Commonwealth Secretariat et al, *Commonwealth (Latimer House) Principles on the Three Branches of Government* (April 2004) 10–12.

[187] See, eg, *NCAT Act* (n 9) s 13(1); *QCAT Act* (n 7) ss 175(1), 176(1); *SACAT Act* (n 7) ss 10(1), 14(1); *VCAT Act* (n 9) s 10(1); *WASAT Act* (n 7) ss 108(3), 112(3). NCAT's Deputy President may also be a retired judge or Australian lawyer of seven years standing: *NCAT Act* (n 9) s 13(3). VCAT's Vice President must be a judge of the County Court, while the Deputy President may be a lawyer of at least five years standing: *VCAT Act* (n 9) ss 11(2), 12(2). In NTCAT and ACAT, magistrates or local court judges (or persons eligible for appointment as such) may be appointed as President or, in NTCAT and SACAT, Deputy President (ACAT does not have a Deputy President): *ACAT Act* (n 9) s 94(3); *NTCAT Act* (n 9) ss 13(1), 15(2); *SACAT Act* (n 7) s 14(1).

who are capable of representing a group of persons relevant to matters over which the tribunal has jurisdiction.[188]

The appointment procedures for super-tribunal members reflect the same general approach as relates to courts and administrative tribunals, vesting the power to appoint presidential members in the executive government (variously in the relevant Minister or Governor).[189] In some states, non-presidential members are appointed by the Governor,[190] and in other states certain members may be appointed by the President.[191] Most members of super-tribunals are appointed for a maximum term of five years,[192] and are eligible for reappointment.[193] A number of super-tribunals, including QCAT, allow for part-time, non-presidential, membership.[194]

Whilst some presidential members of super-tribunals may only be removed by the Governor following an 'address from both Houses of Parliament … praying for removal',[195] most members are subject to removal simply by the executive government.[196] The grounds of removal vary across the super-tribunals and, in most jurisdictions, between levels of tribunal membership. For example, members of QCAT may be removed from office by the Governor in Council on grounds of mental or physical incapacity, for performing their duties carelessly, incompetently or inefficiently, or for engaging 'in conduct that would warrant dismissal from the public service'.[197] The President of NCAT may only be removed by the Governor on an address

[188] See, eg, *NCAT Act* (n 9) ss 13(4)–(6); *QCAT Act* (n 7) ss 183(4)–(5); *SACAT Act* (n 7) s 19(3); *VCAT Act* (n 9) ss 13(2), 14(2); *WASAT Act* (n 7) ss 117(3)–(4).

[189] See, eg, *NCAT Act* (n 9) s 10(2); *QCAT Act* (n 7) ss 175(1), 176(1); *SACAT Act* (n 7) ss 10(1), 14(1); *VCAT Act* (n 9) ss 10(1), 11(2); *WASAT Act* (n 7) ss 108(1), 112(1).

[190] See, eg, *VCAT Act* (n 9) s 16(1); *WASAT Act* (n 7) s 117(1).

[191] See, eg, *NCAT Act* (n 9) s 11(1) (regarding the appointment of occasional members).

[192] *ACAT Act* (n 9) s 98(4) (however, presidential members are appointed for a maximum term of seven years: at s 98(1)); ibid sch 2 cl 2; *NTCAT Act* (n 9) s 17; *QCAT Act* (n 7) ss 175(2), 176(2), 183(7); *SACAT Act* (n 7) s 19(6); *VCAT Act* (n 9) ss 10(2), 11(3) (however, Deputy Presidents and all non-presidential members are appointed for a term not exceeding seven years: at ss 12(3), 13(3), 14(3)); *WASAT Act* (n 7) s 118(2).

[193] *ACAT Act* (n 9) s 98 note; *NCAT Act* (n 9) sch 2 cl 2; *NTCAT Act* (n 9) s 17; *QCAT Act* (n 7) ss 175(3), 176(3), 183(8); *SACAT Act* (n 7) ss 10(4), 14(4), 19(7); *VCAT Act* (n 9) s 16(2); *WASAT Act* (n 7) ss 109(2), 113(2), 118(3).

[194] See, eg, *QCAT Act* (n 7) s 183(9); *WASAT Act* (n 7) s 118(1). Under *VCAT Act* (n 9), Deputy Presidents, senior members and ordinary members may enter into an arrangement with the President to undertake their duties on a part-time basis: at s 18A(1).

[195] *NCAT Act* (n 9) sch 2 cl 6(1); *WASAT Act* (n 7) ss 110(5), 114(5).

[196] See, eg, *QCAT Act* (n 7) s 188; *SACAT Act* (n 7) ss 10(8)(d), 14(12)(d), 20(1).

[197] *QCAT Act* (n 7) s 188(1)(a).

from both houses of Parliament on the same grounds applicable to judges under the *Judicial Officers Act 1986* (NSW), namely proved misbehaviour or incapacity.[198] Other members of NCAT may be removed by the Governor for incapacity, incompetence or misbehaviour.[199]

2 *The Requisite Protections for a 'Court of a State'*

The variation across super-tribunals outlined above does not, of itself, indicate that they are not courts for the purposes of ch III. A court of a state need not be composed of members with protections for their independence akin to those provided for in the *Act of Settlement 1700* ('*Act of Settlement*')[200] or s 72 of the *Constitution*. This much was demonstrated in the High Court's approval of acting judges in *Forge* and is supported by history. As Gummow, Hayne, Heydon, Crennan and Kiefel JJ acknowledged in *K-Generation*:

> [B]oth before and long after federation courts of summary jurisdiction, constituted by Justices of the Peace or by stipendiary magistrates, forming part of the colonial or State public service and thus not enjoying *Act of Settlement* tenure, had been considered fit objects for the investing of federal jurisdiction.[201]

If ch III does not require the gold standard of *Act of Settlement* conditions for the judges of state courts, what kinds of protections for judicial independence are required? Put another way, what specific conditions of appointment, tenure and remuneration for tribunal members will provide sufficient protection to their independence and impartiality to qualify them as 'judges' constituting a 'court' for the purposes of ch III?

Whilst not a super-tribunal, two cases concerning the Tasmanian ADT are illustrative of the complicated state of the case law in this respect. The Act constituting the Tasmanian ADT contained no provisions as to the tenure or remuneration of its members.[202] Therefore, members were subject to removal and changes to their remuneration at the whim of the Minister. In *Wood*, Heerey J held that the Tasmanian ADT was nonetheless a court of a state under ch III and that 'reasonable and informed members of the public would

198 *NCAT Act* (n 9) sch 2 cl 6(1).

199 Ibid sch 2 cl 7(2).

200 *Act of Settlement 1700*, 12 & 13 Wm 3, c 2. The Act provides for judges to hold office during good behaviour but only be subject to removal on an address by both Houses of Parliament: at s III, as enacted.

201 *K-Generation* (n 20) 537 [126]. See also an almost identical statement by Gummow, Hayne and Crennan JJ in *Forge* (n 19) 82 [82].

202 *Wood* (n 85) 292 [69] (Heerey J). See *Anti-Discrimination Act 1998* (Tas) pt 3.

think that the Tribunal was free from influence of the other branches of the Tasmanian government, and particularly the Executive'.[203] In reaching this conclusion, Heerey J engaged the balance sheet approach and placed a heavy emphasis on historical practice. In a controversial passage, his Honour reasoned:

> In *Bradley* at [35]–[38] McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ pointed out that, until quite recent times in Australia, State and Territory summary courts have been constituted by members of the public service and subject to the regulation and discipline inherent in that position. One might add that this circumstance is explicitly recognised in s 39(2)(d) of the *Judiciary Act*. The federal jurisdiction of a court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate or 'some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction'. At the time the *Judiciary Act* was passed, such magistrates would have been salaried officials, as distinct from honorary justices of the peace, and members of their State public service, with nothing like *Act of Settlement* tenure. (And, as late as the 1970s Stipendiary and Police Magistrates in some States were not required to be lawyers.) Moreover, the fact that Parliament thought it necessary to impose such a condition suggests that at the time of the drafting of the *Constitution* a few years earlier it was contemplated that even honorary justices, who had no security of tenure at all, would, in the absence of such a condition, constitute a court of a State.[204]

Thus, for Heerey J, history and the *Judiciary Act* supported the constitution of state courts of summary jurisdiction (including the Tasmanian ADT) by members akin to public servants, lacking security of tenure or, for that matter, legal qualifications.

In *Owen*, McMurdo P took 'some comfort' from Heerey J's decision.[205] For the President, *Forge* recognised the importance of historical practice in the states and left open the possibility of inferior state courts being constituted predominantly by acting judges.[206] Therefore, QCAT's 'independence is not jeopardised solely because the majority of its judicial officers are part-time

[203] *Wood* (n 85) 293 [73], 296 [82].

[204] Ibid 293 [72], citing *Bradley* (n 34) 164–6 [35]–[38]. Cf *Skiwing* (n 66), where Spigelman CJ expressly disagreed with this analysis: at 89 [67]–[69].

[205] *Owen* (n 67) 347 [57].

[206] Ibid 346 [51].

and do not have the same financial security or security of tenure enjoyed by Queensland magistrates and District and Supreme Court judges'.[207]

As to removal, de Jersey CJ similarly recognised that the threshold for the removal of QCAT members was significantly lower than under the *Act of Settlement* and instead akin to the public service:

> Senior members and ordinary members, who account for the vast majority of the membership of the Tribunal, may be removed from office by the executive government for nothing more than inefficiency, or for conduct which would warrant dismissal from the public service.[208]

However, with respect to the removal of QCAT members, the Chief Justice reasoned that the administrative decision to remove a QCAT member was subject to judicial review, and that this provided a sufficient 'safeguard for the independence of inferior courts or tribunals'[209] and ensured protection from arbitrary interference.[210]

The courts in both *Owen* and *Wood* emphasised historical practice and favoured the balance sheet approach, which inherently downplays the 'defining' constitutional characteristics of independence, impartiality, and composition by 'judges'. These methodological distinctions help to explain why these cases appear to be inconsistent with other cases. Effectively, the judges in *Owen* and *Wood* drew on history to hold that weak statutory protections for judicial independence apply in the context of inferior state courts of summary jurisdiction, whereas the other cases hold that tribunals are not courts unless they meet the robust standards of legislatively protected independence and impartiality required by implication from ch III.

Subsequent cases indicate that *Wood* in particular is of little, if any, precedential value. In *Skiwing*, the NSW Court of Appeal expressly disagreed with Heerey J's constitutional analysis and emphasis on history.[211] In *Nichols' Case*, Kenny J criticised *Wood* as placing insufficient weight on the absence of security of tenure for members of the Tasmanian ADT,[212] and relied on this very factor, as well as the lack of provision of remuneration for members, to

[207] Ibid 345 [49] (citations omitted).

[208] Ibid 335 [15].

[209] Ibid, citing *Forge* (n 19) 82–3 [84] (Gummow, Hayne and Crennan JJ).

[210] *Owen* (n 67) 336 [15].

[211] *Skiwing* (n 66) 89 [67]–[69] (Spigelman CJ, Hodgson JA agreeing at 92 [79], Bryson JA agreeing at 92 [84]).

[212] *Nichols' Case* (n 83) 143–4 [242].

hold that the same Tribunal was *not* a court for the purpose of ch III.[213] Despite being obiter dicta, Kenny J's decision in *Nichols' Case* has been influential. Her Honour's reasons were quoted by the High Court in *K-Generation*[214] and by the NSW Court of Appeal in *Gatsby*,[215] and were expressly preferred over Heerey J's analysis by Weinberg JA in *Sudi*.[216]

Unless one strongly favours the balance sheet over the constitutional expression approach, neither *Owen* nor *Wood* align with cases in which tribunals have been found to be administrative bodies on the basis that tribunal members lack sufficient protections for their independence from government. For example, in *Sudi*, Weinberg JA found that VCAT was not a court of a state because: first, members of VCAT 'have nothing remotely approaching the tenure conferred by provisions modelled on the *Act of Settlement*';[217] secondly, non-judicial members were appointed for fixed terms; and, thirdly, members were eligible for reappointment.[218] Weinberg JA's reasons were adopted by Perry J in *Lustig*.[219] Her Honour further noted that VCAT members were eligible for internal promotion, and were entitled to remuneration fixed from time to time with no limits on reduction and potentially fixed for different classes of members.[220] Finally, a procedural concern weighed into Perry J's analysis, namely that the Tribunal was obliged to act in accordance with certain certificates issued by the Premier and with statements of government policy.[221] A similar reasoning process is reflected in other cases. For instance, in *Gatsby*, Bathurst CJ held that the absence of security of tenure for members 'comparable to that held by judges under the *Act of Settlement* … and its statutory or constitutional equivalents' was '[o]f equal, if not greater, importance' to determining the constitutional character of NCAT than whether it had been designated a court of record or even whether it was staffed predominantly by judges.[222] Bathurst CJ also took direct issue with de Jersey CJ's assertion in *Owen* that judicial review of a removal decision

213 Ibid 143 [239], 145 [246].

214 *K-Generation* (n 20) 537 [126] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

215 *Gatsby* (n 19) 35–6 [180] (Bathurst CJ).

216 *Sudi* (n 96) 594 [199].

217 Ibid 594 [201].

218 Ibid. See also *Lustig* (n 47) 165 [71]–[72] (Perry J).

219 *Lustig* (n 47) 165 [71].

220 Ibid 165 [72].

221 Ibid.

222 *Gatsby* (n 19) 36–7 [187]. See also at 45–6 [224]–[226] (Basten JA).

could be relied upon to ensure independence, hinting that a higher threshold of removal was required.[223]

The High Court has also emphasised security of tenure as a defining characteristic of a court. In *K-Generation*, Gummow, Hayne, Heydon, Crennan and Kiefel JJ acknowledged that '[t]he linking of the membership of the Licensing Court to tenure as a District Court judge' was a 'significant' factor in characterising the Licensing Court as a court of a state.[224] Their Honours went on to emphasise the protections afforded to District Court judges concerning their removal and remuneration in the context of their characterisation of the Licensing Court.[225]

One aspect of security of tenure that has received emphasis relates to members' eligibility for reappointment. This factor was 'of particular concern'[226] to Weinberg JA in *Sudi*, who reasoned:

> As a consequence, there will always be a perception that VCAT as a whole is comprised of members who are beholden to the government, and therefore not independent. I should emphasise that this is a matter of perception. I do not intend to suggest in any way that members of VCAT act other than with complete integrity in the discharge of their functions.[227]

In *Gatsby*, Bathurst CJ similarly relied on NCAT members' eligibility for reappointment as indicating the tribunal lacked sufficient independence to qualify as a court of a state.[228]

In summary, the courts of the states are characterised by their independence and impartiality, and these qualities rest primarily on the conditions relating to their membership, particularly concerning appointment, tenure and removal. It is far from clear what specific conditions of appointment, tenure and remuneration are required to ensure the independence and impartiality of tribunal members and so render them capable of being 'judges'. An approach emphasising historical practice would suggest few statutory protections are necessary and that a body may be a court of a state, albeit an inferior court of summary jurisdiction, even where the executive government has near-total control over members' appointment, tenure and remuneration

223 Ibid 37 [189].

224 *K-Generation* (n 20) 537 [127].

225 Ibid 537–8 [127].

226 *Sudi* (n 96) 594 [201].

227 Ibid, quoted in *Lustig* (n 47) 165 [71] (Perry J).

228 *Gatsby* (n 19) 36–7 [187].

so that members are effectively state public servants (as state magistrates traditionally have been). On the other hand, the greater body of case law (and particularly those cases that emphasise the constitutional expression) suggests that robust statutory protections for judicial independence and impartiality are required of courts of the states. These need not meet *Act of Settlement* standards; however, low thresholds for removal, fixed terms with scope for reappointment, and unconstrained executive control of members' remuneration will all indicate the tribunal lacks the requisite independence and impartiality to qualify as a court of a state under ch III. It has been argued that the cases are inconsistent, resulting in *Wood* being of little precedential value today. *Owen*, however, has been distinguished from the other cases on the basis of QCAT's express designation as a court of record. On this reasoning, weaker statutory protections for independence and impartiality are required of designated courts of record, whereas robust statutory protections are required of state courts that lack an express court designation. Such is the state of the case law, though it makes little doctrinal sense.[229]

### E *Further Factors: Practice, Procedure and Powers*

In determining constitutional character, the tribunal's practice, procedure and powers have tended to play a secondary role to the primary inquiries concerning its intended character, independence, impartiality and composition. This reflects the traditional acceptance that the practice, powers and procedures of state institutions are flexible, such that 'tribunals with many trappings of a Court … nevertheless, are not Courts in the strict sense'.[230]

A valuable summary of some of these non-determinative 'trappings' was provided in an oft quoted statement of Lord Sankey LC in *Shell Co of Australia Ltd v Federal Commissioner of Taxation*:[231]

> 1 A tribunal is not necessarily a Court in [the] strict sense because it gives a final decision;
>
> 2 nor because it hears witnesses on oath;
>
> 3 nor because two or more contending parties appear before it between whom it has to decide;

[229] The doctrinal implications of the jurisprudence are explored further in Part IV.

[230] *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 543 (Lord Sankey LC for the Court) (Privy Council) ('*Shell Co*').

[231] *Shell Co* (n 230).

4 nor because it gives decisions which affect the rights of subjects;

5 nor because there is an appeal to a Court;

6 nor because it is a body to which a matter is referred by another body.[232]

Further, in *Attorney-General v British Broadcasting Corporation*,[233] Lord Edmund-Davies recognised that a tribunal will not necessarily be a court simply due to:

1 The fact that the tribunal is called a "court" … ;

2 The necessity of sitting in public;

3 The fact that the tribunal has power to administer oaths and hear evidence on oath;

4 The fact that the prerogative writs may issue in relation to the tribunal's proceedings; [or]

5 The fact that absolute privilege against an action for defamation protects those participating in its proceedings.[234]

More recent case law has added a number of further relevant but non-determinative factors to these lists.

First, the High Court has recognised that the fact of a tribunal not being bound by the rules of evidence may indicate it is an administrative rather than judicial body, but is not determinative of its character. This is because a failure to be bound by the rules of evidence 'does not negate the requirement that the Court act lawfully, rationally and fairly',[235] as well as in accordance with the rules of procedural fairness.[236] Thus in *K-Generation*, the existence of a statutory provision expressing that the Licensing Court was not bound by the rules of evidence, 'but may inform itself of any matter as it thinks fit',[237] did

232 Ibid 544, quoted in *Skiwing* (n 66) 82 [22] (Spigelman CJ). On the issue of avenues of appeal, see *K-Generation* (n 20) 536–7 [122]–[123] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 563 [221] (Kirby J).

233 *A-G v BBC* (n 140).

234 Ibid 348. See also *Skiwing* (n 66) 82 [23] (Spigelman CJ), quoted in *Lustig* (n 47) 164 [67] (Perry J).

235 *K-Generation* (n 20) 528 [82] (French CJ).

236 Ibid 537 [125] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), quoting *Sue v Hill* (1999) 199 CLR 462, 485 [42] (Gleeson CJ, Gummow and Hayne JJ). See also *Owen* (n 67) 334 [15] (de Jersey CJ).

237 *Liquor Licensing Act 1997* (SA) s 23(b).

not assist the case against the characterisation of the Licensing Court as a court of a state.[238]

Secondly, the mixture of judicial and non-judicial powers in the same state body does not impact its constitutional character. As Spigelman CJ recognised, the exercise of judicial power is a necessary condition for the characterisation of a tribunal as a court of a state.[239] However, state administrative tribunals may also be vested with judicial power and, therefore, 'the fact that a body exercises judicial power does not provide any strong basis for inferring that the body is a court'.[240] Conversely, the exercise of non-judicial powers by a super-tribunal may not render it an administrative body. In *K-Generation*, for example, French CJ observed that 'the application of public interest criteria has a long history as part of the judicial function. And the intrusion of policy considerations in its decision making does not necessarily deprive a tribunal of the character of a court.'[241]

The presence or absence of a power to punish for contempt has also been given little weight in the case law. This may surprise in light of the considerable weight granted to the court of record designation, as a key quality of a court of record is arguably an inherent (albeit perhaps limited) power to punish for contempt.[242] Referring to the express conferral of a contempt power on the District Court of South Australia and the absence of any similar conferral of power on the Licensing Court, Gummow, Hayne, Heydon, Crennan and Kiefel JJ in *K-Generation* acknowledged that there 'may be substance in the contention' that contempts of the Licensing Court would fall under the supervisory jurisdiction of the Supreme Court.[243] 'However', their Honours concluded, 'this could not deny to it the character of a court of a State' as inferior courts in Australia historically 'may well have lacked' a contempt power, and 'that must have been within contemplation when

238 *K-Generation* (n 20) 537 [125] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

239 *Skiwing* (n 66) 82 [21], quoted in *Lustig* (n 47) 164 [67] (Perry J).

240 *Nichols' Case* (n 83) 145 [247] (Kenny J). See also *Zistis* (n 54) 796 [71] (Latham J); *Orellana-Fuentes* (n 114) 290 [39] (Ipp JA).

241 *K-Generation* (n 20) 528 [82] (citations omitted).

242 The scope and bases of the inherent powers of Australian courts is a complex and presently under-theorised area, particularly with respect to courts of statute rather than superior state courts of unlimited jurisdiction. See generally *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256, 295 [121]–[122] (Kirby J); Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31(1) *Federal Law Review* 57; Ananian-Welsh (n 141) 424–30.

243 *K-Generation* (n 20) 538 [130].

s 77(iii) was formulated'.[244] Thus, the absence of an express contempt power did not render the Licensing Court an administrative tribunal; rather, the status of the Licensing Court as a court of record was sufficient to grant it a limited power (subject to statute) to punish for contempts 'committed in the face of' that Court.[245] Similarly, the conferral of a limited contempt power on NCAT did not sway the NSW Court of Appeal in its determination that the Tribunal was not a court of a state.[246]

Finally, the existence or absence of an enforcement power is not determinative of the constitutional character of a state super-tribunal. As the High Court observed in *Brandy v Human Rights and Equal Opportunity Commission*,[247] it is 'not essential to the exercise of judicial power that the tribunal should be called upon to execute its own decision'.[248]

The factors outlined in this section are not irrelevant to a determination of the constitutional character of a super-tribunal. Indeed, in *Owen*, McMurdo P based her finding that QCAT was a court of Queensland on its designation as a court of record 'in combination' with the fact that the Tribunal's decisions were enforceable, its hearings were ordinarily public, that reasons were given for its decisions, and that its 'decisions as a court of summary jurisdiction are subject to appeal and to the Supreme Court's supervisory and appellate jurisdiction'.[249]

The powers, practices and procedures of a tribunal will play a secondary and distinctly non-determinative role in ultimate determination of constitutional character. They will, therefore, be relevant in difficult cases where the character of the tribunal hangs in the balance, and especially if the judge is applying the balance sheet approach.

### F *A Framework for Determining Constitutional Character*

Determining whether a state body is an administrative tribunal or a 'court of a State' involves both constitutional and statutory construction. Chapter III of

244 Ibid 538–9 [131]. See also *Owen* (n 67) 335 [15] (de Jersey CJ).

245 *K-Generation* (n 20) 538 [129] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

246 *Gatsby* (n 19) 36 [185] (Bathurst CJ), 62 [292] (Leeming JA).

247 (1995) 183 CLR 245.

248 Ibid 269 (Deane, Dawson, Gaudron and McHugh JJ), quoted in *Owen* (n 67) 336 [15] (de Jersey CJ). Cf *Raschke (SACAT Appeal)* (n 92), in which the lack of an enforcement power was a significant aspect of the Appeal Panel's decision to characterise SACAT as a tribunal rather than a court: at [42] (Hughes P).

249 *Owen* (n 67) 345 [49] (citations omitted).

the *Constitution* has been interpreted to require that a court of a state is independent, impartial, and predominantly composed of judges. These considerations form a single inquiry that focuses on statutory protections for the independence and impartiality of tribunal members, in particular the conditions relating to members' appointment, tenure and remuneration. Tensions in this aspect of the case law may be traced back to the emphasis different judges and courts have placed on historical practice, and whether they have favoured the balance sheet or constitutional expression methodology. The court's favoured methodology will also impact the weight that other (admittedly non-determinative) factors, such as the tribunal's powers, practices and procedures, will play in resolving the question of constitutional character.

Apparent incoherence in the case law may be resolved by distinguishing *Owen*, concerning a designated court of record, from scenarios concerning super-tribunals that lack a court of record designation. The conclusion that arises is that a tribunal designated to be a court of record will be a court of a state unless there are strong reasons to find otherwise. Together, *Wood* and *Owen* suggest that a court of a state designated as such in its constitutive Act may be composed of members subject to weak statutory protections for their independence and impartiality. On the other hand, *Skiwing*, *2UE Sydney*, *Nichols' Case*, *Lustig*, *Zistis* and *Gatsby* indicate that a body lacking the court of record designation will not qualify as a court of a state unless its members enjoy protections approaching those in the *Act of Settlement*.

## IV Critique and Implications

### A *Doctrine*

There is now a substantial body of case law concerning the characterisation of state tribunals as courts or otherwise for the purposes of ch III. This jurisprudence has given rise to some clear principles, but there are three key points that would benefit from High Court intervention. The first two issues concern the most appropriate methodology to be applied in these cases (including the emphasis to be placed on history) and the requirements of ch III with respect to the appointment, tenure and remuneration of state judges. A third issue has not been addressed in this article but remains important: that is, the impact of ch III on *territory* tribunals such as ACAT and NTCAT. Territory tribunals may be subject to the same tests as their state counterparts, or they may be governed by s 122 and beyond the reach of the provisions of ch III that

concern the courts of the states. Moreover, the nature of territory jurisdiction in contrast to federal jurisdiction is uncertain.[250] These complex issues deserve close consideration and have significant implications, including on the character and powers of ACAT and NTCAT in the wake of *Burns*.

Most courts have avoided expressing a clear preference for either the balance sheet or constitutional expression approach, indicating that either will produce the same outcome. However, I suggest that a judge's methodological approach is likely to impact the weight attributed to the express designation of the body and historical practice in determining constitutional character. Specifically, the constitutional expression approach tends to emphasise constitutional text and, by implication, fundamental principles such as independence and impartiality. This emphasis has the potential to overshadow not only statutory labels but also historical practice, which demonstrates a pronounced lack of independence between the branches of government at state level. On the other hand, the balance sheet approach places near-determinative weight on legislative intent as reflected in statutory designations, and subtly facilitates a stronger emphasis on historical practice, which condones greater executive control and influence over state courts (particularly inferior courts of summary jurisdiction).

The emphasis to be placed on historical practice was the primary point of disagreement between the majority and dissenting Justices in *Burns*.[251] If a case concerning the constitutional character of a state tribunal arose for consideration by the present High Court, the favoured methodology and outcome may similarly turn on the weight each judge saw fit to place on historical practice. Ideally, the High Court would clearly resolve the methodological question; however, *Burns* suggests a split decision would be more likely.

History is important and ought not be ignored. Moreover, for over a century state governments have been relatively free in constituting and reconstituting their judicial and administrative systems. As Gleeson CJ observed in *Forge*:

> If Ch III of the *Constitution* were said to establish the Australian standard for judicial independence then two embarrassing considerations would arise: first, the standard altered in 1977; secondly, the State Supreme Courts and other

[250] See generally McDonald (n 16); Lindell (n 16) ch 5.

[251] See above Part II.

> State courts upon which federal jurisdiction has been conferred did not comply with the standard at the time of Federation, and have never done so since.[252]

Nonetheless, the case law examined in this article reveals a doctrinal reason why the constitutional expression approach ought to be favoured, even if it signals a departure from history and traditional understandings of state courts.

When history is drawn upon to justify a very high degree of flexibility in the composition and other features of state institutions, this effectively (though perhaps unintentionally) places determinative weight on legislative intent. A designated court of record will be a court of the state in all but the most extreme scenarios, that is, those scenarios in which even a pre-Federation designated inferior court of summary jurisdiction could not have qualified as a court. Likewise, when a body is not characterised as a court of record, then it will be an administrative tribunal unless there are indisputably strong reasons to doubt its characterisation and find that it could never have qualified as anything but a court of the state.

Ignoring the constitutional framework created by ch III, this approach is attractive. It aligns with and reflects the orthodox acceptance that state governments are not bound by a strict separation of powers and, specifically, that the reach of ch III does not extend to state institutions, an understanding that was not upset until *Kable* in 1996. In the present constitutional context, however, this approach is fraught. State courts are now accepted to have a constitutional status and to be bound by certain constitutional requirements, namely a minimum standard of independence and impartiality. Giving effectively determinative weight to legislative intent allows state governments to choose whether or not quasi-judicial institutions will be bound by the *Kable* doctrine, effectively on the basis of their formal designation. It would appear that the only real difference between a super-tribunal that is a court and one that is not is that the former would be designated to be a court, bound by the *Kable* doctrine and capable of exercising judicial power with respect to federal matters. The latter would not be subject to constitutional protections for its independence or impartiality and would be capable of exercising only non-judicial power with respect to federal matters. Put another way, the place of a tribunal within or external to the national judicial system envisaged by ch III would largely come down to whether the state government decided to label the body a 'court'.

[252] *Forge* (n 19) 66 [36].

Moreover, duelling interpretive approaches have led to two streams of case law that effectively apply two different interpretations of a constitutional standard: 'independence and impartiality'. For bodies not designated to be courts of record, qualifying as a 'court of a State' requires that members enjoy statutory protections for their independence and impartiality from government approaching those under the *Act of Settlement*. For designated courts of record, it seems that slim, or even no, statutory protections are required in order to meet the constitutional description 'court of a State' and the standards of independence and impartiality embodied in that term. The constitutional expression may be applied flexibly in different scenarios, but this outcome in the context of fundamentally similar bodies speaks not of flexibility but inconsistency. If the constitutional expressions 'court of a State' and 'judge' and the constitutional principles of 'independence and impartiality' are to have any meaning, then those meanings must be fundamentally consistent and give rise to clear (if flexible) rules and principles. Moreover, they should apply substantively despite the formal title that a parliament attributes to the body in question.

If a consistent approach favouring constitutional expression over history and legislative intent were adopted, then *Wood* would be resoundingly overturned and Kenny J's decision in *Nichols' Case*, to the effect that the Tasmanian ADT is not a court of a state, would stand. Certain aspects of *Owen* are also thrown into doubt. For instance, if the standards for removal were insufficient to ensure the independence and impartiality of NCAT in *Gatsby*, then the *lower* standards of removal applying to QCAT members may preclude that body from constituting an independent and impartial court of Queensland. However, the demise of *Owen* would not be a foregone conclusion. Unlike the Tasmanian ADT, QCAT is composed in a way that offers a range of protections to the independence and impartiality of its members, and its character would need to be assessed in a holistic way. QCAT, for example, encompasses the State magistracy within its membership,[253] which may weigh in favour of the characterisation of the body as a court composed of judges even where it provides lesser protections in other respects. Ultimately, future clarification of the correct methodology and standards to be applied in determining the constitutional character of state tribunals would be likely to prompt a wholesale reconsideration of the character of each super-tribunal for the purposes of ch III.

[253] *QCAT Act* (n 7) s 171(2).

### B *Policy*

Super-tribunals were constituted as hybrid entities, defying sole categorisation as courts or as administrative bodies. In the wake of *Burns*, however, each super-tribunal must be identified as *either* a court of a state or an administrative tribunal for the purposes of ch III. State governments should carefully consider whether and how to constitute their respective super-tribunals as courts or otherwise. Scholars have begun to consider the range of options facing state governments in this respect, which includes constituting tribunals as courts and, alternatively, constituting tribunals as administrative bodies subject to express exclusions relating to their exercise of federal judicial powers.[254] In this section, I more simply outline some of the pros and cons of constituting a super-tribunal as either a court or an administrative body in light of present ch III jurisprudence.

Regardless of whether a super-tribunal is a judicial or administrative body, the government will maintain considerable control and flexibility over its composition, powers and procedures. Judicial and administrative tribunals need not: adhere to the rules of evidence or other formalities of traditional court processes; be composed only of decision-makers with legal qualifications; or be prevented from exercising a mixture of state administrative and judicial powers. Both may exercise federal administrative powers. Members of neither state administrative tribunals nor courts require *Act of Settlement* protections for their appointment, tenure or remuneration. So what factors might sway a state government in deciding whether or not to constitute its super-tribunal (or other tribunal for that matter) as a court of the state?

Constituting a tribunal as an administrative body sets it apart from the national judicial system under ch III and preserves the highest degree of political control and flexibility over the body. There are no constitutional requirements or protections relating to the independence and impartiality of its members so that, for example, members may be appointed, remunerated and removed at the discretion of government. Similarly, state administrative bodies are not subject to the *Kable* doctrine, which renders invalid laws that confer powers or functions on state courts that impair their independence or institutional integrity. The fundamental efficiency and informality that characterise super-tribunals would be maintained by giving governments discretion and control over the composition, powers and procedures of the body.

[254] Olijnyk and McDonald (n 113) 16–22.

However, *Burns* casts these advantages in a new light. Rather than avoiding the reach of ch III, administrative tribunals may attract constitutional controversy. These bodies are prohibited from exercising judicial power with respect to federal matters. This gives rise to two fraught constitutional questions. First, what is a 'matter'? In *Gatsby*, only Basten JA considered this issue in any detail, engaging in 'circular'[255] reasoning to hold that no matter had arisen before NCAT as 'there was no right, duty or liability established by the *Residential Tenancies Act* which was enforceable by a court, until NCAT had ruled on the landlord's application'.[256]

In matters with a federal aspect, the issue whether the relevant power is judicial or non-judicial will arise — a question traditionally associated with the federal separation of powers under the strict *Boilermakers'* doctrine. The nature and scope of judicial power is a complex area of constitutional law that engages an unpredictable balancing exercise flowing from decades of dynamic High Court jurisprudence. In some cases the nature of the power will be clear, but in other cases that question will be highly controversial.[257] Moreover, unlike much federal legislation, state Acts are not designed with a strict separation of powers in mind.

This scenario played out in *Raschke*, in which the Full Court of the Supreme Court of South Australia was required to determine whether a decision under the *Residential Tenancies Act 1995* (SA) to terminate a tenancy for unpaid rent and make an order for vacant possession of the premises was an exercise of judicial power.[258] This issue only arose because the landlord was a resident of Victoria whereas the tenant was in South Australia, rendering this an exercise of federal diversity jurisdiction.[259] These kinds of cases have bifurcated SACAT's management of residential tenancy disputes into federal matters in which it lacks the capacity to exercise judicial power, and other matters that may be resolved without regard to the distinction between judicial and non-judicial powers. This hints at the considerable inconvenience and complication that *Burns* has imposed on state administrative tribunals, not only in relation to jurisdictional scope but also case management,

[255] Aitken (n 19) 95.

[256] *Gatsby* (n 19) 52 [248].

[257] See, eg, Welsh, 'Purposive Formalism' (n 42) 73–83; Gabrielle J Appleby, 'Imperfection and Inconvenience: *Boilermakers'* and the Separation of Judicial Power in Australia' (2012) 31(2) *University of Queensland Law Journal* 265, 271–3.

[258] *Raschke* (n 93) 248 [95] (Kourakis CJ, Kelly J agreeing at 250 [102], Hinton J agreeing at 250 [103]).

[259] Ibid 218 [5].

constitutional expertise, and the scope and bases of appeals. It can be confidently predicted that *Raschke* is the first of many constitutional challenges to a tribunal's capacity to exercise judicial power with respect to a federal matter, and that the *Boilermakers*' jurisprudence concerning the nature of judicial power will undergo a renaissance in the state tribunal context.

An additional area of constitutional risk presented by *Burns* has been flagged by Basten JA and Aitken. The requirement that disputes between residents of different states are resolved by a court, whereas identical intrastate disputes may be resolved by a tribunal, risks 'a possible conflict' with s 117 of the *Constitution*,[260] which prohibits discrimination on the basis of state residence.[261]

Practically speaking, a wide array of matters before the tribunal will require transfer to a properly constituted court of the state. The administrative tribunal will be unable to resolve disputes in federal matters, not only when a party is a resident of a different state but when the matter concerns constitutional interpretation, issues of federal law (either as a cause of action or defence), or when the Commonwealth is a party. In addition to widespread inconvenience, this presents access to justice and rule of law issues. Super-tribunals have emerged as a uniquely cost- and time-efficient option in the resolution of a staggering breadth and number of disputes. This option will not be available to, for example, tenants whose landlords happen to reside interstate, or in disputes that raise federal consumer law, or in suits against the Commonwealth. As Brendan Gogarty and Benedict Bartl have argued, if state tribunals cannot exercise jurisdiction with respect to matters involving the Commonwealth, '[t]he result is that Commonwealth employees and services provided by Commonwealth agencies will, in practice, be exempted from much state and territory legislation'.[262] In the least, it is clear that pursuing an action against the Commonwealth will be more expensive and time-consuming if it is beyond the capabilities of the state's super-tribunal and restricted to the courts. Gogarty and Bartl's bold assertion highlights the risk to the rule of law presented by excluding super-tribunals from the national judicial system under ch III.

Constituting a super-tribunal as a court of the state would preserve the full scope of its judicial and non-judicial powers and avoid considerable inconvenience and cost for many parties. It would achieve the original aims of the

[260] *Gatsby* (n 19) 53 [251] (Basten JA).

[261] Ibid 53–4 [251]–[254]; Aitken (n 19) 95–6.

[262] Gogarty and Bartl (n 82) 264.

super-tribunal frameworks, which included promoting access to justice and lightening the load of the traditional court system. It would also largely avoid complex constitutional questions of federal judicial and non-judicial powers, and promote the rule of law.

There is a price to be paid for these advantages. First, legislation conferring powers and functions on the super-tribunal would be subject to *Kable* and may risk constitutional challenge. There has been no *Kable* challenge concerning QCAT since *Owen* was decided in 2012, but that is not to say super-tribunals would be insusceptible to future challenge under this unpredictable doctrine.

Secondly, the Acts constituting the super-tribunals would need to be revised in light of present jurisprudence. To an extent, constituting a super-tribunal as a court of a state would be as simple as designating it to be a court of record. However, a prudent government would accompany this (re)classification with enhanced protections for the independence and impartiality of tribunal members, specifically: appointment processes and remuneration protections approaching those under the *Act of Settlement*; clear provisions as to tenure with restrictions on reappointment; and robust processes and thresholds for the removal of members.

Regardless of constitutional doctrine, in light of the vast judicial and administrative workload of state super-tribunals and their central role in Australia's justice system, it would seem appropriate that their members and functions enjoy these kinds of protections for independence and impartiality. Thus, whilst courting the notorious indeterminacy of the *Kable* doctrine,[263] the 'Queensland approach' of characterising a super-tribunal as a court may best serve the interests of efficiency, access to justice, the rule of law, and the harmonisation of a national justice system grounded in judicial independence, impartiality and institutional integrity.

## V Conclusion

As Anna Olijnyk has observed:

> The case law on the exercise of judicial power by State tribunals has come to resemble a dense, messy thicket. The judgments on the constitutional issues are highly technical and the reasoning often divergent and sometimes contradictory. The practical results of those judgments are inconvenient: the fragmentation

[263] Gabrielle J Appleby and John M Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40(1) *Federal Law Review* 1, 6.

> and ultimate frustration of proceedings in tribunals that are intended to provide accessible, efficient justice.[264]

This article has considered the present state of the case law concerning the constitutional character of state tribunals and their place in the national judicial system. It has sought to map, if not carve a path through, this thicket of jurisprudence and highlight its doctrinal, practical and political implications.

Some of the apparent incoherence in the case law may be traced to interpretive methodologies. Whilst some judges have applied a balance sheet approach that emphasises statutory labels and historical practice, other judges have favoured an approach that emphasises constitutional expressions and, relatedly, constitutional values — an approach that is less likely to be coupled with a strong emphasis on history, and that imposes a higher standard of independence and impartiality on state courts. I have proposed a reconciled methodological framework that gives primacy to the constitutional expression approach; however, this approach will de-emphasise historical practice and parliamentary intent.

Acknowledging the live debate as to methodology, some clear principles may be gleaned from the case law. Parliamentary intent — reflected through the express designation of the body as a court or otherwise — is a highly relevant and important consideration. The *Constitution* gives rise to three essential requirements of a court of a state, namely that it is independent, impartial, and composed of judges. These requirements form a single inquiry that ascertains the independence and impartiality of the body by focusing on members' appointment, tenure and remuneration. At this point, the case law splits into two streams. In one stream, designated courts of record are 'courts of a State' under ch III despite being composed of members with weak protections for their independence and impartiality. In the other stream, tribunals lacking the court of record designation have been found to be unworthy of characterisation as a court of a state for the purposes of ch III, because their members are not entitled to robust statutory protections for their independence and impartiality. Either two constitutional standards of independence and impartiality apply depending on a parliament's formal designation of the body, or the cases are inconsistent. Ultimately, High Court intervention is needed to clarify the most appropriate methodology to be

[264] Anna Olijnyk, 'Burns v Corbett: The Latest Word on State Tribunals and Judicial Power', *AUSPUBLAW* (Blog Post, 19 April 2017) <https://auspublaw.org/2017/04/the-latest-word-on-state-tribunals-and-judicial-power/>, archived at <https://perma.cc/C3Y4-UVUD>.

applied in these cases and, relatedly, the constitutional requirements as to appointment, tenure and remuneration for judges of state courts.

*Burns* will undoubtedly prompt challenges to alleged exercises of judicial power over federal matters by state tribunals. *Raschke* demonstrates that these cases will not only grapple with the character of the decision-making body but, perhaps more often, will centre on whether the relevant power is judicial or non-judicial in nature. This question has determined the scope of the permissible powers of federal courts under the two limbs of *Boilermakers'*, and now also determines the scope of state administrative bodies' powers over federal matters.[265] Drawing on the judgment of Basten JA in *Gatsby*, Aitken has further suggested that constitutional controversy may centre on the nature of federal 'matters' or even s 117 of the *Constitution*.[266] These challenges may provide a vehicle for eventual High Court resolution of the issues raised in this article, or they may not. After all, it has been over a decade since the Hon Duncan Kerr SC observed that the methodological and doctrinal inconsistencies between *Wood*, *Skiwing* and *2UE Sydney* rendered it 'inevitable that some of the questions raised by these cases will be finally resolved only by the High Court'.[267]

In the meantime, super-tribunals continue to resolve the bulk of administrative and civil disputes across the federation. In all states bar Queensland, these crucial bodies are technically set apart from the integrated national court system created by ch III of the *Constitution*. This not only sits awkwardly against practical reality, but risks considerable inconvenience and constitutional risk, and undermines access to justice and the rule of law. The case law in this area may be complex, but it presents little impediment to state governments who wish to reconstitute their super-tribunals as courts of the state: an outcome that could be achieved by formally designating the body to be a court of record, and ensuring the protections for its independence and impartiality at least align with those applying to QCAT. This simple shift would bring state super-tribunals within the scope of the national judicial system under ch III of the *Constitution*, subject to constitutional protections for their basic independence and impartiality and, just as importantly, render them capable of exercising judicial powers with respect to federal matters.

[265] The SACAT Appeal Panel considered both the character of the Tribunal and the nature of the power: *Raschke (SACAT Appeal)* (n 92) [8] (Hughes P). Only the nature of the power was in issue before the Full Court of the Supreme Court of South Australia: *Raschke* (n 93) 218 [7] (Kourakis CJ).

[266] Aitken (n 19) 88, 95–6.

[267] Kerr (n 90) 626.