

20 December 2018

The Hon John Quigley MLA  
Attorney General of Western Australia  
5<sup>th</sup> Floor, Dumas House  
2 Havelock Street  
WEST PERTH WA 6005

Dear Attorney General

**DIVERSITY JURISDICTION IN THE STATE ADMINISTRATIVE TRIBUNAL (WA) -  
DESIRABILITY OF ADDRESSING THE ISSUE AS A PRIORITY**

The Law Society of Western Australia has noted your remarks of 13 September 2018 that drafting of a Bill to amend the *Guardianship and Administration Act 1990 (WA) (GA Act)* has commenced.

Obviously, the High Court's decision of *Burns v Corbett* [2018] HCA 15, dealing with diversity jurisdiction under the *Constitution* (Cth), has raised access to justice issues for the State Administrative Tribunal (WA) (**Tribunal**). In the context of the GA Act, there are now some circumstances where we understand the Tribunal no longer considers itself to have jurisdiction to determine some applications under the GA Act. I write to urge your Government to use the opportunity provided by the planned amendments to address this issue.

**Application in Western Australia**

Despite an academic article arguing the Tribunal should be considered to be a Court,<sup>1</sup> the Western Australian Supreme Court has consistently found the Tribunal not to be a Court.<sup>2</sup>

Since the decision in *Burns v Corbett*, the Tribunal has considered *Burns v Corbett* in 3 decisions. In a building services context, a senior member concluded the Tribunal was not a court and hence could not exercise federal diversity jurisdiction.<sup>3</sup> The remaining 2 decisions were matters arising under the GA Act.

In *GS* neither party contended that the Tribunal was a court of a State. However, the Tribunal had to determine whether either of the applications before the Tribunal were a 'matter' between residents of different States. This required analysis of the nature of the Tribunal's functions in exercising powers under the GA Act. The Tribunal

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<sup>1</sup> Johnston, Peter; McNab, Peter – "The Evolution of State Adjudicative Power as an Alternative to State Judicial or Administrative Power" [2015] AIALAdminLF 15; (2015) 81 AIAL Forum 1. Available online at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/AIALAdminLawF/2015/15.html>

<sup>2</sup> *Mustac v Medical Board of WA* [2007] WASCA 128 at [48]; *Hartwig v Builders' Registration Board of WA* [2009] WASCA 138 at [26]; *Erujin v WAPC* [2010] WASC 326 at [55].

<sup>3</sup> *Shuttleworth and Pearson* [2018] WASAT 112.

concluded that it had jurisdiction to determine an application for guardianship as it was not an *inter partes* dispute and so was not a 'matter' between residents of different States. However, the Tribunal concluded that it had no jurisdiction to determine an application for administration or an application for orders relating to the filing of records of an attorney, as each of these applications were 'matters'.<sup>4</sup> It is understood this decision is under appeal to the Supreme Court. In *JS* the Public Advocate was substituted as applicant in the place of the original applicant (being a NSW resident) so any jurisdictional issue was avoided.<sup>5</sup>

### Elsewhere in Australia

Queensland's Civil and Administrative Tribunal (**QCAT**) specifically provides in its enabling legislation that it is a Court. The Queensland Court of Appeal concluded in 2012 that QCAT was a Court for the purposes of Chapter III of the Constitution (Cth).<sup>6</sup> QCAT's appeal panel has a reserved decision considering whether that decision remains good law after *Burns v Corbett*.<sup>7</sup>

The ACT's Tribunal has concluded that as the Territory's Courts derive authority from the Territories power rather than Chapter III of the *Constitution* (Cth) no issue should arise.<sup>8</sup>

The President of the South Australian Civil and Administrative Tribunal (**SACAT**) concluded that SACAT was not able to exercise federal judicial power.<sup>9</sup> The Attorney-General for South Australia has been granted leave to appeal to the Full Court of the Supreme Court of South Australia.<sup>10</sup> In *Re CQG* a Senior Member of SACAT distinguished *Burns v Corbett* on the basis that the exercise of powers under the *Guardianship and Administration Act 1993* (SA) was not *inter partes*.<sup>11</sup> South Australia recently passed legislation to respond to *Burns v Corbett* by allowing certain matters to be transferred from SACAT to the Magistrates Court.<sup>12</sup>

Although the Appeal Panel of the Civil and Administrative Tribunal in New South Wales decided that the Tribunal was a Court, a 5-justice bench of the Court of Appeal in NSW recently overturned that finding.<sup>13</sup> While the decision was not unanimous on all issues, there was unanimity on the conclusion that the Civil and

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<sup>4</sup> GS [2018] WASAT 72.

<sup>5</sup> JS [2018] WASAT 120 [22]-[24].

<sup>6</sup> *Owen v Menzies* [2012] QCA 170; [2013] 2 Qd R 327.

<sup>7</sup> *Derrick v Mitchell* [2018] QCATA 145.

<sup>8</sup> *Bonke v Oz Property Services Pty Ltd Trading as Oz Property Real Estate* [2018] ACAT 91, applying *Spratt v Hermes* [1965] HCA 66; *Re Governor; Goulburn Correctional Centre; Ex Parte Eastman* [1999] HCA 44. The ACT Supreme Court Court of Appeal may also consider this issue soon: see *Practitioner D3 v Council of the Law Society of the ACT* [2018] ACTCA 47.

<sup>9</sup> *Raschke v Hansby* [2018] SACAT 19.

<sup>10</sup> *Attorney-General (SA) v Raschke & Anor* [2018] SASC 165.

<sup>11</sup> *Re CQG* [2018] SACAT 36 at [6].

<sup>12</sup> *Statutes Amendment (SACAT Federal Diversity Jurisdiction) Act 2018* (SA).

[https://www.legislation.sa.gov.au/LZ/B/CURRENT/STATUTES%20AMENDMENT%20\(SACA%20FEDERAL%20DIVERSITY%20JURISDICTION\)%20BILL%202018.aspx](https://www.legislation.sa.gov.au/LZ/B/CURRENT/STATUTES%20AMENDMENT%20(SACA%20FEDERAL%20DIVERSITY%20JURISDICTION)%20BILL%202018.aspx)

<sup>13</sup> *Attorney-General for NSW v Gatsby* [2018] NSWCA 254.

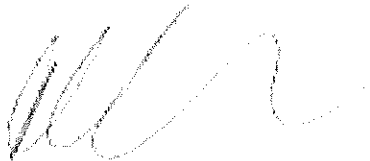
Administrative Tribunal was not a "court of a State" within the meaning of s 39(2) of the *Judiciary Act* and the *Constitution* (Cth).

### **Need for legislative reform**

While it appears to be relatively certain that the Tribunal is not a court of a State, the jurisprudence here and in South Australia shows that debate is ongoing as to whether certain matters under the GA Act are 'matters'. The Law Society contends there is a strong public policy basis for all decisions under the GA Act to be able to be made and determined together in the same jurisdiction. Accordingly, the Law Society urges your Government to use the opportunity of the amendment Bill being drafted to resolve these issues.

Either way, the Law Society also looks forward to being consulted on a draft of the amendment Bill, and if you wish to discuss any of the above further, please contact Mary Woodford, General Manager Advocacy, on (08) 9324 8646 or email [mwoodford@lawsocietywa.asn.au](mailto:mwoodford@lawsocietywa.asn.au).

Yours sincerely

A handwritten signature in black ink, appearing to read 'Hayley Cormann', written in a cursive style.

**Hayley Cormann**  
**President**