

B E T W E E N:

GARRY BURNS

Appellant

and

TESS CORBETT

First Respondent

**ATTORNEY GENERAL FOR NEW SOUTH
WALES**

Second Respondent

**ATTORNEY-GENERAL OF THE
COMMONWEALTH**

Third Respondent



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APPELLANT'S SUBMISSIONS

Part I: Publication of Submissions

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

20 2 The Appellant refers to and relies on the statement of Issues in his Submissions in the appeal against Mr Bernard Gaynor and others in matter no. S185 of 2017.

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Filed on behalf of: the appellant

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Part III: Service of Notices under s 78B of the Judiciary Act, 1903

3 The Appellant has served notices pursuant to s 78B of the Judiciary Act on all States and Territories.

Part IV: Citations

4 *Burns v Corbett* [2013] NSWADT 227
Corbett v Burns [2014] NSWCATAP 42
Burns v Corbett; Gaynor v Burns [2017] NSWCA 3

10 **Part V: Relevant Facts**

5 The Appellant is a resident in New South Wales. The First Respondent, Ms Corbett, is and was at all relevant times, a resident of Victoria: *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3, [5].

6 On 31 January 2013, the Appellant made a Complaint to the Anti-Discrimination Board of NSW (**ADB**) alleging that the First Respondent had made vilifying statements about homosexuals contrary to s 49ZT of the Anti-Discrimination Act 1977 (NSW) (**AD Act**).

7 On 23 April 2013, the President of the ADB referred the Complaint to the Anti-Discrimination Tribunal (**ADT**).

20 8 On 15 October 2013, the ADT found that the First Respondent had unlawfully vilified homosexual persons contrary to s. 49ZT of the AD Act and ordered the First Respondent to make a public and a private apology: *Burns v Corbett* [2013] NSWADT 227, [54].

9 On 12 November 2013, the First Respondent appealed the decision. Prior to the appeal being heard the ADT was replaced by the NSW Civil and Administrative Tribunal (**NCAT**).

10 The First Respondent's appeal was heard by the NCAT Appeal Panel on 30 April 2014 and dismissed on 14 August 2014: *Corbett v Burns* [2014] NSWCATAP 42, [64].

- 11 On 23 October 2015, the Appellant entered the orders in the Supreme Court pursuant to s 114 of the AD Act.
- 12 The Appellant brought proceedings in the Supreme Court charging the First Respondent with contempt for failing to make either the public or the private apology as ordered. The First Respondent sought to strike out the contempt proceedings on the basis that the original decision of the ADT and, as a result, the orders entered in the Supreme Court were void *ab initio*. In the course of the contempt proceedings, Campbell J of the NSW Supreme Court raised the issue, and the First Respondent then argued, that neither the former ADT nor NCAT had jurisdiction to hear the matter due to the operation of s 75(iv) of the Constitution.
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- 13 On 26 July 2016, Campbell J determined that separate questions addressing the jurisdiction of the ADT and the Appeal Panel of NCAT to hear a matter between residents of different States be removed to the Court of Appeal: *Burns v Corbett (No 2)* [2016] NSWSC 612.
- 14 The Attorney General for New South Wales and the Attorney-General of the Commonwealth intervened in the Court of Appeal proceedings (being proceeding 2016/224875). This matter was heard and determined at the same time as proceedings between the Appellant and Mr Bernard Gaynor (referred to in the Appellant's Submissions in Matter No S185 of 2017).
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- 15 The Court of Appeal dealt only with the jurisdictional issue and handed down its judgment on 3 February 2017: *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3.
- 16 It was also agreed between the parties before the Court of Appeal that:
- (a) NCAT is not a 'court of the State': *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3, [29]; and
 - (b) the proceedings in NCAT, being proceedings under the AD Act, involved the exercise of judicial power: *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3, [30].

Part VI: Argument

17 The Appellant adopts the argument set out in his submissions in the appeal in *Burns v Gaynor and Ors* matter (being proceedings S185 of 2017).

Part VII: Applicable Constitutional and Legislative Provisions

18 Please see the annexure to submissions in the appeal in *Burns v Gaynor and Ors* matter (being proceedings S185 of 2017).

Part VIII: Orders

10 19 The Appellant seeks the following orders:

- (1) Appeal allowed.
- (2) Order 1 made by the Court of Appeal on 3 February 2017 in relation to *Burns v Corbett* matter be set aside.
- (3) An order that the questions, as re-formulated by the Court of Appeal be answered as follows:
 - (a) Did the Administrative Decisions Tribunal have jurisdiction to resolve the complaint under s 49ZT Anti-Discrimination Act 1977 (NSW) made by the plaintiff against the defendant? Yes.
 - (b) Did the Appeals Panel of the NSW Civil and Administrative Tribunal have jurisdiction to resolve the said complaint? Yes.
 - (c) Having regard to the answers to (a) and (b), are the orders that appear in the document headed 'Judgment/Order' entered on 23 October 2015 in matter no 2014/00270109 valid and enforceable against the defendant? Yes.
- (4) An order remitting the proceedings back to the Supreme Court of NSW in order to determine the contempt proceedings.
- (5) No order as to costs.

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Part IX: Estimate of Time for Oral Submissions

20 The Appellant relies on and adopts the submissions of the Attorney-General for New South Wales and therefore estimates he will require 30 minutes for oral submissions.

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