IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S185 of 2017**

BETWEEN:

GARRY BURNS
Appellant

and

BERNARD GAYNOR
First Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Second Respondent

STATE OF NEW SOUTH WALES
Third Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Fourth Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Fifth Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication of Submissions

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

Part II: Issues

2. The issues in this appeal are:

(a) whether the Civil and Administrative Tribunal of New South Wales (**NCAT**), which is not a court of the State, has jurisdiction to hear and determine proceedings under the *Anti Discrimination Act 1977* (NSW) (**AD Act**) where one of the parties to the proceedings is resident in another State; in particular, whether there is an

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inconsistency with s 39(2) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and therefore, by the operation of s 109 of the Constitution, the AD Act is inoperative to that extent; and

(b) whether there is an implied limitation on the legislative power of the State of New South Wales that prevents the conferral of judicial power on NCAT to deal with any matter identified in ss 75 and 76 of the Constitution.

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

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 Gaynor* [2015] NSWCATAD 24
Gaynor v Burns [2015] NSWCATAP 150
Gaynor v Burns [2016] NSWCA 44
Burns v Corbett; Gaynor v Burns [2017] NSWCA 3
Burns v Corbett; Gaynor v Burns (No 2) [2017] NSWCA 36

Part V: Relevant Facts

5. The Appellant, is a resident in New South Wales.[1] In June 2014, he made a three Complaints to the Anti Discrimination Board of NSW (**ADB**) alleging that Mr Gaynor, the First Respondent, had engaged in homosexual vilification on his websites and blogs contrary to s 49ZT of the AD Act.[2] Mr Gaynor was, at all relevant times, a resident in the State of Queensland.[3]

6. The Complaints were referred to NCAT. The First Respondent consented to the jurisdiction of NCAT by appearing and participating in those proceedings.

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[1] *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3, [5] (Leeming JA).
[2] Ibid [4] (Leeming JA).
[3] Ibid [5] (Leeming JA).

7. On 8 December 2014, the First Respondent made an interlocutory application to summarily dismiss the proceedings. On 20 January 2015, the application was dismissed by NCAT.[4] The First Respondent appealed the decision to the Appeal Panel of NCAT. On 27 April 2015, the appeal was granted on the basis that the First Respondent had put on material which was irrelevant in the proceedings at first instance and those materials had been relied on by the Deputy President.[5] On 23 July 2015, the Appeal Panel determined that there were special circumstances within the meaning of s 60(3) of the *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**) and made an order that the First Respondent pay the Appellant's costs.[6]

8. The strike out application was remitted and heard by another member of NCAT who, on 14 October 2015, determined that there had been no public act in New South Wales and dismissed the proceedings.[7]

9. The Appellant filed an appeal against that decision. On 24 March 2016, the President of NCAT sought submissions from the parties as to whether NCAT had jurisdiction to deal with the matter because of Chapter III of the Constitution. The Attorney-General of NSW intervened. The NCAT appeal remains pending the outcome of these proceedings.

10. In the meantime, on 11 August 2015, the First Respondent filed a Summons seeking Leave to Appeal in the NSW Supreme Court of NSW pursuant to s 83(1) of the CAT Act against the costs order made by the Appeal Panel, matter number2015/251109 (**Costs Appeal**).[8] The Summons was transferred to the NSW Court of Appeal. No part of the Summons alleged any jurisdictional argument. On 16 March 2016, leave to appeal was granted: *Gaynor v Burns* [2016] NSWCA 44.

11. In separate proceedings on 8 June 2016, the First Respondent filed a Summons in the Equity Division of the NSW Supreme Court seeking, for the

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[4] *Gaynor v Burns* [2015] NSWCATAD 24, [19] (Hennessy DP).
[5] *Gaynor v Burns* [2015] NSWCATAP 150, [1], [11]-[13] (Boland J ADCJ, Chesterman DP, Robberds PM).
[6] Ibid [59], [64] (Boland J ADCJ, Chesterman DP, Robberds PM).
[7] *Burns v Gaynor* [2015] NSWCATAD 211, [22] (Patten PM).
[8] *Gaynor v Burns* [2016] NSWCA 44, [1] (McColl JA, Emmett AJA).

first time, declaratory orders including that NCAT has no jurisdiction to deal with the complaint, matter number 2016/ 204768 (**Summons Matter**). On 13 September 2016, a Further Amended Summons was filed and those proceedings were transferred to the NSW Court of Appeal.

12. In other proceedings, the Appellant had commenced contempt proceedings in the NSW Supreme Court against Ms Corbett (a resident of the State of Victoria) being matter number 2014/280109 in relation to an order made by NCAT that Ms Corbett apologise to the Appellant in relation to a finding that she had engaged in homosexual vilification.[9] Campbell J formulated three questions including in relation to the jurisdiction of NCAT[10] and those proceedings were transferred to the NSW Court of Appeal.

13. On 30 November 2016, The NSW Court of Appeal heard all three matters and restricted its consideration to the jurisdictional question. On 3 February 2017, the NSW Court of Appeal handed down its decision determining that NCAT had no jurisdiction to hear and determine the proceedings against Mr Gaynor or Ms Corbett: *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 (**J**).

14. On 7 March 2017, the NSW Court of Appeal ordered:
    (a) the Appellant pay Ms Corbett's costs of the questions removed to the NSW Court of Appeal; and
    (b) the First Respondent pay the Appellant's costs in relation to the Notice of Motion filed by Mr Gaynor on 13 February 2017: *Burns v Corbett; Gaynor v Burns (No. 2)* [2017] NSWCA 36.

Part VI: Argument

15. The determination by the NSW Court of Appeal that s 109 of the Constitution renders inoperative the AD Act granting NCAT jurisdiction to resolve the

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[9] *Burns v Corbett* [2013] NSWADT 227, [54] (Chesterman, DP, Kelleghan, NJM, Lowe, NJM), affirmed in *Corbett v Burns* [2014] NSWCATAP 42, [64] (Hennessy, LCM DP, Wakefield, SM, Field, GM)

[10] *Burns v Corbett* [2016] NSWSC 612 [17] (Campbell J).

complaint made by the Appellant against the First Respondent rests on the following conclusions:

(a) whilst s 77 of the Constitution (and Chapter III more generally), do not create or mandate a uniform national system for the resolution of matters within federal jurisdiction, thereby removing the extant 'belongs to' jurisdiction of State courts and tribunals, it does empower the Commonwealth legislature to create such a system, if desired: J [58] and [63]-[64];

(b) by s 38 and 39 of the Judiciary Act, the Commonwealth legislature exercised that power and created such a uniform system for the exercise of federal jurisdiction in relation to the matters in ss 75 and 76 of the Constitution. This removed the 'belongs to' jurisdiction of State courts in respect of those matters and then invested the State courts with federal jurisdiction, such jurisdiction being subject to the conditions in s 39(2) of the Judiciary Act: J [66] to [74]; and

(c) to allow a State tribunal (such as NCAT) to exercise the 'belongs to' jurisdiction absent the s 39(2) of the Judiciary Act conditions would impermissibly alter, impair or detract from the operation of the uniform system for the exercise of federal jurisdiction set out in ss 38 and 39 of the Judiciary Act. As such, s 109 of the Constitution applies to render inoperative s 108 of the AD Act when it purports to empower NCAT to resolve a complaint between parties who are residents of different States.

16. The Appellant's contention is that s 77 of the Constitution does not empower the Commonwealth legislature to remove the 'belongs to' jurisdiction of State tribunals in relation to disputes between residents of different States and that the Court of Appeal erred in determining that such a power was available and was exercised by the Commonwealth legislature in enacting s 39 of the Judiciary Act.

17. Section 75(iv) of the Constitution vests jurisdiction in the High Court of Australia to hear matters which prior to 1903 were heard by the colonial

courts. Section 75(iv) of the Constitution did not erase the pre-existing State diversity jurisdiction.[11]

18. Section 77 of the Constitution refers only to courts. It empowers the Commonwealth legislature to define the jurisdiction of federal courts and to define the extent to which that jurisdiction is to be exclusive of the jurisdiction which exists in State courts. It also provides power to invest courts of the State with federal jurisdiction. The powers are discretionary not mandatory.

19. The underlying presumption in s 77(ii) of the Constitution is that, as at federation, State courts continued to have jurisdiction to hear some of the matters set out in ss 75 and 76 of the Constitution, because it authorised the Commonwealth legislature to make laws defining the extent to which State jurisdiction in those areas could be removed. If the effect of ss 75 and 76 of the Constitution was to abolish all State jurisdiction in ss 75 and 76 matters, s 77(ii) of the Constitution would be otiose.

20. Section 39 of the Judiciary Act was enacted pursuant to the power in section 77(ii) of the Constitution. It was restricted to the jurisdiction of courts because that was the limit of the power in s 77(ii) of the Constitution. The exclusion of tribunals from s 39(2) of the Judiciary Act was therefore deliberate.

21. At the time of drafting, the Judiciary Act included no references to tribunals despite the existence of contemporary tribunals; see *Wilson v Minister for Lands*[12] and the Local Land Boards established by the *Crown Land Act 1884* (NSW).

22. Further, there are references to tribunals in the *High Court Procedure Act 1903* (Cth)[13] which was assented to on 28 August 1903, only days after the Judiciary Act, which was assented to on 25 August 1903. The *High Court Procedure Bill* was drafted to supplement the *Judiciary Bill* and was read for the first time when the *Judiciary Bill* was read a second time and debated by

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[11] Zines L, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, Federation Press, 2002) p 197.
[12] (1901) 1 SR (NSW) 177.
[13] Sections 7, 10 and 25.

the Commonwealth House of Representatives, the members being required to "*make* [themselves] *acquainted with its provisions to understand* [the Judiciary] *Bill*".[14] The High Court Procedure Bill was referred to the Committee stage to be dealt with immediately after the Judiciary Bill, being "*practically a part of the Judiciary Bill, and, relating as it does to details of practice, has, as a matter of convenience, been introduced as a separate measure*".[15] The clear inference is that Commonwealth Parliament was aware of the existence of State tribunals and did not include them in s 39 of the Judiciary Act.

10 23. The construction advanced by Leeming JA permits s 39(2) of the Judiciary Act to read out the "belongs to" jurisdiction of the States in its entirety. That is erroneous given the absence of an express statement of Commonwealth legislative intention to cover the field for the purposes of s 109 of the Constitution.[16]

24. Insofar as the finding of inconsistency relies on Leeming JA's conclusions as to the existence of a uniform national system for the resolution of matters within federal jurisdiction, that finding must fall away.

25. The exercise of State diversity jurisdiction by State tribunals does not impair or detract from the operation of s 39(2) of the Judiciary Act. As Her Honour
20 Chief Justice Kiefel held in *Rizeq v Western Australia*[17], s 39 of the Judiciary Act is a legislative grant of federal jurisdiction meaning simply "*the authority given to a court to hear and determine a matter*".[18] Properly understood, the operation of s 39 of the Judiciary Act is to remove the authority granted under State laws for State courts to determine disputes between residents of different States and to replace that jurisdiction with an authority granted under federal law to determine those same disputes, being federal jurisdiction.

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[14] Hansard, House of Representatives, 9 June 1903 at 586-587.
[15] Hansard, House of Representatives, 30 June 1903 at 1525.
[16] *Momcilovic v The Queen* (2011) 245 CLR 1 at [208] per Gummow J.
[17] (2017) 91 ALJR 707 (21 June 2017) (***Rizeq***).
[18] Ibid [8].

26. By s 108 of the AD Act, the NSW legislature does not seek to directly or indirectly alter the removal of the diversity jurisdiction of State courts or the grant of federal diversity jurisdiction to State courts.

27. In any event, with respect, the conclusion in J [78] is not made good in relation to the statutes under consideration in this matter. Proceedings in the NCAT under the AD Act, being the exercise of State jurisdiction (including State diversity jurisdiction), are subject to the same conditions in s 39(2) of the Judiciary Act. In particular, proceedings are subject to an appeal to the High Court.

10 28. First, Subdivision 6 of Part 9 of the AD Act contains the power to refer complaints from the Anti-Discrimination Board to NCAT. An appeal from the tribunal at first instance may be made to the Appeal Panel of NCAT: s 80 of the CAT Act. Thereafter, an appeal may be made to the NSW Supreme Court on a question of law: s 83(1) of the CAT Act. Whether that appeal is made to the NSW Supreme Court or the NSW Court of Appeal depends on the composition of the Appeal Panel of NCAT: s 48(1) of the *Supreme Court Act 1970* (NSW).

29. NCAT may refer a question of law to the NSW Supreme Court for an opinion: s 54 of the CAT Act.

20 30. The NSW Supreme Court also has supervisory jurisdiction over NCAT. In *Kirk v Industrial Relations Commission*[19] the Court said:

> *"To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint."*

31. An appeal lies from the NSW Court of Appeal and NSW Supreme Court to the High Court: s 35 of the Judiciary Act. This appellate trajectory was illustrated in *New South Wales v Amery*[20] and the instant proceedings is another example.

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[19] (2010) 239 CLR 531 at [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[20] (2006) 230 CLR 174. In that matter the tribunal was the Equal Opportunity Division of the Administrative Decisions Tribunal of New South Wales, the statutory predecessor of NCAT.

32. As such, there is no alteration, impairment or detraction from the conditional and universal operation of federal law as contended by Leeming JA at J [78], because there is an appellate process with the High Court at its apex under the AD Act and the CAT Act which governs NCAT.

33. Contrary to the observation at J [79], it is not a 'strange' result for a matter to engage State jurisdiction at first instance and federal jurisdiction on appeal. This would occur where a litigant in a matter before a court of NSW moves out of State while an appeal is pending in the NSW Supreme Court, or where a constitutional matter is raised for the first time on appeal.

34. As to the "incidents to litigation" referred to at J [79], it is not apparent why ss 79 and 80 of the Judiciary Act would operate in a way that would cause the litigation of an appeal from a determination of NCAT under the AD Act in a court exercising federal jurisdiction to differ in any real way from the litigation of a similar matter in a court exercising State jurisdiction. Chief Justice Kiefel observed in *Rizeq v WA*:

> *"[*The purpose of s 79*] is to fill the gaps created by a lack of Commonwealth law governing when and how a court exercising federal jurisdiction is to hear and determine a matter and the inability of a State law to apply directly to that court whilst exercising federal jurisdiction. In such a case it is necessary that s 79 adopt the State provision and apply it".*[21]

35. Rather than creating any difference, the existence of ss 79 and 80 of the Judiciary Act are more likely to ensure uniformity in the litigation of both appeals.

36. Further, and with respect, Leeming JA erred by placing undue weight on s 55B(4) of the Judiciary Act. That provision is a procedural one providing a right for parties to appear by legal representative in an appeal wherein the court hearing the appeal is doing so pursuant to federal jurisdiction.

37. Legal representation is available with leave in NCAT: s 45 of the CAT Act. However, the absence of a *right* to have legal representation at first instance does not detract in any significant way from the operation of the appellate

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[21] Rizeq (2017) 91 ALJR 707 at [32] (Kiefel J).

process under federal jurisdiction. The distinction between State and Commonwealth procedures in *Dickson v The Queen* was in relation to unanimity of a jury trial, a far more significant difference. With respect, it is sufficient in terms of "fact" and "degree": *APLA Limited v Legal Services Commissioner (NSW)*[22].

38. The exercise of federal diversity jurisdiction does not create an operational inconsistency: *Victoria v The Commonwealth (the Kakariki)*[23] at 631; *Commonwealth v Western Australia*[24] at [61] and [139]. Nor does it create any practical inconsistency: *Stock Motor Ploughs Ltd v Forsyth*[25] at 136; *Telstra v Worthing*[26] at [28]. There is no "*real inconsistency*": *APLA Limited.*[27]

39. Section 109 of the Constitution was drafted to ensure the supremacy of Commonwealth legislative power to that of the States. It is not intended to broaden the scope or subject matter of the Commonwealth power. Put another way, the Commonwealth may not "cover a field" of law for the purposes of s 109 of the Constitution unless it has the power to legislate in that field: *Momcilovic v The Queen*[28] at [208]. The Commonwealth's legislative power (contained in s 77 of the Constitution) is very clearly directed to the powers of State courts. The basis upon which the NSW Court of Appeal determined that s 109 operated to render invalid the AD Act insofar as a dispute between residents of different States (being the conditions attached to s 39(2) of the Judiciary Act) is not made out. Section 39(2) is not inconsistent with the exercise of State diversity jurisdiction by NCAT under the AD Act.

40. Chapter III of the Constitution was intended to provide for an integrated system of federal jurisdiction. However, the corollary is not that it provided for the conferral of exclusive jurisdiction to federal and state courts in that

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[22] (2005) 224 CLR 322 at [206], [304] (***APLA Limited***).
[23] (1937) 58 CLR 618.
[24] (1999) 196 CLR 392.
[25] (1932) 48 CLR 128.
[26] (1999) 197 CLR 61.
[27] (2005) 224 CLR 322 at [304].
[28] (2011) 245 CLR 1 (Gummow J).

integrated system over all matters enumerated in ss 75 and 76 of the Constitution.

41. The Commonwealth's contention that there is an implied limitation on State legislative power preventing it conferring judicial power on NCAT (or any tribunal) in relation to the matters in ss 75 and 76 of the Constitution ought be rejected for the reasoning adopted by Leeming JA at J [35], [58] to [65]. The States retain a plenary legislative power except for matters ceded to the Commonwealth.[29] Section 109 of the Constitution acknowledges the legislative power of the Commonwealth and the States can produce conflicting legislation. Clearly, in instances of conflict the Commonwealth legislation will prevail.[30] There is no basis for the implication contended for by the Commonwealth.

Part VII: Applicable Constitutional and Legislative Provisions

42. See Annexure A

Part VIII: Orders

43. The Appellant seeks the following orders:

(1) Appeal allowed.

(2) The declaration made by the Court of Appeal on 3 February 2017 that NCAT was not authorised to decide the three complaints made by the Appellant in relation to the First Respondent as ferred by the ADB by letter dated 11 July 2014, be set aside.

(3) A declaration that NCAT has jurisdiction to hear and determine a complaint brought by a resident of New South Wales under the AD Act

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[29] Section 52 of the Constitution.

[30] *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

in circumstances where the respondent to that complaint is resident in another State.

(4) An order remitting the proceedings to the Court of Appeal in order to determine the remainder of the issues raised in the appeal.

(5) No order as to costs.

Part IX: Estimate of Time for Oral Submissions

44. 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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