

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S187 of 2017

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES, COURT OF APPEAL

BETWEEN:

**ATTORNEY GENERAL FOR
NEW SOUTH WALES**

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Appellant



and

GARRY BURNS

First Respondent

BERNARD GAYNOR

Second Respondent

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**ATTORNEY-GENERAL FOR THE
COMMONWEALTH**

Third Respondent

**NSW CIVIL &
ADMINISTRATIVE
TRIBUNAL**

Fourth Respondent

No. S188 of 2017

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BETWEEN:

STATE OF NEW SOUTH WALES

Appellant

and

GARRY BURNS

First Respondent

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BERNARD GAYNOR

Second Respondent

**ATTORNEY-GENERAL
FOR THE COMMONWEALTH**

Third Respondent

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**CIVIL AND
ADMINISTRATIVE
TRIBUNAL OF NEW SOUTH
WALES**

Fourth Respondent

APPELLANTS' SUBMISSIONS

Part I: Certification of form suitable for publication on the Internet

- 20 1. The Attorney General for New South Wales (the “**NSW Attorney**”) and the State of New South Wales (“**NSW**”) certify that these submissions are in a form suitable for publication on the Internet.

Part II: Concise statement of issues

2. There is one issue in the appeals brought by the NSW Attorney and NSW, which should be resolved as follows:

Whether a State tribunal, which is not a ‘court of a State’, is unable to exercise State judicial power to determine a matter between residents of different States because a State law which purports to authorise the tribunal to do so is inconsistent with s 39(2) of the Judiciary Act 1903 (Cth) and is therefore rendered inoperative by virtue of s 109 of the Constitution? **No.**

- 30 3. There is one issue raised by the Notice of Contention filed by the Attorney General for the Commonwealth (the “**Cth Attorney**”), which should be resolved as follows:

Whether there is an implied limitation on State legislative power the effect of which is that a State law that purports to confer judicial power in respect of any of the matters identified in ss 75 and 76 of the Constitution on a person or body that is not one of the “courts of the States” is invalid to that extent? **No.**

Part III: Certification regarding section 78B notice

4. The NSW Attorney and NSW consider that notices should be given in compliance with section 78B of the Judiciary Act 1903 and issued such notices on 6 July 2017.

Part IV: Citations of reasons for judgment

- 10 5. The reasons for judgment of the New South Wales Court of Appeal (Bathurst CJ, Beazley P and Leeming JA) given on 3 February 2017 are reported as Burns v Corbett (2017) 316 FLR 448; [2017] NSWCA 3 (proceeding 2016/224875) (“J”).
6. The citations of the reasons of the tribunal decisions referred to in the decision of the Court of Appeal are referred to in Part V below.

Part V: Statement of the relevant facts

7. It was common ground below that, at all material times, Mr Burns has been a resident of New South Wales and Mr Gaynor has been a resident of Queensland: J [5].
- 20 8. The relevant procedural history of the matter is set out at J [4], [7]. In short, in 2014 Mr Burns made complaints to the NSW Anti-Discrimination Board about statements made by Mr Gaynor which he claimed were public acts that vilified homosexuals, contrary to s 49ZT of the Anti-Discrimination Act 1977 (NSW) (“AD Act”): J [4]. The complaints were then referred to the NSW Civil and Administrative Tribunal (“NCAT”).
9. There has been no hearing on the merits of Mr Burns’ complaints against Mr Gaynor by NCAT: J [7]. Mr Gaynor succeeded in having the proceedings in NCAT dismissed on the basis that, as a matter of statutory construction, there had been no “*public act*” in New South Wales: Burns v Gaynor [2015] NSWCATAD

211. Mr Burns has filed an appeal to the Appeal Panel against that dismissal, but that appeal has not been heard: J [7].

10. On 8 June 2016, Mr Gaynor filed a Summons in the Equity Division of the Supreme Court of New South Wales (proceedings 2016/175930) seeking inter alia declarations to the effect that NCAT has no jurisdiction to hear Mr Burns' complaints (and that the Appeal Panel of NCAT has no jurisdiction to hear the pending appeal) as the matter is between residents of different States: see J [7], [102]. NSW was named as the third defendant to the Summons in the Equity Division. On 4 July 2016, the proceedings were removed by order of Registrar Riznyczok into the Court of Appeal of New South Wales (and became proceedings 2016/204768).

11. Separately, a series of earlier NCAT interlocutory decisions resulted in a costs order against Mr Gaynor, from which Mr Gaynor obtained a grant of leave to appeal to the Court of Appeal of New South Wales (proceeding 2015/251109): Gaynor v Burns [2016] NSWCA 44. By a proposed amendment to the notice of appeal, Mr Gaynor sought inter alia a declaration that NCAT has no jurisdiction to determine matters between residents of different States: see J [7], [105], [106]. The NSW Attorney intervened in the costs appeal (proceeding 2015/251109) in the Court of Appeal of New South Wales pursuant to s 78A of the Judiciary Act 1903 (Cth).

20. 12. It was common ground before the Court of Appeal that:

- a. NCAT is not a "court of the State" (J [29]); and
- b. the proceedings in NCAT, being proceedings under the AD Act, involve the exercise of judicial power by NCAT (J [30]).

Part VI: Argument

13. The NSW Attorney and NSW adopt herein the NSW Attorney's argument in appeal proceedings No. S186 of 2017 (in relation to both the NSW Attorney's appeal and the Cth Attorney's Notice of Contention).

Part VII: Applicable constitutional and legislative provisions

14. The applicable constitutional and legislative provisions are annexed to the NSW Attorney's submissions in appeal proceedings No. S186 of 2017.

Part VIII: Form of orders sought by the appellants

15. The appellants seek the following orders:

- a. appeal upheld;
- b. in relation to proceeding 2016/204768 in the Court of Appeal of New South Wales:
 - i. set aside the declaration made by the Court of Appeal that the New South Wales Civil and Administrative Tribunal ("NCAT") was not authorised to decide the three complaints made by Mr Burns concerning Mr Gaynor which were referred to it by the President of the Anti-Discrimination Board by letter dated 11 July 2014;
 - ii. set aside the order otherwise dismissing Mr Gaynor's Summons;
 - iii. remit the matter to the Court of Appeal for determination of the remainder of the Summons filed in proceedings 2016/204768;
- c. in relation to proceeding 2015/251109 in the Court of Appeal of New South Wales:
 - i. set aside the declaration made by the Court of Appeal that NCAT was not authorised to decide the three complaints made by Mr Burns concerning Mr Gaynor which were referred to it by the President of the Anti-Discrimination Board by letter dated 11 July 2014;
 - ii. remit the matter to the Court of Appeal for determination of the remainder of the appeal.

Part IX: Estimate of the number of hours required for oral argument

16. The NSW Attorney and NSW do not require time for the presentation of oral argument (in addition to the time allocated for oral argument in the appeal in No S186 of 2017).

Dated: 27 July 2017

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