IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S183 of 2017

BETWEEN:

GARRY BURNS

Appellant

and

TESS CORBETT

First Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES

Second Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH

Third Respondent

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

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S186 of 2017

BETWEEN:

ATTORNEY GENERAL FOR NEW SOUTH WALES

Appellant

and

GARRY BURNS

First Respondent

TESS CORBETT

Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH

Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S187 of 2017

BETWEEN:

ATTORNEY GENERAL FOR NEW SOUTH WALES

Appellant

and

GARRY BURNS

First Respondent

BERNARD GAYNOR

Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH

Third Respondent

NSW CIVIL & ADMINISTRATIVE TRIBUNAL

Fourth Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S188 of 2017

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Fourth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

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

PARTS II & III: INTERVENTION

2. The Attorney-General for the State of Victoria intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth) (the ***Judiciary Act***). The Attorney-General intervenes in support of the State of New South Wales and the Attorney General for New South Wales.

PART IV: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

3. The applicable constitutional and statutory provisions are identified and extracted in the annexure to the submissions of the Attorney General for New South Wales.

PART V: ARGUMENT

A. Introduction

4. On the question at the heart of these proceedings, namely whether the NSW Civil and Administrative Tribunal (**NCAT**) can hear and determine a dispute arising under the *Anti-Discrimination Act 1977* (NSW) (the ***Anti-Discrimination Act***) between a New South Wales resident and a resident of another State, Victoria says the answer is "yes".

5. An affirmative answer is the right answer, for three key reasons.

   (a) *First*, s 75 of the Constitution is not engaged because the NCAT proceedings are not justiciable in a Court of the State of New South Wales and are therefore not "matters" within the meaning of s 75.

   (b) *Secondly*, the view that a State law authorising a tribunal to exercise judicial power in determining "diversity" matters is inconsistent with s 39(2) (read with s 39A) of the *Judiciary Act* rests on a flawed construction of s 39. Section 39 of the *Judiciary Act* is expressly directed only to the jurisdiction of "Courts of the States", not State tribunals or other State bodies that do not meet the description of a "Court of a State".

   (c) *Thirdly*, there is no foundation for an implication limiting the power of State legislatures such that a State legislature cannot confer judicial power in respect of the matters identified in ss 75 and 76 of the Constitution on a body that is not a Court of a State.

B. State Jurisdiction

6. Before turning to the provisions of the Constitution and the *Judiciary Act* that are central to this case, it is useful to address the concept of State jurisdiction.

7. In *Baxter v Commissioners of Taxation (NSW)*, Isaacs J stated "State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws".[1] Justice Isaacs's explanation of federal jurisdiction and State

[1] (1907) 4 CLR 1087 (***Baxter***) at 1142.

jurisdiction has endured, and continues to provide a succinct and accurate account of the "similarity and the difference" between the two forms of jurisdiction.[2]

8. Importantly, though, Isaacs J's description was only concerned with the jurisdiction (whether State or federal) of courts. A body that is not a "Court of a State" may also exercise State jurisdiction, in that a State law may confer on that body the authority to adjudicate under the laws of the State. The adjudication in a tribunal need not have all of the hallmarks of judicial power as that concept would be understood in the context of federal judicial power. The States have the legislative power to specify the forum (court or tribunal) and the methods that are to be used in resolving a dispute. That freedom is not enjoyed by the Commonwealth Parliament. The fact that State jurisdiction may be exercised by a State Court but also may be exercised by a State tribunal (or other body that is not a "Court of a State") is of significance in these proceedings, for reasons developed further below.

C. Sections 75 and 77 of the Constitution

9. Section 75 confers original jurisdiction on the High Court in five categories (or classes) of "matters". The factual background giving rise to these proceedings are said to trigger s 75(iv) (matters between States, or between residents of different States, or between a State and a resident of another State). But it is nonetheless important, when construing s 75, to closely consider the other categories of matters dealt with in s 75.

10. Section 75(i) (matters arising under any treaty) is concerned with the source of the rights and liabilities in dispute. Section 75(ii) (matters affecting consuls or other representatives of other countries) is concerned with the effect of the matter, rather than the subject-matter of the proceeding itself. Section 75(iii) (matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party) is concerned with the identity of the parties to the proceedings, and in particular the connection between those parties and the Commonwealth. Section 75(iv) is also concerned with the parties to the proceeding, and in particular whether there is diversity between them. Section 75(v) is concerned with the relief sought, both the nature of that

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2 *Rizeq v Western Australia* (2017) 91 ALJR 707 (***Rizeq***) at 718 [50] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 (***MZXOT***) at 619 [23] (Gleeson CJ, Gummow and Hayne JJ); *CGU Insurance Ltd v Blakely* (2016) 327 ALR 564 at 570 [24] (French CJ, Kiefel, Bell and Keane JJ).

relief and whether it is sought against an officer of the Commonwealth.

11. While s 75 of the Constitution confers "authority to adjudicate" on the High Court (in the sense used by Isaacs J in *Baxter*) in relation to the five categories of matters, in conferring "original jurisdiction" the provision identifies "the existence of 'federal jurisdiction' by a range of characteristics including the character of the parties ... and the source of the rights and liabilities in contention ...".[3]

12. Section 77 provides that with respect to any of the matters mentioned in s 75 or s 76, the Parliament may make laws falling within three categories. By s 77(ii), the Commonwealth Parliament may make laws "defining 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". By s 77(iii), the Constitution conferred on the Commonwealth Parliament the power to make laws investing any State court with federal jurisdiction. As Professor Bailey observed, there was a practical utility in this arrangement for a small and fledgling nation – it permitted the Commonwealth Parliament to "make use for federal purposes of the existing judicial organization of the States".[4]

13. Two aspects of s 77(ii) are notable.

14. *First*, it is concerned with the jurisdiction of "courts". This is not surprising given that it refers back to matters in s 75 and 76 which are, or which can be, invested in federal courts. It empowers the Commonwealth Parliament to make the jurisdiction of any "federal court" exclusive, and in relation to what that jurisdiction is exclusive of, again it refers to the jurisdiction of "the courts of the States". There is no reference to a tribunal (whether federal or State) or any other body. This choice of words is significant, especially because the Constitution does not universally refer to "courts" but uses different words in other sections. For example, in s 73(ii), reference is made to "the Supreme Court of any State", and also to "any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council". Section 73(iii) refers to the "Inter-State Commission", which was a body established under s 101 of the Constitution. Decisions of this Court such as *K-Generation Pty Ltd*

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3 *MIMIA v B* (2004) 219 CLR 365 at 394-395 [68] (Gummow, Hayne and Heydon JJ).

4 K H Bailey, "The Federal Jurisdiction of State Courts" (1939-1941) 2 *Res Judicatae* 109, 109.

v Liquor Licensing Court[5] underscore the important distinction between a "court" of a State and a lesser tribunal. In concluding that the Licensing Court (established by a South Australian statute) was a "court of a State" for the purposes of s 77(iii) of the Constitution and s 39(2) of the *Judiciary Act*, Gummow, Hayne, Heydon, Crennan and Kiefel JJ engaged in a detailed analysis of the Licensing Court's features, focusing on matters such as its designation under statute as a "court of record", the connection between membership of the Court with tenure as a District Court judge, and its powers with respect to witnesses and evidence.[6] *K-Generation* makes plain that a body is required to possess certain characteristics before it will be considered to have attained the status of a "court of a State".

15. *Secondly*, in empowering the Commonwealth Parliament to make laws defining the extent to which the jurisdiction of any federal court shall be exclusive, the exclusivity is defined by reference to "that which belongs to or is invested in the courts of the States".

The relevant limitations on the scope of ss 75 and 77

16. There are two relevant limitations on the combined operation of ss 75 and 77. The first is that there must be a matter between residents of different states in which the High Court has original jurisdiction; and the second is that with respect to that matter there must be jurisdiction "which belongs to or is invested in the courts of the State".

The scope of matter referrable to State law

17. The concept of "matter" is bounded by well established principles. They include:

    (a) A matter means the subject matter for determination in a legal proceeding – "controversies which *might* come before a Court of Justice";[7]

    (b) There must be some immediate right, duty or liability to be established by the determination of the court;

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5 (2009) 237 CLR 501 (***K-Generation***).

6 (2009) 237 CLR 501 at 535-539 [114]-[131].

7 *Palmer v Ayres* (2017) 91 ALJR 325 (***Palmer***) at 322-333 [26] (Kiefel, Keane, Nettle and Gordon JJ) (emphasis in *Palmer*), citing *South Australia v Victoria* (1911) 12 CLR 667 at 675; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-524 [24]; *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 14 [50].

(c) A matter co-exists with a legal proceeding but is not defined by it; and

(d) A matter requires a remedy from a Court.[8]

18. The requirement that there be a "matter" in federal jurisdiction is critical to the scope of federal judicial power and therefore the separation of powers that Ch III mandates.[9] It addresses a form, but not the universe, of judicial power.[10]

19. There is no separation of powers at State level and no requirement to relate the jurisdiction of courts or tribunals back to the constitutional concept of "matter" nor to any particular paradigm of judicial power.[11] The States can, and frequently do, seek to resolve controversies as to rights and liabilities outside of the court system by the ascertainment of facts and the application of the law and the exercise of discretion and the making of enforceable determinations. The capacity to do so reflects the "constitutional authority of the State legislature in structuring the regulatory and judicial institutions of the State unconstrained by the doctrine of separation of executive and judicial powers applicable to federal courts".[12]

20. The description of a process to resolve controversies outside of the court system as involving State judicial power serves no constitutional purpose because the boundary of judicial power does not reflect a boundary of State legislative power. What may be relevant is not whether the power is judicial power but whether the conferral of a power or function on a State court undermines its institutional integrity. Of course, the Commonwealth can only invest federal jurisdiction in courts. The States are under no such restriction in respect of State jurisdiction.

21. The reasoning that there must be a s 75(iv) "matter" whenever a State tribunal exercises a power in a dispute between residents of different States (which if it were exercised in

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8 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591 at 612 [49] (Gaudron J).

9 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 (***McBain***) at 404-405 [61] (Gaudron and Gummow JJ).

10 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 325 (Jacobs J); *Croome v Tasmania* (1997) 191 CLR 119 at 136 (Gaudron, McHugh and Gummow JJ); *Gould v Brown* (1998) 193 CLR 346 at 420-421 [118] (McHugh J) and 440-441 [178] (Gummow J).

11 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***) at 136-137 (Gummow J); *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343 at 368 [57] (Hayne, Crennan, Kiefel and Bell JJ); *Nguyen v The Queen* (2016) 311 FLR 289 at 341-343 [187]-[192] (Tate JA).

12 *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343 at 362 [35] (French CJ).

a court would be a judicial power) assumes a congruence between State and federal judicial power which is not reflected in the Constitution. When considering whether, and to what extent, a State tribunal regime reflects a constitutional "matter" it is not possible to simply transpose the "tripartite inquiry" explained by Gaudron and Gummow JJ in *McBain* as if the tribunal were a court.[13] That analysis holds true for federal judicial power because it can only be exercised by a court – but that is not the case for the States.

22. Moreover, the legislative decision to authorise a tribunal to exercise State jurisdiction rather than a court will often reflect a deliberate and legitimate policy to avoid some of the more formal aspects of court process (for example, dispensing with the rules of evidence, enabling the tribunal to adopt inquisitive rather than adversarial processes, and in the form of relief it may grant). Sections 75 and 77 do not deny to the States the power to achieve that outcome in relation to residents of other States. Nor do they require that every time a State does so, the State simultaneously vests this Court with original jurisdiction with respect to the dispute.

The jurisdiction with respect to the matter must belong to a court of a State

23. In *Baxter*, Isaacs J expressed the view that the jurisdiction that "belongs to" a State Court within the meaning of s 77(ii) is the authority it possesses to adjudicate under the State Constitution and State laws, whereas the jurisdiction "invested in" a State Court is the authority to adjudicate that is vested in the Court by the Commonwealth Parliament.[14] This approach was approved by Gleeson CJ, Gummow and Hayne JJ in *MZXOT*.[15]

24. The area of exclusivity that can be mandated by a law under s 77(ii) does not extend to the universe of State jurisdiction. The operation of s 77(ii) does not deny the existence of State jurisdiction in a suit which could not be tried in the exercise of federal jurisdiction.[16] Nor does s 77(ii) proceed on the premise, that unless rendered exclusive under a law made under s 77(ii) the courts of the State had existing jurisdiction to adjudicate on each of the 9 matters in ss 75 and 76.[17] Relevantly, it only extends to State

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13 (2002) 209 CLR 372 at 405 [62].
14 (1907) 4 CLR 1087 at 1142.
15 (2008) 233 CLR 601 at 619 [23].
16 *MZXOT* (2008) 233 CLR 601 at 619 [23]; *Williams v Hursey* (1959) 103 CLR 30 at 88-89 (Taylor J) and 113 (Menzies J).
17 *MXZOT* (2008) 233 CLR 601 at 617-621 [16]-[31] (Gleeson CJ, Gummow and Hayne JJ).

jurisdiction that belongs to the courts of the State.

25. There are some matters in State jurisdiction arising under State law that never "belonged to" the courts of the State at all. The anti-discrimination jurisdiction of NCAT is such an example. The jurisdiction is conferred by statute and concerns a statutory regime governing a field of conduct that was never within the ambit of the Supreme Court of New South Wales. The jurisdiction to decide complaints of contraventions of the *Anti-Discrimination Act* is not now (and never has been) properly described as *belonging to* a State Court.

26. In Victoria's submission, there is a harmony between ss 75 and 77 in the sense that a matter within the jurisdiction that "belongs to" the courts of the States would fall within s 77(ii), because the procedural machinery of such matters would remain intact and operative if the matter were to be litigated in the High Court. In that context, both the High Court's jurisdiction (under s 75) and the state jurisdiction (belong to the courts) are exercised in the integrated court system contemplated by Ch III. State tribunals that are not courts do not form part of that integrated system.

27. In other words, the practicalities of litigating such a matter in the Supreme Court of New South Wales would not relevantly differ from the practicalities of litigating the same matter in the High Court. But the same cannot be said for the complaints underlying the NCAT proceedings at issue here. The jurisdiction of NCAT to determine those complaints is not a jurisdiction that "belongs to" the courts of New South Wales. The jurisdiction and procedural machinery giving effect to it is peculiar to, and suited to, NCAT (not a court). How would a person wanting to invoke the High Court's jurisdiction in relation to such a matter go about doing so? As discussed further below, the *Anti-Discrimination Act* establishes a process for making a complaint to the Anti-Discrimination Board of NSW. Complaints can then be referred to NCAT. At what juncture would it be said that a complaint by Mr Burns could be commenced in the High Court? If the answer is thought to be the point at which the complaint is to be referred to NCAT, again the question is asked – how precisely is this to occur, given that the *Anti-Discrimination Act* solely contemplates referral to NCAT, not a court of any kind.

28. These considerations support Victoria's submission that the jurisdiction of State

tribunals of the kind at issue in these proceedings (which jurisdiction is conferred by State statute and involves determination of questions of statutory norms of conduct not justiciable in a State Court) is not jurisdiction that "belongs to" the courts of the States for the purposes of s 77(ii) of the Constitution. Looking at the structure of the Constitution and the constitutional purpose of ss 75 and 77, this conclusion is entirely appropriate.

29. A State can vest jurisdiction in tribunals without giving rise to parallel jurisdiction in the High Court without violence to Chapter III. First, the combination of ss 75, 76 and 77 are not exhaustive; there are aspects of jurisdiction that fall outside its reach. Moreover, the diversity jurisdiction is not founded on a guarantee of federal due process. Such a conclusion would mandate a strict separation of powers at State level at least in diversity jurisdiction. That is because the State would be unable to confer jurisdiction in relation to a tribunal without also giving rise to the exercise of federal judicial power in the High Court under s 75 and empowering the Commonwealth to provide pursuant to s 77(ii) that the matters must be dealt with exclusively in federal courts.

30. In *Brandy v Human Rights and Equal Opportunity Commission*, this Court held that the process of registering a determination of the Human Rights and Equal Opportunity Commission meant that the Commission purportedly exercised judicial power.[18] The Commonwealth legislation amounted to a conferring of jurisdiction with respect to a matter on a body other than a court and was therefore invalid.[19] The non-consensual ascertainment and enforcement of rights in issue between private parties required an exercise of federal judicial power.[20] The requirement stems from the structural imperative of Ch III as explained in *R v Kirby; Ex parte Boilermakers' Society of Australia*.[21]

31. Conferral by State legislation of a cognate system on a State tribunal is valid. It does not entail the conferral of jurisdiction with respect to a matter within the meaning of s 75 of the Constitution simply because it involves an adjudication of a dispute between parties that are from different States. Unlike at the Commonwealth level, the

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18 (1995) 183 CLR 245 (***Brandy***) at 264 (Mason CJ, Brennan and Toohey JJ) and 271 (Deane, Dawson, Gaudron and McHugh JJ).

19 *Brandy* (1995) 183 CLR 245 at 269 (Deane, Dawson, Gaudron and McHugh JJ).

20 *Duncan v New South Wales* (2015) 255 CLR 388 at 407 [41] (the Court).

21 (1956) 94 CLR 254, especially at 269-270 (Dixon CJ, McTiernan, Fullager and Kitto JJ).

non-consensual ascertainment and enforcement of rights in the State jurisdictions does not in any case require the exercise of State judicial power by a court. Were it otherwise, there would be an implied strict separation of powers at the State level with respect to the items of s 75. Such a separation is not required or intended by Ch III.[22]

D. Sections 38, 39 of the Judiciary Act

32. Drawing on the power conferred under s 77(ii) of the Constitution, s 38 of the *Judiciary Act* sets out five categories of matters in which the High Court's jurisdiction is exclusive. The five categories draw upon, but do not precisely correspond with, the five categories of the High Court's original jurisdiction provided for by s 75. The High Court's exclusive jurisdiction pursuant to s 38 of the *Judiciary Act* is narrower than the original jurisdiction conferred by s 75. Section 38 is subject to ss 39B and 44 of the *Judiciary Act*. The former provision is directed to the scope of the original jurisdiction of the Federal Court of Australia, while the latter provides for the remittal of matters by the High Court of Australia to other courts.

33. Having set the bounds of the High Court's exclusive jurisdiction in s 38, the next provision in the *Judiciary Act* (s 39) deals with "federal jurisdiction of State Courts in other matters". It is clear from the heading of s 39, as well as its text, that it is subject to s 38 in the sense that it is concerned with the balance of the High Court's jurisdiction – in other words, it is directed to that part of the High Court's jurisdiction that is not exclusive by reason of s 38. In relation to this jurisdiction (the jurisdiction of the High Court that is not exclusive by reason of s 38), s 39(1) provides that it "shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section". Subsection (2) then invests in the several Courts of the States (and within the limits of their jurisdictions) "federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it" but does so subject to what are expressed to be "conditions and restrictions".

34. From the perspective of a State Court, what s 39 does is two-fold. *First*, it makes exclusive of State Courts the High Court's jurisdiction under ss 75 and 76 of the

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22 *Kable* (1996) 189 CLR 51 at 136-137 (Gummow J); *The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343 at 368 [57] (Hayne, Crennan, Kiefel and Bell JJ); *Nguyen v The Queen* (2016) 311 FLR 289 at 341-343 [187]-[192] (Tate JA).

Constitution (to the extent not already dealt with by s 38). *Secondly*, it invests in the State Court *federal jurisdiction* with respect to those matters, but on conditions. Shortly stated, some of the jurisdiction of a State Court is taken away by s 39, but is then invested again, although by that (conditional) investiture is transformed into federal jurisdiction. In *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*, French CJ, Kiefel, Bell, Gageler and Gordon JJ described the "settled effect" of s 39(2) as follows: "where a matter which would otherwise be within the jurisdiction of a State court answers the description of a matter within s 75 or s 76 of the *Constitution*, the State court is invested with federal jurisdiction with respect to that matter to the exclusion of State jurisdiction under s 109 of the *Constitution*".[23]

35. What s 39 does not do is impact in any way the jurisdiction of State bodies that are not "Courts of a State". Section 39 is expressly only concerned with the jurisdiction of "the several Courts of the States". This is borne out not only by the language of subsections (1) and (2), which refers to the jurisdiction of "the several Courts of the States", but also by reason of the fact that the conditions and restrictions imposed by s 39(2) are only referable to courts. Section 39(2)(a) proscribes appeals to Her Majesty in Council, and in so doing refers to appeals from "a decision of a Court of a State, whether in original or in appellate jurisdiction". It makes no sense to speak of the original or appellate jurisdiction of a non-judicial body. Moreover, it was not possible to appeal from a decision of a non-judicial body to Her Majesty in Council.[24] In the same way, in providing for the grant of special leave to appeal to the High Court from "any decision of any Court or Judge of a State" notwithstanding any prohibition under State law, s 39(2)(c)'s focus is decisions of "Courts" and "Judges", not decisions of tribunals or other non-judicial bodies (the decisions of which could never be granted special leave to appeal to the High Court).

36. Accordingly, statements to the effect that "no State jurisdiction can exist" with respect to matters falling within the High Court's jurisdiction[25] or that "there is no State

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23 (2015) 258 CLR 1 at 21 [53] (citing *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471, 479 and *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7]).

24 Appeals lay from State courts (as of right and by special leave): see A F Mason, "The Limitation of Appeals to the Privy Council" (1968) 3 *Federal Law Review* 1 at 2-4.

25 *Baxter* (1907) 4 CLR 1087 at 1142, cited in *MZXOT* (2008) 233 CLR 601 at 619 [23] (Gleeson CJ, Gummow and Hayne JJ).

jurisdiction in diversity actions at all"[26] can only be understood as referring to State jurisdiction as exercised by State courts. To the extent that a State tribunal exercises State judicial power to determine issues arising under State law, there remains State jurisdiction and that jurisdiction is untouched by ss 38 and 39(1) of the *Judiciary Act*.

E. Why NCAT can hear and determine a diversity dispute

37. Before the New South Wales Court of Appeal, it was agreed between the parties and the intervening Attorneys-General that NCAT was not a "court of the State" within the meaning of Chapter III of the Constitution, and that NCAT was exercising judicial power in hearing and determining Mr Burns's complaints.[27] There is no reason to doubt the accuracy of the first proposition. The second proposition is a distraction if it invites a simple transposition of the State cause of action to federal jurisdiction.

38. NCAT is a creature of a statute enacted by the Parliament of New South Wales, specifically the *Civil and Administrative Tribunal Act 2013* (NSW) (the ***CAT Act***). By s 28(1) of the *CAT Act*, NCAT has jurisdiction and functions as conferred or imposed on it by the *CAT Act* or any other legislation.

39. Mr Burns's original complaints were made to the Anti-Discrimination Board of NSW, and were complaints of contraventions of s 49ZT of the *Anti-Discrimination Act*.[28] Under s 89A of the *Anti-Discrimination Act*, a complaint of contravention of the Act or regulations can be made to the President of the Anti-Discrimination Board of NSW. Various provisions in the *Anti-Discrimination Act* permit the referral of a complaint to NCAT.[29] Mr Burns's complaints were referred to NCAT.[30]

40. Under Division 3 of Part 9 of the *Anti-Discrimination Act*, NCAT is conferred functions with respect to complaints. For example, NCAT may dismiss a complaint (in whole or in part) or find the complaint substantiated (in whole or in part).[31] Notably, Division 3 uses the language of NCAT's "functions" with respect to complaints, rather than "jurisdiction".

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26 G Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed, 2016), p 135.
27 [2017] NSWCA 3 at [29]-[30]. All references to this decision are to the judgment of Leeming JA with whom Bathurst CJ and Beazley P agreed.
28 [2017] NSWCA 3 at [4].
29 See, e.g., ss 93A, 93B, 93C and 95.
30 [2017] NSWCA 3 at [4].
31 *Anti-Discrimination Act*, s 108(1). See also s 102.

41. Although the focus of the reasons of the Court of Appeal is on s 77 of the Constitution and s 39 of the *Judiciary Act*, the reasoning proceeds on an anterior, and it is submitted erroneous, premise namely that s 75 is relevantly engaged.

42. The first step is to recall that the *Anti-Discrimination Act* does the following things:

(a) It sets up a norm of conduct by proscribing certain conduct based on protected attributes. The norm of conduct is peculiarly a product of statute. It has no common law analogue. As a matter of plain language the proscription would extend to residents of other states;

(b) It provides for a form of dispute resolution comprising: the making of a complaint, a referral, conciliation, and ultimately determination by a tribunal with powers to make various orders. Some orders may be registered in the Supreme Court in aid of enforcement;

(c) NCAT is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice;[32] and

(d) The Courts of NSW (within the meaning of Ch III) are not involved in the process other than through the mechanism of registration of non-monetary[33] and monetary[34] judgments and through their appellate and supervisory jurisdiction.

43. If the relevant "matter" for the purposes of s 75 is the determination of the complaint, it must follow that the complaint could be brought and determined in the original jurisdiction of the High Court notwithstanding that the rights and liabilities are entirely statutory and are only cognisable in a State tribunal. However, the determination of the complaint is not a "matter".

There is no "matter"

44. Victoria's principal submission is that s 75(iv) is not engaged at all because the complaints underlying the NCAT proceedings are not "matters". The existence of a "matter" is assumed, without analysis, by the Commonwealth. In Victoria's submission,

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32 *CAT Act*, s 38 (subject to certain exceptions which are presently irrelevant).
33 *Anti-Discrimination Act*, s 114.
34 *CAT Act*, s 78 (the operation of which is preserved by s 114(4) of the *Anti-Discrimination Act*).

the complaints are not "matters" within the meaning of s 75 because they are not justiciable in a Court of the State of New South Wales – they are "not controversies which *might* come before a Court of Justice".[35] The proceedings in NCAT arise under a State statute and involve complaints that are only able to be resolved by way of the particular process established under the *Anti-Discrimination Act*. Jurisdiction to determine complaints referred by the President of the Board is conferred on NCAT, not the Supreme Court of New South Wales. Moreover, the substance of Mr Burns's complaints forming the subject of the NCAT proceedings (namely, contraventions of the *Anti-Discrimination Act*) are not matters which could otherwise be litigated in the Supreme Court of New South Wales or any other court of that State. Although proceedings in NCAT are subject to the supervision of the Supreme Court of New South Wales, the determination of complaints of contraventions of the *Anti-Discrimination Act* is not itself a justiciable matter in a Court of the State of New South Wales.

45. The creation of the norm of conduct, the forum, the method of dispute resolution (including that NCAT is not bound by the rules of evidence) and the available remedies (including as here the ordering of an apology) are all of a piece. They are not severable yet could not be applied in their entirety by this Court.[36] The solution lies in the fact that complaints of the kind made by Mr Burns pursuant to the *Anti-Discrimination Act* are not matters that are capable of being resolved in a court.

46. Because s 75 is not engaged in relation to the NCAT proceedings, s 77(ii) and s 39 of the *Judiciary Act* are simply not relevant. If, contrary to Victoria's principal submission, the NCAT proceedings are "matters" and s 75 is engaged, there is nevertheless no basis upon which to conclude that NCAT could not determine Mr Burns's complaints. Victoria's submissions, in the alternative, are set out below.

47. That is not to say that there can be no matter relating to the complaint. For example, although the hearing and determination of the merits of the complaint must occur in NCAT, the Supreme Court of New South Wales has a supervisory jurisdiction and may in a properly constituted suit determine whether or not NCAT has exceeded or

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35 *Palmer* (2017) 91 ALJR 325 at 332-333 [26] (Kiefel, Keane, Nettle and Gordon JJ) (emphasis in *Palmer*), citing *South Australia v Victoria* (1911) 12 CLR 667 at 675; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 523-524 [24]; *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 14 [50].

36 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134-135 [24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

threatened to exceed its jurisdiction. That jurisdiction belongs to a court of the State and, assuming diversity, would also give rise to a matter in the original jurisdiction of the High Court.

The inconsistency argument

48. The Court of Appeal decided that NCAT could not determine Mr Burns's complaints because a State law purporting to authorise a tribunal to exercise judicial power to determine matters between residents of two States is "inconsistent with the conditional investment by s 39(2) read with s 39A of the *Judiciary Act* of *all* such jurisdiction in State courts".[37] For the following reasons, Victoria submits the inconsistency argument is flawed and should not be accepted by this Court.

49. Justice Leeming described the effect of s 39 as follows: "to take away existing jurisdiction of State courts in respect of the classes of matters identified in ss 75 and 76 and to invest State courts *conditionally* with federal jurisdiction in all such matters".[38] Justice Leeming's analysis goes further, however, and extends the operation of s 39 beyond "State courts" to include State tribunals such as NCAT. As has already been stated, the argument that s 39 should not be read as referring to bodies other than State Courts is firmly anchored in the text of s 39. Both subsections (1) and (2) of s 39 refer to the "several Courts of the State". The language is not broadened to include, for example "Courts *or Tribunals* of a State". Although in some cases it is difficult to determine whether a particular body is – as a matter of substance – a tribunal or a court, the concepts are different and are not interchangeable. Indeed, the distinction between the two concepts underlies decisions such as *Trust Company of Australia Ltd (t/as Stockland) v Skiwing Pty Ltd (t/as Café Tiffany's)*[39] (holding that the Administrative Decisions Tribunal (NSW) was not a court of a State), and *Qantas Airways Ltd v Lustig*[40] (holding that VCAT is not a court of a State). Because a "Court of a State" is not the same thing as a "Tribunal" of a State, that s 39 refers to the former concept but not the latter is a strong textual indicator in favour of the view that s 39 does not apply to State tribunals.

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37 [2017] NSWCA 3 at [95] (emphasis in original).
38 [2017] NSWCA 3 at [23] (emphasis in original).
39 (2006) 66 NSWLR 77.
40 (2015) 228 FCR 148.

50. Justice Leeming acknowledged the "sound textual base" for the argument that s 39 should not be read as extending to tribunals.[41] His Honour's principal reason for rejecting it was based upon the view that the "effect and purpose of s 39 of the *Judiciary Act* is that where any matter identified by ss 75 or 76 is determined by a court, that will occur by the exercise of the judicial power of the Commonwealth, and be subject to an appeal to the High Court".[42] His Honour then reasoned that it would "alter, impair or detract from the conditional and universal operation of federal law" for a State law to permit the determination of a matter identified by ss 75 or 76 by the exercise of judicial power but not subject to an appeal to the High Court "on the terms mandated by s 39(2)".[43]

51. The difficulty with this argument is that it presupposes that s 39 – properly construed – applies beyond "Courts of a State" to include bodies such as Tribunals. Yet, this is the very question to be resolved. His Honour appears to have engaged in circular reasoning: he adopts a broad view of the purpose and operation of s 39 as the starting point, and then rejects an argument that the provision should be more narrowly read not by applying the orthodox principles of statutory construction but by saying that the narrow construction "would alter, impair or detract" from the broad construction (which of course it would). With respect, the real issue is whether s 39 should be understood (as a matter of statutory construction) as applying only to Courts of States, or more broadly to other bodies such as State tribunals. This is a question of construction and cannot be avoided by using the s 109 analysis (which only assists if one assumes s 39 should be broadly construed).

52. Justice Leeming also rejects the "narrow" construction of s 39 on the basis that it would mean a State tribunal determining a dispute would be exercising State judicial power, but if the dispute went on to be determined by a State Court (say, on appeal or by way of judicial review), the State Court would be exercising federal jurisdiction.[44] In Victoria's submission, there is no constitutional difficulty with that result.[45] Nor is there any difficulty in the fact that the "narrow" construction of s 39 might lead to a situation

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41 [2017] NSWCA 3 at [78].
42 [2017] NSWCA 3 at [78].
43 [2017] NSWCA 3 at [78].
44 [2017] NSWCA 3 at [79].
45 *Ruhani v Director of Police* (2005) 222 CLR 489 at 499-500 [9]-[11] (Gleeson CJ), 511-512 [51]-[52] (McHugh J), 528 [108], [110] (Gummow and Hayne JJ).

where a legal practitioner unable to appear before the State tribunal could then appear in any subsequent hearing in a State court.[46] This possibility may be seen as an inconvenience but it cannot be relied upon as a reason to ignore the fact that s 39 of the *Judiciary Act* refers to State "Courts" but not State tribunals.

53. In any event, s 39 of the *Judiciary Act* cannot validly operate to exclude the jurisdiction of State tribunals. While Ch III of the Constitution may vest the entire subject-matter of legislative power with respect to the conferral and exercise of federal jurisdiction exclusively in the Commonwealth Parliament,[47] State Parliaments retained the capacity to legislate with respect to matters contained in ss 75 and 76 of the Constitution.[48] The Commonwealth's only power to regulate the exercise of federal jurisdiction is s 51(xxxix)[49] but "this gives it no power, express or implied, to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because that controversy is or has come within the purview of Ch III".[50]

54. Subsections 39(1) and (2) (like s 79) of the *Judiciary Act* are supported by s 51(xxxix) of the Constitution. That legislative power is concurrent, not exclusive. State laws regulating the conferral and exercise of federal jurisdiction will be invalid under s 109 of the Constitution.[51] Nevertheless, s 39 can only render an inconsistent State law invalid, either expressly or impliedly, to the extent that it itself is empowered by s 51(xxxix). Just as that placitum gives no power to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the controversy is (or may) come within the purview of Ch III, it equally gives no power to confer on such parties an immunity from State laws conferring rights and liabilities. Section 109, operating on s 39 of the *Judiciary Act*, cannot vacate a field that a Commonwealth law enacted pursuant to s 51(xxxix) cannot occupy.

The implied limitation on State legislative power

55. State Parliaments are not subject to an implied limitation on the exercise of their legislative power, which limitation operates to prevent the conferral of judicial power

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46 [2017] NSWCA 3 at [79].
47 *Rizeq* (2017) 91 ALJR 707 at 720 [61] (Bell, Gageler, Keane, Nettle and Gordon JJ).
48 *Rizeq* (2017) 91 ALJR 707 at 721 [67] (Bell, Gageler, Keane, Nettle and Gordon JJ).
49 *Rizeq* (2017) 91 ALJR 707 at 720 [59] (Bell, Gageler, Keane, Nettle and Gordon JJ).
50 *Rizeq* (2017) 91 ALJR 707 at 717 [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).
51 *Rizeq* (2017) 91 ALJR 707 at 721 [67] (Bell, Gageler, Keane, Nettle and Gordon JJ).

in respect of the matters identified in ss 75 and 76 of the Constitution on a body that is not a State court.

56. Section 16 of the *Constitution Act 1975* (Vic) (the **Victorian Constitution**) provides that "the Parliament shall have power to make laws in and for Victoria in all cases whatsoever". In *Mobil Oil Australia Pty Limited v Victoria*,[52] Gaudron, Gummow and Hayne JJ stated that the power to make laws "in and for Victoria" is a plenary power, and the words "in and for Victoria" should not be read as words of limitation.[53] Their Honours went on to state that it is now settled law that the "legislation of a State Parliament 'should be held valid if there is any real connection – even a remote or general connection – between the subject matter of the legislation and the State'".[54]

57. Accordingly, absent any impediment arising under the Constitution or by reason of s 109 of the Constitution, a State Parliament would be empowered to legislate to confer judicial power on a tribunal (or any other body that is not a court) to determine "diversity" matters so long as there existed a real connection between the subject matter of the legislation and the State of Victoria.[55]

58. The implication is said to be required "as a matter of logical or practical necessity" to protect "those features of the institutional landscape envisaged by Ch III".[56] The Commonwealth contends the implication prevents the "fragmentation" of the integrated judicial system.[57]

59. Victoria submits that the test to be applied to whether the implication advanced by the Commonwealth ought be drawn is that identified by Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*,[58] because the implication is structural rather than textual. In *ACTV*, Mason CJ said: "where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure."[59] Thus,

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52 (2002) 211 CLR 1 (***Mobil***).

53 (2002) 211 CLR 1 at 33 [46] (citing *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 (the Court)). See also at 54 [113] (Kirby J).

54 (2002) 211 CLR 1 at 34 [48] (citing *Pearce v Florenca* (1976) 135 CLR 507 at 518 (Gibbs J)).

55 See, e.g., *Ex parte Bell* (1903) 3 NSWSR 449 at 451 (Stephen ACJ, G B Simpson J), referring to the circumstances in which the Albury District Court had jurisdiction over non-residents.

56 Commonwealth's Submissions at [23].

57 Commonwealth's Submissions at [24].

58 (1992) 177 CLR 106 (***ACTV***).

59 (1992) 177 CLR 106 at 135.

in order to accept the implication advanced by the Commonwealth, the Court would need to be satisfied that it is logically or practically necessary for the preservation of the integrity of the structural feature of the Constitution relied upon by the Commonwealth, namely the integrated Australian judicial system. In Victoria's submission, there is nothing before the Court to warrant such a conclusion. There is nothing antithetical to the integrated judicial system in permitting a State tribunal (not a court) from exercising judicial power to determine diversity matters.

60. In this regard, it is relevant to consider the Court's decision in *Mobil*. The plaintiff in *Mobil* contended that "an implication from federalism prohibits State legislation which, if given extra-territorial effect, would affect the relationship between another State or a Territory and its residents or would determine the legal consequences of actions in another State or Territory".[60] The argument was rejected by the Court.[61]

61. Of relevance to the present case is the Court's rejection of that part of the plaintiff's argument which posited that a State Parliament cannot enact legislation which would determine the legal consequences of actions in another State or Territory. In this regard, Gleeson CJ stated:[62]

> There is nothing either uncommon or antithetical to the federal structure, about legislation of one State that has legal consequences for persons or conduct in another State or Territory.

62. The same conclusion applies here. There is nothing antithetical to the federal structure – in particular the integrated judicial system – about State legislation authorising a State tribunal to exercise State judicial power to determine diversity matters, so long as the relevant connection to the State exists.

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60 (2002) 211 CLR 1 at 26 [16] (Gleeson CJ).

61 (2002) 211 CLR 1 at 26 [16] (Gleeson CJ), 36 [57], 38 [62] (Gaudron, Gummow and Hayne JJ), 61 [130] (Kirby J).

62 (2002) 211 CLR 1 at 26 [16] (Gleeson CJ).

PART VI: ESTIMATE

63. Victoria estimates it will require approximately 20 minutes for the presentation of its oral submissions.

Dated: 24 August 2017

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