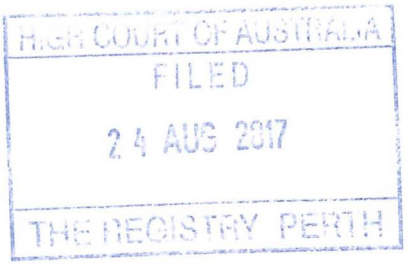
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S183 of 2017**

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 FOR COMMONWEALTH
Third Respondent

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

B E T W E E N:

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

Date of Document: 24 August 2017

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S186 of 2017**

B E T W E E N:

ATTORNEY-GENERAL FOR NEW SOUTH WALES
Appellant

AND

GARRY BURNS
First Respondent

TESS CORBETT
Second Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S187 of 2017**

B E T W E E N:

ATTORNEY-GENERAL FOR NEW SOUTH WALES
Appellant

AND

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Third Respondent

NEW SOUTH WALES CIVIL AND ADMINISTRATIVE TRIBUNAL
Fourth Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S188 of 2017**

B E T W E E N:

STATE OF NEW SOUTH WALES
Appellant

AND

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Third Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Fourth Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia (**Western Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Appellants.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. Western Australia accepts and adopts the statement of relevant constitutional and legislative provisions set out by the Appellant in S186 of 2017 (**New South Wales**).

PART V: SUBMISSIONS

5. Western Australia makes submissions in relation to:

   (a) the issue in the Notice of Contention raised by the Attorney General for the Commonwealth (**Commonwealth**), namely, whether there is an implied limitation on State power the effect of which is that a State law which 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?[1]

   (b) the issue in New South Wales' appeal, namely, whether a State tribunal that 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*?

6. Western Australia submits that each question should be answered "No".

The Commonwealth's Notice of Contention – Implied Constitutional Limitation

7. Western Australia adopts the submissions of New South Wales (in its submissions in S186 of 2017 dated 27 July 2017, at [17]-[38]) in relation to this issue and makes the following supplementary submissions.

8. The implied limitation contended for in the Commonwealth's Notice of Contention is expressed to extend to State laws that purport "to confer judicial

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[1] This is the form in which the Commonwealth's Notice of Contention poses the issue. For reasons set out below, however, Western Australia submits that the issue raised in the present appeals is of narrower compass and concerns only the conferral of State judicial power in relation to disputes between residents of different States.

power in respect of ***any*** of the matters identified in ss 75 and 76 of the *Constitution*" (emphasis added). For the purposes of the present appeals, it is submitted, posed in this way, the issue is too broad and, by conflating all of the matters in ss 75 and 76, it has the potential to distract from the issues in relation to the jurisdiction of the New South Wales Civil and Administrative Tribunal (**NCAT**)[2].

9. The only issue that must be determined, arising from the Commonwealth's Notice of Contention, is whether a State law may confer State judicial power (or jurisdiction) on a State tribunal in respect of matters between "residents of different States". That is, whether a State may confer State diversity jurisdiction on a body other than a Court.

10. The distinction is significant because there is no suggestion in the present case that the State law purports to confer, or that NCAT was purporting to exercise, "the judicial power of the Commonwealth". The only judicial power (or jurisdiction) purported to be conferred, or exercised, was ***State*** judicial power (or jurisdiction)[3], *albeit* in relation to a matter between residents of different States.

11. The position may be different, were it suggested that the State law purported to confer judicial power (or jurisdiction) in relation to a matter that would, necessarily, involve the exercise of the judicial power of the Commonwealth (such as a writ of mandamus against an officer of the Commonwealth, within the meaning of s 75(v))[4]. That issue, however, does not arise and need not be determined[5].

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2 References to NCAT in these submissions include the since replaced Anti-Discrimination Tribunal (**ADT**) that made the original orders the subject of the proceedings in S183 of 2017 and S186 of 2017. The issue as to the jurisdiction of the ADT is, it is submitted, relevantly identical.

3 *Rizeq v Western* Australia (2017) 91 ALJR 707 per Bell, Gageler, Keane, Nettle & Gordon JJ at [50], citing *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 per Isaacs J at 1142.

4 *MZXOT v Minister for Immigration* (2008) 233 CLR 601 per Gleeson CJ, Gummow & Hayne JJ at 619-620 [26].

5 *Knight v Victoria* [2017] HCA 29 at [32].

12. Accordingly, for the purposes of the present appeals, the Commonwealth's essential contention is that the Commonwealth *Constitution*, immediately and by direct operation, removed from the State Parliaments the power to confer judicial power on a body other than a court in relation to a matter between residents of different States, regardless of whether:

    (a) the matter was entirely a matter arising under State law (involving no application of a law of the Commonwealth);

    (b) the authority to adjudicate upon that matter was conferred by State law; or,

    (c) the Commonwealth Parliament had made any provision for the adjudication of that matter.

13. It is the concomitant of that contention that all existing laws of the States that so provided (such as the *Crown Lands Act* 1884 (NSW)[6]), were, upon Federation, rendered *pro tanto* invalid.

14. Understood in this light, it is submitted, it is apparent that the Commonwealth's broad contention goes well beyond its identified object of achieving the "exclusiveness of the jurisdiction (in the sense of the authority to adjudicate) of a federal court" (see Commonwealth, at [30]). It, rather, posits an area of legislative incompetence, the result of which might be the absence of *any* jurisdiction (in the sense of the authority to adjudicate), State or Commonwealth[7].

15. A constitutional limitation of that reach, it is submitted, cannot be justified by the text or structure of the *Constitution*.

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6 See *Minister for Lands v Wilson* [1901] AC 315 especially at 323 (Privy Council).

7 For example, according to the Commonwealth's contention, even in the absence of any Commonwealth legislation conferring jurisdiction pursuant to s 76(iii) (i.e. Admiralty or maritime jurisdiction), a State would be incompetent to confer such jurisdiction on any person or body other than a "court of the State". As Quick & Garran observed, admiralty jurisdiction in New South Wales and Victoria at the time of Federation was not exercised by a Court "of" a State within the meaning of s 73 or s 77 of the Constitution (but by Imperial Courts established by Commission of the Admiralty) (see Quick & Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, (2015 Edition), page 799).

16. First, insofar as "exclusiveness" (or exclusivity) is concerned, Chapter III is only concerned to confer legislative power on the Commonwealth Parliament to provide for such exclusivity. Nothing in its text or structure evinces an intention to *effect* any exclusivity (let alone to deprive a State of legislative competence that it previously had) by operation of the *Constitution* itself[8].

17. That the *Constitution* itself did not create such exclusivity, simply by the conferral of jurisdiction on the High Court (under s 75) or the provision for further jurisdiction to be so conferred (under s 76), is supported by the general statutory presumption against ousting or withdrawing existing jurisdiction[9]. This principle was well settled at the time of Federation, and expressly relied upon by Quick & Garran in relation to the construction of s 77 of the *Constitution*[10]. So much was also recognised in the convention debates[11].

18. As observed by Leeming JA in the decision below[12] at [61]-[63], the recognition in the *Constitution* of jurisdiction which "belongs to" State courts, is an express acknowledgement that no direct exclusivity (or withdrawal of State legislative power) was intended by the *Constitution*[13]. Given that the *Constitution* does not directly oust the existing jurisdiction of any State courts, with which it deals expressly, less still should it be supposed to have intended to do so in relation to tribunals, in relation to which it makes no reference at all.

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8 *Rizeq v Western* Australia (2017) 91 ALJR 707 per Edelman J at [142].

9 *Shergold v Tanner* (2002) 209 CLR 126 per Gleeson CJ, McHugh, Gummow, Kirby & Hayne JJ at [34].

10 See Quick & Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, (2015 Edition) at page 799: "This construction is strengthened by the general presumption against ousting jurisdiction, or creating new jurisdictions. (See Maxwell, Interpr. Of Statutes, Chap V)."

See also at 802: "The Constitution, whilst it confers jurisdiction, or enables jurisdiction to be conferred, on the federal courts in certain cases, does not take away the pre-existing jurisdiction of the State courts in any of those cases".

11 *Official Record of the Debates of the Australasia Federal Convention, Vol. V, Third Session Melbourne 1898*, at page 1894 (Mr Barton).

12 *Burns v Corbett* (2017) 316 FLR 448; [2017] NSWCA 3.

13 *Rizeq v Western* Australia (2017) 91 ALJR 707 per Bell, Gageler, Keane, Nettle & Gordon JJ at [50], [66]-[67]; *MZXOT v Minister for Immigration* (2008) 233 CLR 601 per Gleeson CJ, Gummow & Hayne JJ at 618621 [22]-[30]; *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 per Isaacs J at 1142. See generally, Geoffrey Lindell, *Cowen & Zines's Federal Jurisdiction in Australia* (The Federation Press, 4th ed, 2016) at 43-44, 134-135, 254-257.

19. The Commonwealth's answer to this textual lacuna is that a negative implication must, as a matter of necessity, be derived from s 77(ii) itself (see Commonwealth, at [30]). Absent the negative implication of State legislative incompetence, the Commonwealth submits, "s 77(ii) could not achieve its object".

20. This contention, it is submitted, should not be accepted.

21. First, insofar as it was thought necessary for the Commonwealth to be able to make federal jurisdiction exclusive of "all potentially available sovereign adjudicative authority derived from each of the State polities", the incidental power in s 51(xxxix) would provide an ample basis for such legislative provision[14].

22. Indeed, the existence of an incidental power to legislate as the means by which to render federal jurisdiction exclusive of "all potentially available sovereign adjudicative authority derived from each of the State polities", is more consistent with the *Constitution* as a whole, than is the Commonwealth's proposed area of State legislative incompetence. This is because, as with s 77(ii), such a power ensures that the withdrawal or ouster of State adjudicative authority may only occur in the context of, and incidental to, the conferral of adjudicative authority with a federal source.

23. Again, as Quick & Garran observed, in relation to s 77(ii):

> "The power to make the federal jurisdiction exclusive means the power to take jurisdiction away from the courts of the States, in all cases in which jurisdiction is given to the courts of the Commonwealth. But this power of taking away jurisdiction is confined, not only within the limits of "the matters mentioned in the last two sections," but within the narrower limits of the jurisdiction actually conferred on Federal Courts under those sections. That is to say, the Parliament can at once take away the jurisdiction of the State courts in matters enumerated in sec. 75; but it cannot take away the jurisdiction of the State courts in any matter enumerated in sec. 76 until it has first conferred that jurisdiction upon a

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14 See *Rizeq v Western Australia* (2017) 91 ALJR 707 per Bell, Gageler, Keane, Nettle &Gordon JJ at [45]-[46]. See also: *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 587.

> federal court. The exclusion of the State jurisdiction must be founded on the establishment of the federal jurisdiction."[15]

24. Significantly, it is apparent from this and related passages, that the exclusion of State jurisdiction is not only founded upon the establishment of federal jurisdiction, but is in all cases a matter of Commonwealth legislative *choice*; not constitutional imperative.

25. Indeed, it has been observed that the express legislative power in s 77(ii) for the Parliament to define the extent to which federal jurisdiction shall be exclusive of the jurisdiction which belongs to the courts of the States, merely made explicit that which in the Constitution of the United States had been held to be implied[16]. In that regard, doubts had been raised in the convention debates as to whether the express power was even necessary[17].

26. That an express power in s 77(ii) to exclude the jurisdiction of State 'courts' was considered necessary (as opposed to simply relying upon an implied or incidental power) may be explained by the key role of State courts in the Constitutions of the States. State courts, being essential parts of the governments of the States, could not have their jurisdiction removed by the Commonwealth in the absence of express power. As Brennan & Toohey JJ observed in *Re Tracey; Ex parte Ryan*:

> "State courts are an essential branch of the government of a State and the continuance of State Constitutions by s.106 of the *Constitution* precludes a law of the Commonwealth from prohibiting State courts from exercising their functions. It is a function of State courts to exercise jurisdiction in matters arising under State law."[18]

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15 Quick & Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, (2015 Edition) at page 802-803. Similar observations were made by Inglis Clark, Studies in Constitutional Law (1901), pages 177-178; see *MZXOT v Minister for Immigration* (2008) 233 CLR 601 per Gleeson CJ, Gummow & Hayne JJ at 619620 [26].

16 Quick & Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, (2015 Edition) at page 802.

17 *Official Record of the Debates of the Australasia Federal Convention, Vol. V, Third Session Melbourne 1898*, at page 348-349.

18 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 per Brennan & Toohey JJ at 574-575; see also Mason CJ, Wilson & Dawson JJ at 547.

27. Finally, in this context, the Commonwealth's submission (at [19]) that:

> "The question raised by these appeals is whether that general proposition extends to permit a State Parliament to confer judicial power on a tribunal or an administrative decision-maker in circumstances where it could not confer judicial power with respect to the same matter on its own courts"

with respect, proceeds upon the premise that there is an absence of State legislative power in relation to State courts where there is none.

28. That is, there is no absence of State legislative power to confer judicial power on State courts with respect to matters under State law "between residents of different States". Indeed, so much appears to be accepted by the Commonwealth at [12.2] in relation to the "belongs to" jurisdiction[19]. The inability of State courts to exercise State judicial power in diversity matters does not arise by reason of the absence of State legislative power, but by reason of, and only by reason of, the operation of s 109 in light of s 39 of the *Judiciary Act* 1903.

29. This raises the second of the issues identified above, namely whether that provision brings about the same result in relation to State judicial power in tribunals.

New South Wales' Appeals – No Inconsistency Pursuant to s 109 of the *Constitution*

30. Western Australia adopts the submissions of New South Wales (in its submissions in S186 of 2017 dated 27 July 2017, at [39]-[62]) in relation to this issue and makes the following supplementary submissions.

31. The operation of s 39 of the *Judiciary Act* 1903, it is submitted, is to be understood in light of the operation of the *Constitution* as submitted above. In particular, the effect of s 39 is to be interpreted in light of:

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[19] Whether a State Parliament might not have legislative competence in relation to the matters that, by their "federal" nature are necessarily within exclusive Commonwealth legislative competence, such as the matters in s 75(iii) and (v), as noted above, does not arise in the present appeals.

(a) the power of the Commonwealth Parliament to determine the extent to which federal jurisdiction is to be exclusive of all potentially available sovereign adjudicative authority derived from the States; and

(b) the principle, reflected in the *Constitution*, that the exclusion of State jurisdiction be founded upon the establishment of federal jurisdiction.

32. The focus of s 39 of the *Judiciary Act* 1903, enacted pursuant to s 77(ii) and (iii) of the Constitution, is with the exercise of federal judicial power by State ***courts***. It is unremarkable that, with the investiture of the judicial power of the Commonwealth in such courts by s 39(2), the Commonwealth Parliament made provision as to the exclusive nature of that jurisdiction. So much is consistent with, and contemplated by, the dual operation of s 77(ii) and (iii) and exclusion of the State jurisdiction being founded on the establishment of the federal jurisdiction.

33. Accordingly, inasmuch as s 39 manifests a statutory intention to "take away" the State jurisdiction (the authority to adjudicate) of State Courts in diversity matters, it only does so in the context of the Parliament "giving back" equivalent jurisdiction (authority to adjudicate) derived from the Commonwealth *Constitution* to those same Courts. Without more, nothing changed in relation to those Courts, other than there being a different basis of authority to enforce the same law[20].

34. The reason why, *in relation to courts*, s 39(2) "covers the field", and so engages s 109 of the *Constitution*, is because of the conditions attached to the grant. Absent those conditions, it would have been possible for the same court to exercise either State or federal jurisdiction in relation to the same matter (or indeed, it is submitted, exercise both)[21].

35. The same dual intention, it is submitted, cannot be discerned in relation to State tribunals, other than courts, exercising State jurisdiction. Were the

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20 *Rizeq v Western* Australia (2017) 91 ALJR 707 per Bell, Gageler, Keane, Nettle & Gordon JJ at [53]; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 per Kitto J at 30.

21 *Rizeq v Western* Australia (2017) 91 ALJR 707 per Bell, Gageler, Keane, Nettle & Gordon JJ at [67]; per Edelman J at [198].

Commonwealth Parliament to "take away" such State jurisdiction, it could not give back the authority to adjudicate to the same tribunal as federal jurisdiction. That is, of course, because pursuant to Chapter III, the Parliament can only invest the judicial power of the Commonwealth in a State or federal "court".

36. That is, the Commonwealth Parliament could not remove the State diversity jurisdiction of NCAT, and at the same time invest federal diversity jurisdiction in relation to the same matter in NCAT. If it chose to remove that State diversity jurisdiction it could only invest that jurisdiction, as federal jurisdiction, in a Chapter III court.

37. There is nothing in the *Judiciary Act* 1903 as a whole, or in s 39 in particular, that evinces an intention that the Commonwealth Parliament intended to do so; that is, that the Commonwealth intended to transfer the authority to adjudicate from State bodies such as NCAT to State or federal courts.

38. Section 39(2), for example, invests federal jurisdiction in the several Courts of the States "within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter or otherwise". Those limits are a matter to be determined by reference to State law[22]. Given that the jurisdiction under the *Anti-Discrimination Act* 1977 to determine complaints is, by that Act, conferred, and only conferred, on NCAT[23], it is difficult to see *which* Court of the State (if any) would be invested with any federal jurisdiction to determine a breach of the *Anti-Discrimination Act* 1977.

39. An intention should not be ascribed to the Commonwealth Parliament to oust a pre-existing State jurisdiction to determine whether there has been a breach of State law, while leaving the potential for there to be the absence of any authority to determine that question.

PART VI: LENGTH OF ORAL ARGUMENT

40. It is estimated that the oral argument for the Attorney General for Western

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22 *Ly v Jenkins* (2001) 114 FCR 237 per Sackville J (Moore & Kiefel JJ agreeing) at [82]-[91]; *Commonwealth v Dalton* (1924) 33 CLR 452 per Isaacs & Rich JJ at 456.

23 And not, for example, as a suit able to be tried in a Court of general jurisdiction.

Australia will take 15 minutes.

Dated: 24 August 2017

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