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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Filed on behalf of: The Appellant in S183 and S185

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APPELLANT'S REPLY

Part I

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

Part II:

Scope of the Question in Issue

2. The submissions and the Notice of Contention by the Commonwealth are wrongly directed to State tribunals purporting to exercise judicial power over *all* of the matters in ss. 75 and 76 of the Constitution. That is an unacceptable extension of the debate in these proceedings because it assumes that the nine matters in ss. 75 and 76 are all of the same kind and over which State tribunals may seek to exercise judicial power. This is both exaggerated and distracting.[1] The Appellant makes no such contention.

3. The focus of this contest is much narrower. It is directed only at diversity jurisdiction and, in particular, whether State tribunals such as NCAT retain state diversity jurisdiction in the face of the federal diversity jurisdiction provided for in s. 75(iv) of the Constitution. That was the basis on which special leave was granted.

No Implied Constitutional Limitation

4. There is no implication in the structure or text of the Constitution which mandates that diversity jurisdiction may only be exercised pursuant federal judicial power. State diversity jurisdiction is part of the 'belongs to' jurisdiction of the States recognised in s. 77(ii) of the Constitution. The exercise of the power in s. 77(ii) to define *"the extent to which the jurisdiction of any federal court shall be exclusive of the of that which belongs to or is invested in the courts of the States"* was undertaken by the enactment of the *Judiciary Act 1903*. Section 38 delineated those matters which were exclusive to the High Court. Section 39(1) removed state jurisdiction of State courts in respect of the remaining matters in which the High Court has original jurisdiction and s. 39(2) of the Judiciary Act replaced that with federal jurisdiction. However, as has been properly adopted by New South Wales,[2] Victoria,[3] Queensland,[4] and Western Australia,[5] s. 39 was only directed to 'courts' because that was the limit of the constitutional power in s. 77(ii). There is no proper basis for

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1 The Appellant adopts the Submissions of the Attorney General of Queensland filed 24 August 2017, at [26] and the Submissions of the Attorney General of Western Australia filed 24 August 2017 at [8].

2 Submissions of the Attorney General of New South Wales in S186, filed 27 July 2017 at [34]-[35].

3 Submissions of the Attorney General of Victoria filed 24 August 2017 at [14].

4 Submissions of the Attorney General of Queensland filed 24 August 2017 at [50]-[54].

5 Submissions of the Attorney Genearl of Western Australia filed 24 August 2017 at [7] and [25]-[27].

the exclusivity contended for by the Commonwealth, Gaynor and Corbett, because there is no Constitutional delineation on the exercise of state legislative power in relation to the powers to be exercised by tribunals.

No Inconsistency for the Purposes of s. 109

5. The Appellant adopts the submissions of New South Wales,[6] Victoria,[7] Queensland,[8] and Western Australia[9] on this issue and makes the following further submission.

6. The Commonwealth's argument (adopted by Mr Gaynor and Ms Corbett) rests, in part, on the contention that allowing State tribunals to exercise state diversity jurisdiction gives rise to the fragmentation of the integrated Australian judicial system for the exercise of the judicial power of the Commonwealth. This, it is said, is because the tribunals would not be subject to the same uniform set of rules or incidents of litigation established by the Constitution and the Judiciary Act. The Commonwealth identified the following "incidents of litigation" the absence of which it is said will cause this fragmentation:

   (a) that appeals lie in all cases to the High Court: s. 73(ii) of the Constitution and s. 39(2)(c) of the Judiciary Act;

   (b) that the High Court can order the removal of causes from a federal court or a court exercising federal jurisdiction: s. 40 of the Judiciary Act;

   (c) that a person who is entitled to practise in a federal court has a right of audience in any State or Territory court exercising federal or "federal-type" jurisdiction: s. 55B(4) of the Judiciary Act; and

   (d) that the Attorneys-General of the Commonwealth and the States may intervene in proceedings before the High Court or any other federal, State or Territory court, being proceedings that relate to a matter arising under the Constitution or involving its interpretation: ss. 78A and 78B of the Judiciary Act.

7. In relation to paragraph 6(a), appeals to the High Court are available in relation to a determination made by NCAT under the *Anti-Discrimination Act 1977* (NSW) (**AD Act**). The Appellant refers to his Submissions in Chief in proceedings S185 of 2017 at [27] to [31], [36] and [37] as to the available appellate trajectory to the High Court. As such, the Commonwealth's (repeated) contention that there exists a lacuna in relation to non-jurisdictional errors of law is wrong. That contention is based on *Kirk*, a case concerning the Industrial Relations Commission of NSW. It was the existence of the privative clause in s. 179 of the *Industrial Relations Act 1996* (NSW) which produced the lacuna whereby appellate intervention could only

[6] Submissions of the Attorney General of New South Wales in S186, filed 27 July 2017 at [39]-[62].
[7] Submissions of the Attorney General of Victoria filed 24 August 2017 at [48]-[54].
[8] Submissions of of the Attorney General of Queensland filed 24 August 2017 at [73]-[76].
[9] Submissions of Attorney Genearl of Western Australia filed 24 August 2017 at [30]-[39].

occur by the exercise of the supervisory jurisdiction of the Supreme Court. However, the "lacuna" was specific to the statutory regime of that tribunal. There is no such privative clause in the AD Act or *Civil and Administrative Tribunal Act 2013* (NSW) (**CAT Act**). Rather, there is a statutory right to appeal on questions of law against any decision made by NCAT in the proceedings, subject to leave being granted by the Supreme Court: s. 83(1) of the CAT Act.

8. Further, as to paragraphs 6(a) and (b) above, the Commonwealth overlooks the fact that the Supreme Court of NSW and the High Court both have original jurisdiction in matters falling within s. 75(iv) of the Constitution; as the Commonwealth accepts elsewhere.[10] As to paragraph 6(c), parties may be represented by legal practitioners in NCAT, albeit with leave (which, in practice, is rarely refused): s. 45 of the CAT Act. As to paragraph 6(d) above, that rule would only apply in circumstances enlivening s. 76(i) of the Constitution. It is difficult to see why a power of intervention would necessarily be required in circumstances where NCAT does not have jurisdiction to make a determination in relation to s. 76(1) matters.[11] In any event, there is a right for the Minister and the Attorney General to intervene in proceedings in NCAT: s. 44(4) of the CAT Act.

9. Having said that, the Commonwealth does not and perhaps cannot, point to the manner in which these differing procedural matters would lead to the catastrophic fragmentation of the federal judicial system under Ch III, such that it is necessary to imply the exclusivity of diversity jurisdiction to the federal court system alone.

10. As to the submission at [63] of the Commonwealth that the reference to "tribunal" in the *High Court Procedure Act 1903* should simply be taken to mean "court", that submission should be rejected. There is no basis for that construction in particular because in that Act, the drafters used the phrase "*an inferior Court or tribunal*"; see clause 7 of Order XLI of the Schedule to that Act.

Submissions of Gaynor and Corbett

11. The composite submissions of Ms Corbett and Mr Gaynor filed 31 August 2017 (**Gaynor and Corbett Submissions**):

    (a) were served late;[12]

    (b) seek to adduce further irrelevant facts;[13]

    (c) seek to address matters not in issue between the parties;[14]

[10] Submissions of the Attorney-General for the Commonwealth in reply filed 31 August 2017 at [5].
[11] *Sunol v Collier* (2012) 81 NSWLR 619 at 624, [20].
[12] The composite submissions of Gaynor and Corbett were served late, on 1 September 2017, in breach of the Orders made 24 August 2017.
[13] Composite Submissions of Gaynor and Corbett filed 31 August 2017 at [16]-[33].
[14] Composite Submissions of Gaynor and Corbett filed 31 August 2017 at [38]-[44].

(d) seek to address questions not determined by the Court of Appeal;[15] and

(e) are contrary to the established authority.[16]

12. The Appellant rejects the correctness of the factual assertions at [16] to [33] of the Gaynor and Corbett Submissions where they differ from the facts set out in the Appellant's Submissions in Chief. To the extent the Gaynor and Corbett Submissions are germane, they endorse the substance of the Commonwealth's Submissions.[17]

13. In answer to [78] to [86] of the Gaynor and Corbett Submissions, the Appellant notes that s. 76(iv) of the Constitution provides that the Commonwealth Parliament may make laws conferring original jurisdiction on the High Court in any matter relating to the same subject-matter claimed under the laws of different States. However, no such law appears to have been made conferring that jurisdiction on the High Court. Section 39(2) confers federal jurisdiction on the Courts of the States in all matters in which original jurisdiction can be conferred upon the High Court. That is, the Courts of the States have original federal jurisdiction under s. 76(iv) even though the High Court has no such original jurisdiction.

14. Without accepting Gaynor and Corbett's interpretation of s. 76(iv) of the Constitution, the argument here does not go beyond the s. 109 inconsistency argument made in relation to s. 75(iv) of the Constitution and must fail for the same reasons.

Amended Notice of Contention

15. Ground 1 of the Amended Notices of Contention filed by Gaynor and Corbett in matters S183 to S188 (**Amended Notices of Contention**) is a restatement of the substantive matter on appeal and not a proper ground of a notice of contention.[18]

16. Ground 2 of the Amended Notices of Contention is also not a proper ground as the matter complained of was not the subject of any argument or finding in the judgment of the Court of Appeal.

17. Ground 3 of the Amended Notices of Contention is developed in the extra-territoriality arguments in [68-76] of the Gaynor and Corbett Submissions. However, the ground is misconceived. Further, Mr Gaynor and Ms Corbett do not advert to s. 2 of the *Australia Act 1986* (Cth).

18. Ground 4 of the Amended Notices of Contention is unintelligible and not within the scope of the grant of special leave.

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[15] Composite Submissions of Gaynor and Corbett filed 31 August 2017 at [8], [10], [69]-[76], [88] and [89].

[16] Composite Submissions of Gaynor and Corbett filed 31 August 2017 at [54]-[67]; noting that Gaynor and Corbett disavow the "belongs to" jurisdiction of the States.

[17] Composite Submissions of Gaynor and Corbett filed 31 August 2017 at [4]-[5] and [34].

[18] Rule 42.08.05 of the *High Court Rules 2004* (Cth).

Cross-Appeals – Special Leave should be refused

19. The Notices of Cross-Appeal filed by Gaynor in matters S185, S187 and S188 on 13 July 2017 (**Notices of Cross-Appeal**) are not yet the subject of a grant of special leave. In substance, the Notices of Cross-Appeal seek to disturb costs orders made by the Court of Appeal. The Gaynor and Corbett Submissions are silent as to the relevant features which would attract the exercise of this Court's discretion to grant special leave. There is no issue of significant importance or public interest and it is submitted that there is no proper basis for a grant of special leave.[19]

Notice of Cross-Appeal

20. If special leave is granted, the Appellant makes the following submissions. In relation to grounds 1-3 of the Notices of Cross-Appeal, the wide discretion in relation to the power to award costs is provided for in s. 98 of the *Civil Procedure Act 2005* (NSW). Rule 42 of the *Uniform Civil Procedure Rules 2005* (NSW) stipulates that "*costs follow the event unless it appears to the court that some other order should be made*". The Court in exercising its discretion as to costs is entitled to take in account a range of factors: *Oshlack v Richmond River Council* (1998) 193 CLR 72.[20] Leeming JA made a costs order that was open and available under those powers. His Honour declined to make a costs order in favour of Mr Gaynor because of his conduct of the matter.[21] Grounds 1 to 3 of the appeal should be dismissed.

21. Grounds 4 and 5 of the Notices of Cross-Appeal are misconceived as the Court of Appeal could not have dismissed (or made a declaration in relation to) all of the complaints made by the Appellant against Gaynor as none except those the subject of the proceedings were before the Court of Appeal.[22]

Dated: 7 September 2017

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[19] cf *Oshlack v Richmond River Council* (1998) 193 CLR 72, [99]-[100] (Brennan CJ).
[20] see also *Hughes v Western Australian Cricket Association (Inc)* (1986) 66 ALR 541.
[21] *Burns v Corbett; Gaynor v Burns (No 2)* [2017] NSWCA 36 [41]-[48] (**Costs Decision**).
[22] [104] of J.