IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No S183 of 2017

No S186 of 2017

No S 185 of 2017

No S 187 of 2017

No S 188 of 2017

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

10 BETWEEN:

GARRY BURNS and Ors

Appellants

and

TESS CORBETT

Respondent in S 183 and S 186 of 2017

BERNARD GAYNOR

Respondent in S 185 and S 187 and S 188 of 2017

20

AND ORS

COMPOSITE SUBMISSIONS OF RESPONDENTS CORBETT AND GAYNOR

[By leave - Orders of Gordon J of 24 8 2017]

1. Ms Tess Corbett and Mr Bernard Gaynor [the Respondents] submit that the appeals in each matter should be dismissed with costs for the reasons which follow.

30 Part 1: Publication of Submissions

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2. The submissions are in a form suitable for publication on the internet.

Part II: Issues

3. The following issues arise:

4. Issue (i) - the section 109 Issue: Whether *Judiciary Act 1903* [Cth] s 39 is inconsistent with the conferral by the Parliament of NSW of jurisdiction on a State tribunal in respect of a matter identified in Constitution ss 75 and 76 rendering the State law inoperative? The issue is identified in the Court of Appeal Reasons [33] and resolved in favour of the Respondents at [97]. The Respondents submit that the Court of Appeal's conclusion is correct for the reasons it gave, and further adopts the Commonwealth submissions in this Court, noting that the Tasmanian Submissions do not take issue with the Court of Appeal conclusion, and that neither of the Territories intervene to take issue.

5. Issue (ii) - the Implied Restriction Issue: Whether there is an implied limitation on State legislative power to the effect that a State law purporting to confer judicial power in respect of the matters identified in Constitution ss 75 and 76 on a body which is not a court of the State is invalid. The issue is identified in the Court of Appeal Reasons at [33] and resolved against the Respondents at [64].The Respondents in this Court adopts the Commonwealth Submissions.

6. Issue (iii) - the Chapter III Issue: Whether regardless of the operation of the Judiciary Act 1903 the Parliament of a State has power to vest judicial power in respect of the subject-matters identified in Constitution ss 75 and 76 upon any body other than a Chapter III court, such that the State laws vesting part of that jurisdiction in NCAT are to that extent invalid.

7. Issue (iv) - the 'Belongs To' Issue: Whether the assumption in the Appellant's case that there was prior to Federation and still is a reserve or residual 'belongs to' jurisdiction of the Parliament of New South Wales with respect to the subject-matter of Constitution s 75(iv) should be rejected.

8. Issue (v) - the Extra-Territorial Power Issue: Whether the Parliament of the State of NSW has extra-territorial legislative power to make laws imposing obligations and conferring rights upon the residents of Victoria and Queensland and to sue and be sued where the legislatures of those States have made laws inconsistent with those laws.

9. Issue (vi) – the s76 (iv) issue: Whether *Judiciary Act 1903* [Cth] s 39 is inconsistent for the purposes of Constitution section 109 with the conferral by the Parliament of NSW of jurisdiction on NCAT in respect of a matter identified in *Constitution* ss 76 (iv) rendering the CAT Act and the ADA with respect to the Appellant Burns complaints against the Respondents inoperative?
10. Issue (vii) – Whether by reason of the absence of a public act within the meaning of ADA ss 49ZS and 49ZT of the Respondent Gaynor occurring in NSW NCAT lacked jurisdiction with respect to each of the complaints of the Appellant Burns?
11. Issue (viii) – Whether special leave in respect of the cross-appeals should be granted the cross-appeals upheld and the orders sought made?

Part III: Section 78B Judiciary Act 1903 Notices

12. Notices have been served by several parties including the Respondents.

Part IV: Citations

13. Reference is made in these submissions [*Respondents Submissions*] to the submissions of the Appellant Mr Burns dated 27 7 2017 [*Burns Submissions*], the Appellant the Attorney-General for NSW dated 27 7 2017 [*AG's Submissions*], the Appellant State of NSW [*NSW Submissions*] and those of the intervenors.
14. Reference is also made to the notices of appeal [NA S 183 and NA S 186] in the appeals joining Ms Corbett, and to the notices of contention in those matters of the Commonwealth [refer NC S183 and NC S185] and of Ms Corbett revised with leave of Gordon J granted on 24 8 2017 [refer Am NC S 183 and NC S 186]. There is no cross appeal by Ms Corbett in these matters.
15. The Judgment and Orders of the Court of Appeal of NSW [Bathurst CJ, Beazley P and Leeming JA] dated 3 2 2017 and other judgment of the Supreme Court are reported as follows:

    Burns v Corbett (No 1) [2017] NSWCA 3; 316 FLR 448

    Burns v Corbett (No 2) [2017] NSWCA 36

    Gaynor v Burns [2016] NSWCA 44

    Corbett v Burns [2016] NSWSC 612.

    The relevant decisions of the ADT and NCAT are cited as follows:

    Burns v Corbett [2013] NSWADT 227

    Corbett v Burns [2014] NSWCATAP 42.

    Burns v Gaynor [2015] NSWCATAD 24 [Hennessy Deputy President]

Gaynor v Burns [2015] NSWCATAP 150 [Appeal Panel]

Burns v Gaynor [2015] NSWCATAD 211 [Patten A/J and Principal Member]

Part V: Relevant Facts

16. On 22 1 2013 the Respondent Ms Corbett was a candidate in a federal general election for the seat of Wannon situated in the Western Districts of Victoria. The Appellant Mr Burns made a complaint in the course of the campaign on 31 1 2013 to the Anti-Discrimination Board of NSW [the ADB] that on 22 1 2013 by public act at Hamilton Victoria Ms Corbett had contravened the *Anti-Discrimination Act 1977* [NSW] [the ADA] s 49ZT by vilifying homosexuals in the course of a local media interview in response to questions from the '*Hamilton Spectator*': refer [2013] NSWADT 227 at [1] and [54]. The public act comprised her response to the journalist's question. It was then reported by others. The fact of that communication became the basis of the Appellant Burns complaint to the ADB and its referral of that complaint to NCAT for its decision as to contravention of ADA s 49ZT by the Respondent Corbett.

17. The Appellant Burns accepted before the court below and in the Administrative Decisions Tribunal of NSW [the ADT] and later the NSW Civil and Administrative Tribunal [NCAT] that he and the Respondent Corbett are residents of different States being NSW and Victoria respectively, as the word '*resident*' is used in Constitution s 75(iv), a concession found to be correctly made by the Court of Appeal: [2017] NSWCA 3 at [19] and [28]. The Appellant was not a candidate in the election, nor an elector of the seat of Wannon. He neither attended nor heard himself any public act of Ms Corbett in Hamilton. He has never met Ms Corbett in person, nor heard of her except through his activity on the internet.

18. The subject matter claimed by the law of NSW by ADA s 49ZT at the date of the Appellant Burns complaint to the ADB is the resolution of complaints of sexual discrimination and harassment generally and of the incitement of hatred or ridicule of persons having a homosexual orientation in particular. The same subject matter was and is claimed by the law of Victoria in *Equal Opportunity Act 2010* (Vic) generally and in particular in s4(1) ['*sexual orientation*'], s6(p), Part 3, and s 92(2)(b) and (c).

19. NCAT is a tribunal which by reason of its lay membership and the nature of its jurisdiction and powers is not a '*court*' nor a '*court of a State*' within the meaning

of *Constitution* Chapter III and section 77 in particular, which was a concession by each of the Appellants made to the Court of Appeal and held to be correctly made: [2017] NSWCA 3 at [29]. A similar concession was made with respect to the Administrative Decisions Tribunal of NSW [the ADT] by which the relevant decision was made, and which was replaced by NCAT in 2013.

20. The ADT proceeded in the absence of Ms Corbett and on 15 10 2013 found the complaint of Mr Burns substantiated in the exercise of its powers under ADA s 108(1) and made non-monetary Orders that Ms Corbett apologise generally by a written apology to be published in the Sydney Morning Herald at her expense and to Mr Burns in writing under subsection (2): [2013] NSWADT 227 at [54].

21. Following the adverse finding Ms Corbett appealed by an internal appeal to NCAT which by the *Civil and Administrative Tribunal Act* 2013 (NSW) [the CAT Act] had in the meantime replaced the ADT. On 14 8 2014 NCAT dismissed the appeal from the Decision and Orders of the ADT made on 15 10 2013. The Appeals Panel did not make any order eg in substitution for or affirming such Orders: refer *Wishart v Fraser* [1941] HCA 8; (1941) 64 CLR 470.

22. Mr Burns then applied to the Supreme Court of NSW and obtained after filing a certificate of the ADT Orders on 24 9 2014 an order for registration of the Orders as a judgment of the Supreme Court under s 114 ADA: [2016] NSWSC 612 at [1]. He then sought by notice of motion orders from the Supreme Court of NSW against Ms Corbett for contempt of the Supreme Court of NSW. He publicized his own actions in the local and national media and on the internet.

23. On 26 6 2016 Campbell J referred the question of the validity of the Orders of the ADT to the Court of Appeal: *Burns v Corbett (No 2)* [2016] NSWSC 612 at [17].

24. The Court of Appeal then declared that the judgment by registration of the ADT Orders by the Supreme Court of NSW and that those Orders were neither valid nor enforceable, by Orders it made on 3 2 2017: refer *Burns v Corbett (No 1)* [2017] NSWCA 3 at [109] and in particular Order (1)(c).

25. Subject to the Orders made by this Honourable Court in these appeals it may properly be assumed that upon return of the matter to Campbell J his Honour will dismiss the Appellant Burns notice of motion for contempt against Ms Corbett.

26. On 31 3 2017 the Court of Appeal ordered Mr Burns to pay the costs of Ms Corbett of the removal into the Court of Appeal: *Burns v Corbett (No 2)* [2017] NSWCA 36.

27. Relevantly the facts in the Gaynor matters insofar as they differ from the above are as follows. Mr Gaynor is a conservative social commentator who is a resident of Queensland. He operates his website in and from Queensland and, at the time of all the complaints made against him by Mr Burns, he lived and worked in Queensland and the public acts namely the fact of certain communications by Mr Gaynor and the subject of the complaints by the Appellant Mr Burns all occurred in Queensland: [2015] NSWCATAD 211 per Patten A/J at [9].

28. On 4, 7 and 11 May 2014, Mr Burns complained of a contravention of *Anti-Discrimination Act 1977* [NSW]]the ADA] s 49ZT to the Anti-Discrimination Board of New South Wales ['ADB'] about an article posted by Mr Gaynor on his website and Facebook page on 10 April 2014 titled, 'The crack SS Gay Brigade storms America'. The article commented on the harassment and subsequent resignation of the CEO of Mozilla, Brendan Eich, who donated $1,000 towards the political campaign to defend the traditional view of marriage in California. These comprise the first Burns complaint to the ADB [No 2014/0373].

29. On 6 May 2014, Mr Burns complained to the ADB about an article posted on 12 February 2014 by Mr Gaynor on his website and Facebook page titled, 'Defence to march down Oxford Street again in 2014'. This article commented on the decision by the Australian Defence Force to officially participate in the Sydney Gay and Lesbian Mardi Gras along with numerous political parties and lobby groups campaigning for same-sex marriage. This comprised the second Burns complaint to the ADB [No 2014/0374].

30. On 18 May 2014, Mr Burns complained to the ADB about an article posted on 28 March 2014 by Mr Gaynor on his website and Facebook page titled, 'Facebook says Toronto's Gay Pride Parade breaches community standards'. This article commented on the behavior of participants in the Toronto Gay Pride Parade and showed images of naked men at that parade standing in front of children. This comprised the third Burns complaint to the ADB [2014/0392].

31. On 27 May 2014, the ADB notified Mr Gaynor that it had accepted Mr Burns' complaints and asked for a response.

32. On 24 June 2014, Mr Gaynor responded to these three complaints (and one earlier complaint that was subsequently withdrawn by Mr Burns; it related to a webpage Mr Gaynor had nothing to do with and did not own or control).

33. Mr Gaynor's response to the ADB raised a number of defences, including firstly and relevantly want of jurisdiction of the ADB and NCAT with respect to Mr Burns complaints against him.

Part VI: Argument

34. **Issues (i) and (ii)** - In respect of the first two points the Respondents rely on the submissions of the Commonwealth as referred to in Issues (i) and (ii) above.

10 35. **Issue (iii) - Chapter III**:

36. The Respondents submit that regardless of the operation of the *Judiciary Act 1903* the Parliament of a State had and has no power to vest judicial power in respect of the subject-matters identified in Constitution s 75 upon the ADT or NCAT or any tribunal or body other than a Chapter III court, such that State laws vesting that jurisdiction in the ADT and NCAT are invalid.

37. The reason for this conclusion is that *Constitution* Chapter III restricts the power to vest and define judicial power in respect of the matters identified in s 75 to the Parliament of the Commonwealth. Further it is a consequence of the express words in s 77 that no other entity, whether the Parliament of a State or a member of the
20 executive of the Commonwealth by delegation or an exercise of power under s 61, may vest in or define such power of a court.

38. In the present case as already noted the Appellants have properly conceded that neither the ADT nor NCAT is a '*court of a State*' within the meaning of *Constitution* Chapter III: generally see CA Reasons at [29] and *Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] 66 NSWLR 77; *Sunol v Collier* [2012] 81 NSWLR 619 at [8]. The concession necessarily carries with it, the lesser including the greater, that neither the ADT nor NCAT is a '*court*' within the meaning of Chapter III. Of course if the concession was not properly made and neither were a court then different issues would arise as to the validity of the vesting of
30 jurisdiction and of the power of the Supreme Court to register and enforce as orders of its own by its contempt powers the ADT Orders of 15 10 2013: cf *Brandy v Human Rights and Equal Opportunity Commission*1995] 183 CLR 245; *Kable v Director of Public Prosecutions (NSW)* [1996] 189 CLR 51. As Isaacs J observed

in *Federal Commissioner of Taxation v Munro* [1926] 38 CLR 153 at 175 the punishment of crime and the trial of actions for breach of contract and it may be added punishment for contempt are '*appropriate exclusively to judicial action.*'

39. The consequence of the exercise of judicial power by a body that is not a Chapter III '*court*' is the invalidity of its process and the purported orders it makes. *Forge v ASIC* [2006] HCA 44; 228 CLR 45 is an example of a case where it was critical to determine whether or not the State forum [in that case the Supreme Court itself] lacked such institutional integrity as not to be a '*court*'. Not only is such a body not a suitable repository of federal judicial power but if it is part of the federal judicature in the sense referred to in *Kable* or its jurisdiction includes the exercise of federal judicial power it is otherwise incapable of exercising judicial power. For example the *Australian Consumer Law* jurisdiction is conferred, in addition to the Supreme Court, upon all the traditional courts of NSW. Part 9 and s 52 of the *Constitution Act 1902* [NSW] describe those courts including the Land and Environment Court of NSW a court with a specialist jurisdiction.

40. Gummow, Hayne and Crennan JJ observed in *Forge* at [56], citing *R v Kirby; Ex parte Boilermakers' Society of Australia* [1956] 94 CLR 254 at 267-268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, that the language of '*demarcation*' as to the character of the judicial power involved in a particular case is a matter of '*equal importance*' at both the Commonwealth and State levels.

41. And at [61] Gummow, Hayne and Crennan JJ confirmed: '*It is only in a 'court', as that word is understood in the Constitution, that federal jurisdiction may be invested.*' Their Honours referred to *Constitution* ss 71 and 72 as well as s 77. In other words whether or not s 39(2) exists in its current form may be irrelevant to the inquiry whether the vesting in a particular entity or repository of that jurisdiction is constitutionally permissible.

42. Accordingly what is described as the third consequence of the arguments considered in the Court of Appeal and referred to by Leeming JA in the Court of Appeal at Reasons 35(3) it is respectfully submitted is not an accurate statement of the true alternatives: that is, rejection of Ms Corbett's case on issue (i) [the section 109 point] does not free the Parliament of NSW or initiate a power in it to vest in and define the exercise of federal judicial power by its tribunals eg by repealing

Judiciary Act s 39(2) or amending it at the whim of a compliant Parliament of the Commonwealth. There is in short a wider Chapter III limitation.

43. As noted above Court of Appeal has held that the elements of impermanency, lay membership, the legitimacy of policy considerations as part of deliberations, the absence of power to enforce its own decisions and member insecurity render each of the ADT and NCAT incapable of qualifying as a '*court*' that might exercise federal judicial power.

44. Further, merely because a State Parliament describes its own creations as a '*court of record*' does not make it a '*court*' in the Australian or Chapter III sense but the absence of such a provision in the CAT Act may have relevance: cf *Owen v Menzies* [2012] QCA 170 at [10]; *Queensland Civil and Administrative Tribunal Act 2009*, s 164(1); *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501, at 562 per Kirby J.

45. In this context this issue raises the question as to the extent and nature of the legislative power of the Parliament of NSW.

46. Prior to Federation it is accepted by all commentators that the Parliament of NSW had limited not universal legislative powers. For example there were some legislative powers exercisable only by the Parliament of the United Kingdom or by the Federal Council of Australasia. The latter limits for example remained after Federation unless the State directly concerned with the making of such laws requested the Parliament of the Commonwealth to intervene: see *Constitution* s 51(xxxviii). The *Colonial Laws Validity Act 1865* [Imp] s 3(1) also imposed certain limits on the exercise of State legislative power which remained until freed by the *Australia Acts 1986*: see ss 2(2) and 3(2). However those restrictions were replaced by restrictions more appropriate to the contemporary post-Federation context: eg see *Australia Acts* s 5.

47. There were also territorial limitations upon the then Parliaments of the Colonies whereby a State made law was valid so long as its substantive provisions had a sufficient territorial connection with the State and did not conflict with the laws of other States: see *Macleod v Attorney-General (NSW)* [1891] AC 455 at 477; *Union Steamship Co of Australia Pty Ltd v King* [1988] 166 CLR 1 at pages 10-14; *Gould v Brown* [1998] 193 CLR 346 at page 376 per Brennan CJ and Toohey J. That extra-territorial limitation remains relevant to Issue (v) considered below.

48. *Constitution* s 107 provides that:

> *'Every power of the Parliament of the Colony which has become or becomes a State, shall, unless it is exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth... '* [counsel's emphasis]

49. Obviously with respect to the powers under ss 75 and 76 the qualification in s 107 is relevant to the present matters. In *Re Wakim; ex parte McNally* [1999] 198 CLR 511 the Court held that *'no polity other than the Commonwealth'* by its Parliament could confer jurisdiction with respect to such matters.

10 50. Accordingly, in that case it was held that the Parliament of NSW had no legislative power to confer upon a federal judicial body any judicial power which fell within the heads of power under *Constitution* ss 75 and 76. It followed that the cooperative national legislative scheme considered in that case, which some commentators saw as an affliction upon responsible government at both the State and Federal levels, was held to be invalid.

51. If as conceded by the Appellants and found by the Court of Appeal that both the Appellant Burns and the Respondent Corbett are residents of different States within the meaning of s 75(iv) it follows that the notion of a residual State power with respect to such matters is not merely a fiction in the sense referred to in the next
20 submission, but rather is a creative error. That is because the Constitution removed and rendered etiolate any reserve or residual power of the State of NSW such as claimed by the Appellants, and assumed by Leeming JA at Reasons 35(3).

52. It follows that the State of NSW had no legislative power after 1901, apart from or dehors the *Judiciary Act 1903,* whether it may be described as reserve or residual or a 'belongs to' jurisdiction, to confer any jurisdiction on the ADT or NCAT which fell within s 75(iv), or with respect to any other head of judicial power referred to in s 75.

53. Issue (iv) – 'Belongs To':

54. The assumption in the Appellant's case that there is a reserve or residual 'belongs
30 to' jurisdiction of the Parliament of NSW with respect to the subject-matter of Constitution s 75(iv) should be rejected.

55. It is accepted by the Appellants that Ms Corbett, Mar Gaynor and Mr Burns are '*residents*' ie of NSW and Victoria, in the sense used in s75(iv).

56. Acceptance of the submission necessitates a qualification to the Commonwealth Submissions at par. 12.2 [page 4] and par. 14 [page 5] to the extent that the Commonwealth appears to accept that the courts of the former Colonies entertained s 75(iv) jurisdiction. The qualification derives from what is submitted is a misunderstanding of, or if understood in the manner of the Queensland Submissions at par.s 20-38 an error in, an *obiter dictum* in *MZXOT v Minister for Immigration* [2008] 233 CLR 601 esp at [26] to [31].

57. In particular at [25], for the purposes of rejecting the Plaintiff's argument that, in contrast to the position in the USA held in *McClung v Silliman* [1821] 19 US (6 Wheat) 598, there remained a residual State jurisdiction inherited from the King's Bench for the Supreme Court to issue mandamus against an officer of the Commonwealth, it was noted from a 'perusal' of ss 75 and 76 that that there were some '*controversies well known in the anterior body of general jurisprudence in the colonies*', but that was not so for all the nine heads. Reference was made to actions in tort or contract between residents of the former colonies in the apparent context of an example by reference to s 75(iv).

58. However s 75(iv) is not expressed to cover such disputes. Rather, in an adaptation of the United States provision, it speaks of three classes of matters, none of which comprised the subject-matter of any jurisdiction of the former colonial courts, including the Supreme Court of NSW and which, as from 1901, has drawn its jurisdictional foundation and existence from *Constitution* s 73 [refer *ASIC v Edensor Nominees Pty Ltd* [2001] 204 CLR 559 at [69].

59. As to the first class in subsection (iv), being '*all matters ...between States*', no example is given nor could be given of such jurisdiction in the colonial courts prior to 1901. The States did not exist either politically or constitutionally in the form they assumed after 1901. They were separate colonies of the empire not states of a federation. Even assuming for present purposes the word 'State' means 'Colonies' in s 75(iv) which having regard to s 78 should not be accepted, nor did the common law, its jurisdiction being territorial and local, acknowledge any jurisdiction in the NSW courts between say other former Colonies such as between South Australia and Victoria over riparian rights to the River Murray. Nor could the legislature of NSW assume such jurisdiction, for reasons already discussed in relation to Issue (iii).

60. As to the second and third classes, being '*all matters ...between residents of different States*', and '*between a State and a resident of another State*', the same objection arises. Thus an action in tort between residents of NSW was a classic case of the exercise of territorial jurisdiction but it depended solely upon issue and service in NSW of initiating process: see *Laurie v Carroll* [1957] 98 CLR 310.

61. *Elkan v De L Juvenay* [1900] 22 ALT 34, a decision of the Full Court of the Supreme Court of Victoria is an illustration of the difficulties in colonial times in suing upon a contract between residents of different colonies: see the discussion in Quick and Garran at page 615. The Federal Council of Australasia under *Federal Council of Australasia Act 1885* (Imp) 48 and 49 Vict, c 60 was given the power to make laws addressing the head of power which power was adapted into *Constitution* s 51((xxiv) and (xxv) and led to *Service and Execution of Process Act 1901* (Cth) replaced in 1992. The Federal Council passed *Australasian Civil Process Act 1886*, *The Australasian Judgments Act 1886* and *The Australasian Testamentary Process Act 1897* but none of these did anything other than provide for limited long arm jurisdiction and none extended to any cause of the character described in subsection (iv).

62. It was having regard to the foregoing an established rule of construction that the process of a court did not run beyond its territorial jurisdiction: *City Finance Co. Ltd. v. Matthew Harvey & Co. Ltd.* [1915] HCA 75; (1915) 21 CLR 55. It is of course not now open to question that a State may validly legislate so as to authorize the service of originating process outside the State: *City Finance Co. Ltd. v. Matthew Harvey & Co. Ltd* [1915] HCA 75; (1915) 21 CLR 55 ; *Ashbury v. Ellis* (1893) AC 339. On the other hand that power may not be abused, and it was recognized in the nineteenth century that the courts of one colony might declare that a statute of another colony providing for an extra-territorial operation of its process was ultra vires on the ground that it exceeded the power to legislate for the good government of the colony: *Ray v. M'Mackin* [1875] VicLawRp 112; (1875) 1 VLR (L) 274 and the judgments in *Reg. v. Call; Ex parte Murphy* [1881] VicLawRp 71; (1881) 7 VLR (L) 113 at page 443; *Dalton v NSW Crime Commission* [2006] HCA 17; 227 CLR 490 at [23-25]. And see the discussion in *Quick and Garran* at pages 613 to 620.

63. It is one thing for the Supreme Court of NSW today to exercise the powers under *Uniform Civil Procedure Rules 2005* Parts 11 and 11A for service outside Australia or under *Service and Execution of Process Act 1992* [Cth] s 15 made under s 51(xxiv) and Chapter V for service and enforcement of State process in other States of Australia. Dixon CJ, Williams and Webb JJ in *Laurie v Carroll* [1957] 98 CLR 310 at pages 325 ff explained that the rules as to service of writs in *in personam* matters defined the jurisdiction of the court, a jurisdiction in this sense that was ultimately territorial.

64. Accordingly jurisdiction in tort [and contract] cases was and remains '*a criterion for determining questions of liability*' as established by Coke CJ in the *Case of the Marshalsea* [1612] 10 Co Rep 68b at 72b and relevantly for present purposes relating to the making of orders by a body which is not a court in *Dr Bonham's Case* [1609] 8 Co Rep 107a: *Jurisdiction and Illegality*, Oxford, Rubinstein, 1965 at page 58; also refer pages 208-212. If NCAT is not a court for the purpose of making any relevant finding with respect to the Appellant's ADB claims, which is common ground, then the ultimate order remains vulnerable to collateral attack. This is one obvious answer to the complaints of the intervenors as to the inconvenience of the result in the present case. Thus an NCAT decision made in excess of jurisdiction may be quashed and all further proceedings prohibited as occurred with respect to on-board misconduct wrongly brought in VCAT in *Qantas Airways Ltd v Lustig* [2015] 228 FCR 148, and possibly many years after the event as this Court did in respect of a NSW magistrates court decision in *Yirrell v Yirrell* [1939] 62 CLR 287 applied recently by the Court of Appeal in *Katter v Melhem* [2015] NSWCA 213; 90 NSWLR 164.

65. As to the position in the United States: see Story *Commentaries on the United States Constitution* par.s 1685-1688; *Quick and Garran* pages 773-778.

66. The above conclusion is also supported by the terms of s 77(ii) which speaks of the jurisdiction of any federal court that is exclusive of that '*which belongs to*' or is invested in the courts of the States. The reference is not to that which '*belonged to*' but that which '*belongs to*' such a court. Necessarily by operation of s 75 which relates to the exclusive jurisdiction of the High Court such jurisdiction cannot belong to the courts of the States, even assuming that once it did: see *Boilermakers* above at page 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Forge* above at

[56] per Gummow, Hayne and Crennan JJ; *Rizeq v Western Australia* [2017] HCA 23 at [15] per Kiefel CJ; *Alqudsi v The Queen* [2016] 258 CLR 203 at [168-172] per Nettle and Gordon JJ; *CGU Insurance Ltd v Blakely* [2016] 90 ALJR 272 at [24] per French CJ, Kiefel, Bell and Keane JJ; *APLA Ltd v Legal Services Commissioner (NSW)* [2005] 224 CLR 322 at [230] per Gummow J.

67. It follows for the foregoing reasons that, contrary to the Appellants' case, there is not a unique '*belongs to*' jurisdiction of the character claimed by NSW in its submissions to this Court with respect to the State's diversity jurisdiction as described in s 75(iv). That of course does not mean the former Colony did not and the State does not have jurisdiction over the subject-matter described in some other classes of case eg in admiralty jurisdiction in s 76(iii).

68. **Issue (v) - Extra-Territorial Power:**

69. It is submitted that if the broader construction of ADA s 49ZT giving the provision extra-territorial operation is adopted [which it ought not be] that the Parliament of the State of NSW has no legislative power to make laws imposing obligations and conferring rights upon the residents of other States of Australia relevantly for present purposes where the legislature of another State has made laws inconsistent with those laws.

70. The ADA s 49ZT on the view adopted by the Appellant Burns and the ADB relates to any proscribed conduct across Australia and across the planet, and not merely as between a resident of NSW and another resident of the State. For these purposes it is merely an accident but an incident of liability that Ms Corbett made her allegedly proscribed communication whilst campaigning for the Katter Australia Party in Hamilton Victoria in the general election in 2013.

71. The actual words of s 40ZT in context should be read as limiting the exercise of the ADB's jurisdiction and NCAT's jurisdiction on the facts as found by the ADT to conduct occurring within NSW: see the narrower construction adopted by the Privy Council in *Macleod v Attorney-General for NSW* [1891] AC 455 at pages 457-8; also see the approach to construction of like provisions in *Port Macdonnell Professional Fishermen's Association Inc v South Australia* [1989] 168 CLR 340 at 371ff per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. If that be correct then the conduct at Hamilton was not proscribed and not amenable to the jurisdiction of the ADT or NCAT.

72. However it is clear, if the broader construction be adopted, that other States of Australia at least have legislation which regulates such conduct by similar laws. Whilst Queensland has a similar provision to ADA s 49ZT [see *Anti-Discrimination Act* (Qld) s 124A] Victoria covers the field in such cases by reference to the sexual orientation provisions of its *Equal Opportunities Act 2010* (Vic) [see ss 4(1), 6(p), Part 4, and 92]. Accordingly each State has laws relating to the same subject matter, which purport to cover the field of vilification and harassment whether on religious or racial or homosexual grounds.

73. For a law of NSW to validly operate outside the State's boundaries so as to have a valid extra-territorial operation there must be a sufficient connection with the peace, order and good government of NSW: *Robinson v Western Australian Museum* [1977] 138 CLR 283 at page 331 per Mason J; *Union Steamship v King* [1988] 166 CLR 1 at 14. That connection must be a real and substantial connection: *Port Macdonnell Professional Fishermen's Association Inc v South Australia* [1989] 168 CLR 340 at 373 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. Further and critically of present relevance '*if the extra-territorial operation claimed by it for the Act exceeds what might properly be claimed having regard to the legislative powers which adjoining States might exercise over*' the same subject- matter, then the State law fails on that basis also: see *Port Macdonnnell* at page 373 above.

74. In its extra-territorial operation in Victoria or Queensland ADA s 49ZT does not have a real and substantial connection with the peace order and good government of the territory that is NSW: *Bonser v La Maccia* [1969] 122 CLR 177 at page 337 per Barwick CJ; *Croft v Dunphy* [1933] AC 156 at page 162 per Lord Macmillan; *Port Macdonnnell* at page 373.

75. The same consideration and principle flows it is submitted from the operation of the *Australia Acts 1986* s 5(b) which provides that laws specified in s2(1) ie laws that have extra-territorial operation such as s 9ZT, do not have force and effect if '*repugnant to this Act the Commonwealth of Australia Constitution or the Statute of Westminster.*' ADA s 49ZT is repugnant to the *Constitution* insofar as it has extra-territorial operation outside NSW in other States of Australia. That is because the Preamble refers to '*one indissoluble Federal Commonwealth*' which is inconsistent with a Federal polity where State laws compete with each other for room, and their

operation will depend on such discretionary or capricious factors as to whether one State or another has resourced the dispute resolution mechanisms provided, or has an activist ADB or equivalent or the like. Similarly clause 3 refers to a '*united*' polity which would not be the case where State laws clamour with each other for operation across the country outside State boundaries.

76. For these reasons it is submitted that the Parliament of the State of NSW has no legislative power to make laws such as ADA s 49ZT imposing obligations and conferring rights upon the residents of other States of Australia relevantly for present purposes where the legislature of another State has made laws inconsistent with those laws.

77. **Issue (vi) - the Section 76(iv) Point**:

78. Mr Gaynor submits that *Judiciary Act 1903* [Cth] s 39 is inconsistent for the purposes of Constitution section 109 with the conferral by the Parliament of NSW of jurisdiction on NCAT in respect of a subject-matter identified in *Constitution* s 76 (iv) rendering the CAT Act and the ADA with respect to the Appellant Burns complaints against the Respondent Gaynor inoperative.

79. The provision is wider than that in the equivalent provision in the United States Constitution. The provision has not been the subject of juridical analysis.

80. The material referred to in the Corbett Submissions demonstrates that other States of Australia at least have legislation with respect to the same subject matter which regulates such conduct by similar laws. Queensland has a similar provision to ADA s 49ZT in *Anti-Discrimination Act* (Qld) s 124A.

81. The subject matter claimed by the law of NSW by ADA s 49ZT at the date of the Appellant Burns complaint to the ADB is the resolution of complaints of sexual discrimination and harassment generally and of the incitement of hatred or ridicule of persons having a homosexual orientation in particular. The same subject matter was and is claimed by the law of Victoria in *Equal Opportunity Act 2010* (Vic) generally and in particular in s4(1) ['*sexual orientation*'], s6(p), Part 3, and s 92(2)(b) and (c).

82. Accordingly each State has laws relating to the same subject matter, which purport to cover the field of vilification and harassment whether on religious or racial or homosexual grounds. In the case of Queensland and NSW the subject-matter is

identical and it is not necessary to resort to covers the field reasoning although it is submitted that is the relevant test.

83. However once the conclusion is reached that each State has laws which relate to the same subject-matter and claimed under the laws of each such State the 'matter' in question is a matter involving the exercise of federal jurisdiction.

84. Accordingly, adopting the reasoning of the Court of Appeal in this matter with respect to the section 109 point, the result of Judiciary Act 1903 section 39(2) is to create a disconformity between those NSW laws which refer the Burns complaints to NCAT which is not a 'court' and the 1903 Act which requires the contrary.

10 85. There is merit in the broader construction of section 76(iv). For example assume a mining company located in Queensland near the NSW border and contaminant from the Queensland mine seeps into and pollutes groundwater in NSW. The cases discussed in *Quick and Garran* in the nineteenth century in such matters took a strict approach on territorial jurisdiction in such cases: see eg pages 613 ff. The evident purpose of subsection iv of section 76 is to ensure that the Commonwealth Courts were able to resolve such issues, whatever the confines of colonial tribunals might be.

86. Accordingly *Judiciary Act 1903* [Cth] s 39 is inconsistent for the purposes of Constitution section 109 with the conferral by the Parliament of NSW of
20 jurisdiction on NCAT in respect of a subject-matter identified in *Constitution* s 76 (iv) rendering the CAT Act and the ADA with respect to the Appellant Burns complaints against the Respondent Gaynor inoperative.

87. Issue (vii) the Public Act point:

88. Mr Gaynor submits there was no public act in NSW by the Respondent Gaynor as against the Appellant Burns as required by ADA ss 49ZS and 49ZT as a condition of jurisdiction, with the result that the complaints should have been dismissed on this ground.

89. The Respondent Gaynor respectfully adopts the reasoning of Patten A/J on this issue. It is supported by a consideration of the terms of similar legislation in
30 Victoria where the equivalent VCAT statute makes it plain it is to operate 'outside' Victoria: see ss 7 and 8 of the *Racial and Religious Tolerance Act 2001 (Vic).*

90. **Issue (viii) - The Cross Claim issue:**

91. It is submitted that the Court of Appeal erred in its judgment and orders of 7 March 2017 in refusing to order the costs of the matter before it between the Appellants and the Respondent Gaynor, and in ordering the costs of the application for costs against him and in the circumstances of the case special leave to cross-appeal should be granted and the cross-appeal allowed.

92. In the principal reasons at [107] Leeming JA said his Honour was not disposed to order costs in favour of Mr Gaynor because he did not have the primary carriage of the argument that had been dispositive, that his submission on that issue had been rejected, and that he had advanced a suite of other arguments not necessary to consider. However each of these considerations are in error, and were repeated in the costs judgment on the papers of 7 March 2017.

93. In the costs judgment at [39] the Court of Appeal stated that on any view '*Mr Gaynor's success has been qualified: his appeal was dismissed, and the broader relief sought by him has been rejected.*' It is submitted the exercise of the costs discretion erred in having regard to these considerations, and in the 6 considerations that followed it.

94. As to the passage cited above at Reasons [39], as to the 'appeal' firstly referred to, this reference is to the appeal in SCNSW proceedings No 251109/2015, in which, on a point of law, the Respondent Gaynor sought to set aside the costs order of the Appeal Panel of NCAT made against him after his successful internal appeal from the decision of Hennessy DP. In that appeal, over the opposition of Mr Burns, the Court of Appeal granted leave to appeal: *Gaynor v Burns* [2016] NSWCA 44. That appeal was then listed with the Summons matter and heard together with it.

95. Far from being unsuccessful his appeal in the Court of Appeal, the Court of Appeal accepted the submission of the Respondent Gaynor in that Court [see Reasons at 105] that if the primary argument succeeded [ie that NCAT had no jurisdiction] it was unnecessary to deal with the merits of the appeal because the adverse costs order was null and void, a position agreed in by the present Appellants. The Court of Appeal hence embraced Mr Gaynor's submissions on this point. Thus although the appeal was technically 'dismissed', in substance the appeal was successful because the dismissal merely reflected the success on the key argument of want of jurisdiction in NCAT over any of Mr Burns complaints. In short in substance he was successful twice over in the Court of Appeal – on getting leave to appeal under

CAT Act on a point of law on the underlying merits of the matter, and in his overall objection as to want of jurisdiction [described by the Court of Appeal at [105] correctly as his '*primary argument*'.

96. Second, as to the Summons matter, the '*broader relief*' sought by Mr Gaynor in the Court of Appeal was unnecessary once the Court of Appeal made an order that NCAT was '*not authorized to decide the three complaints*' of Mr Burns: see Order 1. It might have in the exercise of its discretion have also quashed the determinations of NCAT as occurred in *Qantas Airways Ltd v Lustig* [2015] FCA 253; 228 FCR 148; also see *Yirrell v Yirrell* [1939] 62 CLR 287; *Katter v Melhem* [2015] NSWCA 213; 90 NSWLR 164. His Amended Summons determined by the Court of Appeal sought a declaration to the effect of that granted.

97. It is submitted that the Court of Appeal erred, in the sense referred to in *House v The King* [1936] 55 CLR 499 at pages 504-5, in the characterization of both the result of the Court of Appeal's decision and the qualified success of Mr Gaynor. In substance he was completely successful both in the appeal, and in the reference matter on the jurisdictional objection to the Burns NCAT proceedings. Further, whereas UCPR Rule 42.1 provides that '*Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs*' in this case the Respondent Gaynor was completely successful in both the appeal and summons matters. In this case with the same result and on the same issue costs were granted to Ms Corbett but not to Mr Gaynor, and in his case 'some other order' was not made, in apparent conflict with the rule. The only order as to costs made in his case [see Order 2 dated 7 March 2017] was in respect of the costs of the applications for costs. Also see Dal Pont *Costs* 3rd ed, Butterworths, at Chapter 20 par 20.27.

98. As to the first point at Reasons [42] it is incorrect to state that the costs in the Court of Appeal '*were entirely of his own making*': refer transcript of 25 May 2016 of Wright J. As to the second consideration at Reasons [43] it is true that costs were expended on issues not determined by the Court of Appeal, but that is only because the diversity point was 'determinative'. The other material, 'not thousands of pages', was lodged after the Court of Appeal granted leave to amend the Summons and directed that Submissions and evidence in support of it be filed in the Court of

Appeal. That material included material responsive to the 32 claims of Mr Burns against Mr Gaynor in NCAT, placed before the Court of Appeal as part of the complete record of NCAT, including the respective affidavits of the parties in support of the vexatiousness case for dismissal under ADA s 92(1)(a)(i).

99. The third and fourth points are in error for the reasons given above as to the passage at [39]. As to the fifth point the Court of Appeal states it is 'not possible' to determine if the Respondent Gaynor has breached any duty under Civil Procedure Act 2005 s 56, but then proceeds to hold that he has done so in an unspecified way. With respect that is in error of principle.

10 *100.* As to costs against the other Appellants it is not correct that '*the only reason*' [see Reasons 47] that the Attorney-General and the State were joined is because Mr Gaynor joined them. '*In substance*' they were both parties supporting Mr Burns [cf 5th sentence at 47]. Neither the Attorney nor the State were mere intervenors. The usual order should have followed.

101. In the premises the Court of Appeal erred in refusing both the costs of the reference, the appeal and of the applications for costs in respect of each of the Appellants.

Part VII: Applicable Constitutional and Legislative Provisions

1. *Constitution*: Preamble, Covering Clauses, Chapter III and Chapter V
20 2. *Anti-Discrimination Act 1977* (NSW) ss 49ZS and 49ZT
3. *Civil and Administrative Tribunal Act 2013* (NSW) ss 92 to 114
4. *Anti-Discrimination Act* (Qld) s 124A
5. *Equal Opportunities Act 2010* (Vic) ss 4(1), 6(p), Part 4, and 92.

Part VIII: Orders

6. The appropriate orders are that the Appeals in each matter should be dismissed with costs, special leave to cross-appeal should be granted, the cross-appeals allowed and the costs orders there sought made against each Appellant.

Part IX: Oral Submissions

7. The oral submissions of the Respondents are estimated to take 90 minutes minutes
30 ie approximately 15 minutes for each topic and allowing time to hand up material.

[signed]

Peter E King

Counsel for the Respondents 31 August 2017.