IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S186 of 2017

BETWEEN:

ATTORNEY GENERAL FOR NEW SOUTH WALES

Appellant

10 and

GARRY BURNS

First Respondent

TESS CORBETT

Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH

20 Third Respondent

APPELLANT'S SUBMISSIONS

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

1. The Attorney General for New South Wales (the "**NSW Attorney**") certifies that these submissions are in a form suitable for publication on the Internet.

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Part II: Concise statement of issues

2. There is one issue in the NSW Attorney's appeal, which should be resolved as follows:

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

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

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

Part III: Certification regarding section 78B notice

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

Part IV: Citations of reasons for judgment

5. The reasons for judgment of the New South Wales Court of Appeal (Bathurst CJ, Beazley P and Leeming JA) given on 3 February 2017 are reported as Burns v Corbett (2017) 316 FLR 448; [2017] NSWCA 3 (proceeding 2016/224875) ("**J**").

6. The citations of the reasons of the tribunal decisions referred to in the decision of the Court of Appeal are referred to in Part V below.

Part V: Statement of the relevant facts

7. It was common ground below that, at all material times, Mr Burns has been a resident of New South Wales and Ms Corbett has been a resident of Victoria: J [5].

8. The relevant procedural history of the matter is set out at J [4]-[8]. In short, in 2013, Mr Burns made a complaint to the NSW Anti-Discrimination Board about statements made by Ms Corbett which he claimed were public acts that vilified homosexuals, contrary to s 49ZT of the Anti-Discrimination Act 1977 (NSW) (the "**AD Act**"): J [4]. The complaints were referred to the former Administrative Decisions Tribunal of New South Wales (the "**former ADT**") under s 93C of the AD Act as the complaint could not be resolved by conciliation.

9. The former ADT, pursuant to s 108 of the AD Act, found that Ms Corbett had breached the AD Act and ordered her to make a public and private apology: Burns v Corbett [2013] NSWADT 227. Her appeal to (the then newly established) New South Wales Civil and Administrative Tribunal ("**NCAT**") Appeal Panel was dismissed: Corbett v Burns [2014] NSWCATAP 42.

10. The Appeal Panel's orders were then entered in the Supreme Court pursuant to s 114 of the AD Act on 23 October 2015. Mr Burns thereafter brought separate proceedings in the Supreme Court charging Ms Corbett with contempt for failing to make the apologies. In defence to the contempt proceedings, Ms Corbett asserted that neither the former ADT nor the Appeal Panel of NCAT had jurisdiction over her, because, inter alia, she was a resident of Victoria.

11. The contempt proceedings (2014/280109) were then removed to the Court of Appeal for determination of separate questions addressing the jurisdiction of the former ADT and the Appeal Panel of NCAT to determine a matter between residents of different States: Burns v Corbett (No 2) [2016] NSWSC 612 (Campbell J). Thus, the status of proceedings prior to the Court of Appeal's decision, was that orders had been made by the Appeal Panel of NCAT, registered in the Supreme Court of NSW and were in the process of being enforced: J [8].

12. The NSW Attorney intervened in the Court of Appeal proceeding (being proceeding 2016/224875).

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

    a. NCAT is not a "court of the State" (J [29]); and

    b. the proceeding in NCAT, being proceedings under the AD Act, involved the exercise of judicial power by NCAT (J [30]).

Part VI: Argument

14. As s 109 of the Constitution resolves a conflict between laws that are otherwise valid (Rizeq v Western Australia [2017] HCA 23 ("**Rizeq**") at [47]), it is necessary to consider the Cth Attorney's Notice of Contention before turning to the s 109 issue.

(a) Notice of Contention – implied limitation

15. The Cth Attorney has filed a Notice of Contention asserting that the judgment of the Court of Appeal should be affirmed for the further reason that there is an implied limitation on State legislative power such that a State law purporting 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" would be invalid: J [65] and [80]-[93].

16. For the reasons set out below, it is submitted the Court of Appeal was correct to reject that contention.

"Belongs to" jurisdiction – State courts

17. The Commonwealth Parliament, pursuant to s 77(iii) of the Constitution, may invest "any court of a State with federal jurisdiction" and, under s 77(ii), may define 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".

18. As Professor K H Bailey explained, in "The federal jurisdiction of State courts" (1939-1941) 2 Res Judicatae 109 at 111:

> Thus s. 77(ii) draws a distinction between the jurisdiction which 'belongs to' State courts and that which is 'invested in' them. The former is their 'State' jurisdiction, even though it exists in respect of some of the matters mentioned in ss. 75 and 76. It belongs to them by virtue of State law, without any necessity for Commonwealth action. The latter, on the other hand, is the 'federal' jurisdiction of State courts. They could not exercise any of it at all except as the Parliament invested them with it.

19. The jurisdiction which "belonged" to State courts was the authority those courts possessed to adjudicate under the constitution and laws of the relevant States which pre-existed Federation and which included jurisdiction in respect of some of the subject matters mentioned in ss 75 and 76 (referred to herein as the "**belongs to**" jurisdiction): see Cowen and Zines's Federal Jurisdiction in Australia (3rd ed) 2002 at 196.

20. In this respect, it is submitted that the dictum of Jacobs J in Commonwealth v Queensland (1975) 134 CLR 298 at 327-328 – to the effect that Ch III is an "exhaustive enunciation" of the judicial power that may be conferred on or exercised by any court in respect of the subject matters set forth in ss 75 and 76 of the Constitution – is not correct in principle: see MZXOT v Minister for Immigration and Citizenship (2008) 233 CLR 601 ("**MZXOT**") at [24]-[25] per Gleeson CJ, Gummow and Hayne JJ; J [39], [87]-[89].

21. Rather, while s 77 of the Constitution confers jurisdiction, or enables jurisdiction to be conferred in certain cases, it does not take away the pre-existing jurisdiction of the State courts in respect of matters in ss 75-76: see recently, MZXOT at [24]; Quick and Garran (The Annotated Constitution of the Australian Commonwealth, 1901 (1995 reprint) at § 336, 802); Official Report of the National Australasian Convention Debates (Legal Books, Sydney, 1986 (reprint)) Melbourne, 1898, at 1894; see J [45], [54].

22. As s 77(ii) of the Constitution makes clear, that is a matter for Parliament.

23. Of course, by s 39(1) of the Judiciary Act, Parliament excluded the jurisdiction of State courts in respect of some of these matters. To the extent that s 39(2) invested State Courts with federal jurisdiction in respect of matters which had not been

excluded by s 39(1), s 109 of the Constitution operates to exclude the laws under which the State jurisdiction of the court would be exercised: Moorgate Tobacco Company Limited v Philip Morris Limited (1980) 145 CLR 457 ("**Moorgate**") at 470-471 per Gibbs J and .479 per Stephen, Mason, Aickin and Wilson JJ. That does not mean that, absent a law such as s 39 of the Judiciary Act, a State Parliament cannot confer State judicial power on a State court in respect of a matter in ss 75 and 76 of the Constitution that "belonged to" State courts prior to Federation.

24. In terms of the scope of the "belonging to" jurisdiction, in MZXOT, Gleeson CJ, Gummow and Hayne JJ at [26] quoted from Inglis Clark, Studies in Australian Constitutional Law (1901) at 177-178, who observed that the judicial power of the Commonwealth seemed to be "necessarily exclusive of the judicial power of the States" in matters in which: the Commonwealth is a defendant (s 75(iii)); a State may be compelled under the Constitution to become a defendant (s 75(iv)); and a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth (s 75(v)). Gleeson CJ, Gummow and Hayne JJ considered, at [30], it unnecessary to determine whether this was the extent of the subject matters in ss 75 and 76 which did not "belong" to the States.

25. However, their Honours drew a distinction at [25] with "controversies well known in the anterior body of general jurisprudence in the colonies (for example, actions in tort or contract between residents of the former colonies"). As Leeming JA correctly observed at J [73], the passage unambiguously proceeds on the basis that State courts continued to have jurisdiction in relation to matters answering the description in s 75(iv) between residents of two States: see also Rizeq at [136] per Edelman J.

26. Thus, as the Cth Attorney properly accepted, and as Leeming JA concluded below, Federation did not remove the "belongs to" jurisdiction of State courts such as that involving the residents of two States: see J [45], [51], [62], [65], [73], [83], [88]. As such, a State Parliament may confer State judicial power on a State court in respect of a diversity matter in s 75(iv) of the Constitution (subject to the exercise of legislative power by the Commonwealth under s 77(ii) of the Constitution).

"Belongs to" jurisdiction – State tribunals

27. It is submitted that if, as is common ground, Federation did not remove the "belongs to" jurisdiction of State *courts* in respect of matters between the residents of two States, then *a fortiori* it did not remove the existing jurisdiction of State tribunals: see J [65].

28. The structural implication contended for by the Cth Attorney is not logically or practically necessary for the preservation of the integrity of the constitutional structure envisaged by Chapter III: Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106 at 135 per Mason CJ; see McGinty v Western Australia (1996) 186 CLR 140 at 168 per Brennan CJ; APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 ("**APLA**") at [240] per Gummow J, at [389] per Hayne J.

29. First, Chapter III does not itself mandate a uniform national system within the classes of matters falling within federal jurisdiction. As Leeming JA observed at J [58]:

> Whether or not there is such uniformity depends on the extent to which the legislative power in s 77 is exercised. The conferral of legislative power by s 77 says nothing of whether such power is to be exercised, and, if so, how it is to be exercised. That choice, which the Constitution leaves to the Commonwealth Parliament to make, cannot sustain an implication denying legislative power to the State irrespective of whether and how federal legislative power is exercised.

30. It is submitted that Leeming JA was correct to conclude that the fact that s 77 *empowered* the Commonwealth Parliament to exercise the legislative power conferred, rather than *mandating* any particular outcome, is fatal to the contention that a restriction is to be implied: J [64].

31. Secondly, s 77(ii) of the Constitution is drafted in specific and narrow terms and relevantly only refers to "the courts of a State". There is no reference to other bodies within a State. This is significant given that State administrative bodies exercising judicial power, such as Local Land Boards under the Crown Lands Act

1884 (NSW), were well known prior to Federation, and yet the framers of the Constitution chose to exclude any reference to them in s 77(ii).

32. In this respect, as Leeming JA observed, to the extent that the legislative power conferred by s 77 is not exercised, then ss 106, 107 and 108 of the Constitution suggest that the Constitution, powers and laws of the States continue as they were: J [59]. This is not merely hypothetical supposition: J [59]. Local Land Boards were regarded as being validly empowered at the time of Federation to exercise judicial power: Wilson v Minister for Lands (1899) 20 LR (NSW) 104 (FC) at 109 per the Chief Justice, at 123 per Owen J and at 123 per Simpson J) and the Privy Council (Wilson v Minister for Lands (1901) 1 SR (NSW) 177 at 183).

33. Given that State administrative bodies exercising judicial power were well known prior to Federation, it is submitted that it cannot be the case that s 77(ii) gives rise to a "negative" implication that, if jurisdiction in respect of a s 75(iv) matter is to be exercised by any State body at all, it is to be a State court: see J [65].

34. Thirdly, in this respect s 77(iii) of the Constitution does not support the implication which is contended for by the Cth Attorney. Section 77(iii) speaks of investing any court of a State "with federal jurisdiction". In this respect, when a State *court* hears a matter between residents of different states, its jurisdiction is 'federal' because of the source of its grant (s 39(2) of the Judiciary Act) – not because of the subject matter: see J [24]-[25]; Rizeq at [50]-[53] per Bell, Gageler, Keane, Nettle and Gordon JJ.

35. In this respect, the fact that the Commonwealth Parliament may not confer federal jurisdiction on any body other than the courts referred to in Chapter III is not to the point. The exercise of jurisdiction by NCAT (and the former ADT) in the present matter involves the exercise of State jurisdiction (notwithstanding the diversity of residents within the meaning of s 75(iv) of the Constitution), as the source of the tribunal's authority to decide is New South Wales legislation: MZXOT at [23] and CGU Insurance Ltd v Blakely [2016] HCA 2; 90 ALJR 272 at [24]; see J [17]-[18].

36. Fourthly, separation of powers is not a constitutional requirement at a State level and, as such, there is no doubt that a State administrative tribunal may lawfully

exercise both judicial and administrative powers: see Kirk v Industrial Relations Court (NSW) (2010) 239 CLR 531 ("**Kirk**") at [69] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Clyne v East (1967) 68 SR (NSW) 385; Builders' Labourers Federation v Minister for Industrial Relations (1986) 7 NSWLR 372; see J [32].

37. Finally, it is not correct to say that the exercise of judicial power by State administrative bodies will lead to the existence of a parallel system. State administrative bodies exercising judicial power still sit within the federal structure for appellate review by, ultimately, the High Court. As the High Court's decision in Kirk established, at [99], the Supreme Court in each State has a supervisory jurisdiction (by the grant of prerogative relief or orders in the nature of that relief) and that jurisdiction is exercised according to principles that, in the end, are set by the High Court. Any decision of a State administrative body is accordingly subject to judicial review by the relevant State Supreme Court which, in turn, is subject to an appeal to the High Court: s 73(ii) of the Constitution. That arrangement is entrenched by the Constitution itself and there is no need for Commonwealth legislative power to provide for and maintain those arrangements.

38. It is accordingly submitted that the implication contended for by the Cth Attorney is not logically or practically necessary for the preservation of the integrity of the constitutional structure envisaged by Chapter III.

(b) Section 109 of the Constitution

39. It is submitted that the Court of Appeal erred in concluding that NCAT is unable to exercise judicial power to determine matters between residents of different States by operation of s 109 of the Constitution because any State law which purports to confer such power on a tribunal 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: J [95].

40. Where there is an alleged conflict between a Commonwealth and State law, "s 109 requires a comparison between any two laws which create rights, privileges or powers, and duties or obligations, and s 109 resolves conflict, if any exists, in

favour of the Commonwealth": Jemena Asset Management (3) Pty Ltd v Coinvest Limited (2011) 244 CLR 508 ("**Jemena**") at [37]; Bell Group NV (In liq) v Western Australia (2016) 90 ALJR 655 ("**Bell Group**") at [50] per French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ. Although the utility of the accepted tests of direct and indirect inconsistency, as articulated by Dixon J in Victoria v The Commonwealth (1937) 58 CLR 618 at 630, is well accepted, the tests are "interrelated" and their purpose is to "discern whether a 'real conflict' exists between a Commonwealth law and a State law" (citation omitted): Jemena at [42].

Sections 39 and 39A of the Judiciary Act

41. The Commonwealth Parliament exercised the powers conferred by ss 77(ii) and 77(iii) of the Constitution in Part VI of the Judiciary Act (entitled "Exclusive and invested jurisdiction"). In Rizeq, at [66], Bell, Gageler, Keane, Nettle and Gordon JJ relevantly explained:

> ... Under s 77(ii) of the Constitution, it defined the extent to which the jurisdiction of the High Court was to be exclusive of State jurisdiction. Under s 77(iii) of the Constitution, it invested State courts with federal jurisdiction. The former it achieved by a combination of s 38 (providing for the jurisdiction of the High Court to be exclusive of the jurisdiction of State courts in specified categories of matters within the scope of, although not precisely aligning to, the categories of matters referred to in s 75 of the Constitution) and s 39(1) (providing that the jurisdiction of the High Court in matters not mentioned in s 38 was to be exclusive of the jurisdiction of State courts except as provided in s 39(2)). The latter it achieved by s 39(2), which provided that, except as provided in s 38 and subject to specified 'conditions and restrictions', State courts were, 'within the limits of their several jurisdictions', to be 'invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it'. ...

See also at [137] per Edelman J.

42. As presently enacted, s 39(2) confers federal jurisdiction on the several courts of the States subject to the conditions and restrictions that a decision of a Court of a State shall not be subject to appeal to Her Majesty in Council and that the High Court may grant special leave to appeal from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any such appeal.

43. State Courts are also invested with federal jurisdiction by federal laws other than the Judiciary Act. As Leeming JA explained, s 39A, inserted by the Judiciary Act 1968, ensures that the conditions imposed by s 39(2) apply, irrespective of which federal law invests federal jurisdiction in a State Court, so far as that is possible: J [24]-[25].

The settled effect of s 39(2)

44. In PT Bayan Resources TBK v BCBC Singapore Pte Ltd (2015) 258 CLR 1 at [53] French CJ, Kiefel, Bell, Gageler and Gordon JJ explained that the "settled effect" of s 39(2) of the Judiciary Act is that, where a matter which would otherwise be within the jurisdiction of a State court answers the description of a matter within ss 75 or 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. See also Rizeq at [67] and [138].

45. It is important to recognise that s 39(2) only has this effect where the State jurisdiction in respect of the relevant matter has not been excluded (pursuant to s 77(ii) of the Constitution) under s 39(1) (or s 38) of the Judiciary Act. In Felton v Mulligan (1971) 124 CLR 367 at 411-412 Walsh J explained:

> Section 39 (1) of the Judiciary Act took away the jurisdiction of the State courts in matters in which this Court had jurisdiction. It did so by making the jurisdiction of this Court exclusive (except as provided in the section) of that of the State courts. No provision of the Act was expressed to take away the jurisdiction of the State courts in those matters in which this Court did not have original jurisdiction but in which original jurisdiction might be conferred upon it. By s. 39 (2) the courts of the States were invested with federal jurisdiction in both classes of matter.

See also Moorgate at 479.

46. In what has been described as "an early wrong turning" (Rizeq at [138]), in Lorenzo v Carey (1921) 29 CLR 243 at 252 Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ considered that, when federal jurisdiction is given to a State Court and the jurisdiction which belongs to it is not taken away, there was no difficulty in that Court "exercising either jurisdiction at the instance of a litigant": see also at 255 per Higgins J. In Ffrost v Stevenson (1937) 58 CLR 528 at 573 Dixon J stated that it appeared to him that once the conclusion was reached that federal jurisdiction was validly conferred on a State court, "under sec. 109 it was impossible to hold valid a State law conferring jurisdiction to do the same thing ...": see also Minister of State for the Army v Parbury Henty and Company Pty Ltd (1945) 70 CLR 459 at 483 per Latham CJ.

47. Dixon J's solution to the issue of "double jurisdiction" was criticised by Geoffrey Sawer, "Judicial power under the Constitution" in Else-Mitchell (ed), Essays on the Australian Constitution (Lawbook, 2nd ed, 1961) 71. Professor Sawer, who noted (at 85) that the possibility of double jurisdiction arose because the Commonwealth Parliament had not "obliterated the jurisdiction 'belonging' to the State Courts" in s 39(1), said at 86 (emphasis in original):

> There are, however, objections to an escape from the 'double jurisdiction' puzzle by the use of s. 109 of the Constitution. There is no direct conflict between a State law and a Commonwealth law both conferring authority to control the same matter [citing Victoria v The Commonwealth (1937) 58 CLR 616 and Carter v Egg & Pulp Marketing Board for Victoria (1942) 66 CLR 557]. ... Hence the application of s. 109 would require a view that the Commonwealth Parliament had expressed the intention to 'cover the field'. So far from this being the case, the very plan followed in divesting the jurisdiction 'belonging' to the State courts appears to suggest the absence of any legislative desire to override *all* the jurisdiction which could be given as 'federal'. Hence it is suggested with respect that the clearing up of

this unnecessary piece of mystification will have to be performed (as it can easily be performed) by Parliament.

48. In Felton v Mulligan, Walsh J, at 412, rejected the solution adopted in Lorenzo v Carey, stating that the "problem must be resolved by treating the Commonwealth law as paramount and as excluding, ..., the operation of the laws under which the State jurisdiction of the court would be exercised": see also 373 per Barwick CJ, 392-393 per Windeyer J. Although Walsh J recognised the doubts expressed by authors such as Professor Sawer and "in spite of difficulties created by the manner in which s. 39 has been framed", his Honour concluded that the laws under which the State courts would exercise their 'belonging' jurisdiction were made inoperative by s 39, observing at 412-413:

> ... But when the conditions which have been attached to the grant of federal jurisdiction are considered, I think it should be held that Parliament intended that in the federal matters to which the section relates the only jurisdiction to be exercised by the State courts was to be federal jurisdiction, the exercise of which would be subject to the specified conditions.

49. In Moorgate, at 479, Stephen, Mason, Aickin and Wilson JJ endorsed Walsh J's reasoning for treating the Commonwealth law as paramount. Gibbs J, at 471, also expressed his agreement with Walsh J's reasons, stating that he found it (citation omitted):

> ... inconceivable that the Parliament could have intended that the conditions attached to the exercise of federal jurisdiction might be rendered nugatory either by the parties or by the State Court. The law of the Parliament investing the State court with federal jurisdiction, and imposing conditions on its exercise, therefore is inconsistent with a law of the State which confers jurisdiction to do the same thing but would produce different consequences.

Indirect inconsistency

50. It is submitted that there is no indirect inconsistency between the State law conferring diversity jurisdiction on NCAT because ss 39(2) or s 39A are not intended to "cover the field", meaning "cover the subject matter" (Jemena at [42]), of the exercise of judicial power with respect to the matters in ss 75 and 76 of the Constitution. To employ the language used by Dixon J in Victoria v The Commonwealth at 630, it does not appear from the terms, the nature or the subject matter of ss 39 or 39A of the Judiciary Act that they were intended as a complete statement of the law governing the exercise of judicial power in respect of the matters in ss 75 and 76 of the Constitution.

51. In terms of the words used, ss 39 and 39A of the Judiciary Act refer only to "Courts of the States" or the related terms of a "Court of a State" and "Court or Judge of a State". The fact that ss 39 and 39A only refer to "Courts of the States" is notable given that Commonwealth Parliament chose to refer to "tribunals" elsewhere in the Judiciary Act: see ss 55H, 55ZG, 77RL, 77RN, 77RQ and 77RS. In only referring to "Courts of the States", the Judiciary Act is drafted in specific and narrow terms. This is significant given that State administrative bodies exercised judicial power prior to the enactment of the Judiciary Act in 1903 (see above at [32]) and the Commonwealth Parliament chose to exclude any reference to these bodies in ss 39 and 39A.

52. Neither ss 39(2) nor 39A include an "implied negative stipulation" in relation to the exercise of judicial power by bodies other than State courts in respect of the matters in ss 75 and 76 of the Constitution: cf J [46], [76]-[78]. Even assuming *arguendo* that the Commonwealth Parliament (pursuant to s 77(ii) and ss 51(xxxix) of the Constitution) could have excluded the jurisdiction of State tribunals, that power has not been exercised in s 39(1) (or s 38) of the Judiciary Act. Section 39(2) is not drafted as a complete statement as to the manner in which judicial power in respect of a matter in ss 75 and 76 of the Constitution can be exercised; it simply invests federal jurisdiction conditionally. The same problem arises in construing s 39(2) as covering the field for the exercise of judicial power by the courts of the States. As Leeming JA has explained extra-judicially (Mark

Leeming, Authority to Decide: The Law of Jurisdiction in Australia (Federation Press, 2012) at 148):

> The only real difficulty is that the *express* exercise of the power to make *some* Chapter III jurisdiction exclusive in s 39(1) makes it difficult to conclude that s 39(2) has the same operation for those Chapter III matters which fall within s 39(1) and those which do not. Plainly enough, the disparity between s 39(1) and (2) makes it impossible to impute an intention to cover the field. ...

See also Cowen and Zines's Federal Jurisdiction in Australia (3rd ed) 2002 at 237-238.

53. In this respect, it is submitted that Spigelman CJ (with whom Ipp JA agreed) was correct to observe in Attorney-General of New South Wales v 2UE Sydney Pty Ltd (2006) 226 FLR 62 at [55] that:

> Section 39(1) removes jurisdiction from courts. It does not speak in any way to the exercise of powers by tribunals who have what is often conveniently described as a 'jurisdiction', which word does not signify the same kind of power. ... Th[e] restriction [on a state tribunal deciding a matter arising under the Constitution] arises by reason of the text and structure of the Constitution .... It does not turn, in my opinion, on s 39(2) of the Judiciary Act.

Direct inconsistency

54. Noting that the question is "always one of fact and degree" (APLA at [206]), it is submitted that a State law conferring State judicial power on a State tribunal in respect of a matter between residents of different States does not "alter, impair or detract" (Victoria v The Commonwealth at 630) from the conditional investment of federal jurisdiction in such a matter on the courts of the States under s 39(2) or 39A of the Judiciary Act.

55. It is submitted that Leeming JA adopted an erroneous starting point in considering that "[s]ubstantially the same considerations apply" for regarding ss 39(2) and 39A of the Judiciary Act as rendering State conferral of judicial power on State *courts*

inoperative as render State conferral of judicial power on State *tribunals* inoperative: J [75] and [95], see also at [27], [59] and [64]. As noted above, at [44]-[49], the authorities to which his Honour referred (see at J [27], [65]-[75]) regarding the engagement of s 109 of the Constitution, deal with the potential issue of a court of a State being able to exercise federal jurisdiction and State jurisdiction concurrently. These authorities do not speak to an inconsistency between the exercise of *federal jurisdiction* by *courts* and the exercise of *State jurisdiction* by a State *tribunal* in respect of the same subject matter. The issue in this case is not whether s 109 renders inoperative "concurrent State authority to decide": Rizeq at [138].

56. Leeming JA concluded at J [78] that the "effect and purpose" of s 39 was 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.

57. However, the State law conferring judicial power on NCAT to resolve a complaint under the AD Act between residents of different States (here s 28 of the Civil and Administrative Tribunal Act 2013 (NSW) and ss 93C and 108 of the AD Act) does not touch upon federal jurisdiction or the exercise of that federal jurisdiction by the courts of the States. If a court of a State hears such a matter, the jurisdiction it exercises will be federal in nature and the exercise of its jurisdiction will be subject to the "conditions and restrictions" in s 39(2) and 39A of the Judiciary Act. In this respect, the conferral of *State jurisdiction*, in the sense of authority to decide derived from the State Constitution and laws, on a State tribunal in respect of such a matter does not render nugatory any condition attached to the exercise of federal jurisdiction in such a matter by a Court of a State.

58. To adapt the remarks of Barwick CJ in Blackley v Devondale Cream (Vic.) Pty Ltd (1968) 117 CLR 253 at 258, there is no point at which a State law conferring State jurisdiction on a body such as an NCAT collides, directly or indirectly, with the conditional investment of federal jurisdiction on the courts of the States in ss 39(2) or 39A of the Judiciary Act. The absence of any such collision is perhaps not surprising given that s 39(2) is a conferral of jurisdiction pursuant to s 77(iii) of the

Constitution and State tribunals are constitutionally impermissible receptacles of any such jurisdiction.

59. Nor does a conflict arise from the laws' legal operation or from their practical effect: Bell Group at [51]. As identified at [37] above, the exercise of judicial power by State administrative bodies still sits within the federal structure for appellate review by, ultimately, the High Court.

60. Contrary to J [79], there is nothing "strange" in the fact that the State administrative body would be exercising State judicial power while the court hearing an appeal or exercising judicial review would be exercising federal jurisdiction invested by s 39(2) of the Judiciary Act: see Pasini v United Mexican States (2002) 209 CLR 246 at 253-255 [11]-[18] per Gleeson CJ, Gaudron, McHugh and Gummow JJ (where legislation providing for an order made by a State local court magistrate was held to not involve the exercise of the judicial power of the Commonwealth but a review of the order by a court did involve the exercise of the federal judicial power). The result is analogous to the change in the authority to decide exercised by a court, within a proceeding in State jurisdiction, when federal jurisdiction is enlivened, such as by a defence arising under a law of the Commonwealth: see eg Felton v Mulligan at 373 per Barwick CJ. Further, as this Court's recent decision in Rizeq makes clear, the AD Act (being a substantive law creating norms of conduct) would continue to apply of its own force: see Rizeq at [103].

61. Although Leeming JA accurately identified that there may be different incidents to litigation arising from this shift in the authority to decide exercised by the State administrative body at first instance and a court of State on review (see J [79]), this effects no alteration, impairment or detraction from s 39(2). In relation to his Honour's reliance at J [79] on Dickson v The Queen (2010) 241 CLR 491 at [20], that was a case far removed from the present case. In Dickson, a State law rendered criminal conduct not caught by, and deliberately excluded from the conduct rendered criminal by a Commonwealth law: see at [22]. It was in that context that this Court observed at [20] that the case for inconsistency was strengthened by the differing methods of trial for the federal and State offence.

62. For the reasons set out above, it is submitted that the determination of a matter between residents of different States by NCAT does not alter, impair or detract from the operation of s 39(2) of the Judiciary Act at all or, in the alternative, in a manner that is "significant and not trivial": Jemena at [41].

Part VII: Applicable constitutional and legislative provisions

63. The applicable constitutional and legislative provisions are annexed.

Part VIII: Form of orders sought by the appellant

64. The NSW Attorney seeks the following orders:

a. appeal upheld;

b. set aside the orders made by the Court of Appeal and in their place order that the questions referred to, and reformulated by, the Court of Appeal be answered as follows:

> "(a) Did the Administrative Decisions Tribunal have jurisdiction to resolve the complaint under s 49ZT of the Anti-Discrimination Act 1977 (NSW) made by the plaintiff against the defendant? **Yes.**
>
> (b) Did the Appeals Panel of the NSW Civil and Administrative Tribunal have jurisdiction to resolve the said complaint? **Yes.**
>
> (c) Having regard to the answers to (a) and (b), are the orders that appear in the document headed 'Judgment/Order' entered on 23 October 2015 in matter no 2014/00270109 valid and enforceable against the defendant? **Yes.**"

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

65. The NSW Attorney estimates that 2 hours will be required for the presentation of his oral argument.

Dated: 27 July 2017

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ANNEXURE A

Part VII: Applicable Constitutional and Legislative Provisions

The Constitution

(Printed on 1 January 2012)

75 Original jurisdiction of High Court

In all matters

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) 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;

(iii) investing any court of a State with federal jurisdiction.

109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

***Judiciary Act 1903* (Cth)**

(Compilation date: 1 July 2016)

38 Matters in which jurisdiction of High Court exclusive

Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

(a) matters arising directly under any treaty;

(b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;

(c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;

(d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;

(e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

39 Federal jurisdiction of State Courts in other matters

(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions:

(a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.

Special leave to appeal from decisions of State Courts though State law prohibits appeal

(c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

39A Federal jurisdiction invested in State Courts by other provisions

(1) The federal jurisdiction with which a Court of a State is invested by or under any Act, whether the investing occurred or occurs before or after the commencement of this

section, including federal jurisdiction invested by a provision of this Act other than the last preceding section:

(a) shall be taken to be invested subject to the provisions of paragraph (a) of subsection (2) of the last preceding section; and

(b) shall be taken to be invested subject to paragraph 39(2)(c) (whether or not the jurisdiction is expressed to be invested subject to that paragraph), so far as it can apply and is not inconsistent with a provision made by or under the Act by or under which the jurisdiction is invested;

in addition to any other conditions or restrictions subject to which the jurisdiction is expressed to be invested.

(2) Nothing in this section or the last preceding section, or in any Act passed before the commencement of this section, shall be taken to prejudice the application of any of sections 72 to 77 (inclusive) in relation to jurisdiction in respect of indictable offences.

***Anti-Discrimination Act 1977* (NSW)**

(Current version for 8 December 2016)

49ZT Homosexual vilification unlawful

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

(2) Nothing in this section renders unlawful:

(a) a fair report of a public act referred to in subsection (1), or

(b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or

(c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

93C Other referral of complaints to Tribunal

If the President:

(a) is of the opinion that a complaint cannot be resolved by conciliation, or

(b) has endeavoured to resolve a complaint by conciliation but has not been successful in his or her endeavours, or

(c) is of the opinion that the nature of a complaint is such that it should be referred to the Tribunal, or

(d) is satisfied that all parties wish the complaint to be referred to the Tribunal and that it is appropriate in the circumstances to do so,

the President is to refer the complaint to the Tribunal.

Note. The President may also refer a complaint to the Tribunal under section 90B (5).

108 Order or other decision of Tribunal

(1) In proceedings relating to a complaint, the Tribunal may:

(a) dismiss the complaint in whole or in part, or

(b) find the complaint substantiated in whole or in part.

(2) If the Tribunal finds the complaint substantiated in whole or in part, it may do any one or more of the following:

(a) except in respect of a matter referred to the Tribunal under section 95 (2), order the respondent to pay the complainant damages not exceeding $100,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct,

(b) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act or the regulations,

(c) except in respect of a representative complaint or a matter referred to the Tribunal under section 95 (2), order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant,

(d) order the respondent to publish an apology or a retraction (or both) in respect of the matter the subject of the complaint and, as part of the order, give directions

concerning the time, form, extent and manner of publication of the apology or retraction (or both),

(e) in respect of a vilification complaint, order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination,

(f) make an order declaring void in whole or in part and either ab initio or from such time as is specified in the order any contract or agreement made in contravention of this Act or the regulations,

(g) decline to take any further action in the matter.

...

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***Civil and Administrative Tribunal Act 2013* (NSW)**

(Current version for 1 July 2017)

28 Jurisdiction of Tribunal generally

(1) The Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under this Act or any other legislation.

(2) In particular, the jurisdiction of the Tribunal consists of the following kinds of jurisdiction:

(a) the general jurisdiction of the Tribunal,

20 (b) the administrative review jurisdiction of the Tribunal,

(c) the appeal jurisdiction of the Tribunal (comprising its external and internal appeal jurisdiction),

(d) the enforcement jurisdiction of the Tribunal.

(3) Subject to this Act and enabling legislation, the Tribunal has jurisdiction in respect of matters arising before or after the establishment of the Tribunal.

72 Contravention of orders of Tribunal

(1) A person must not, without lawful excuse, contravene a designated order of the Tribunal.

Maximum penalty:

(a) in the case of a corporation—100 penalty units, or

(b) in any other case—50 penalty units or imprisonment for 12 months, or both.

(2) A ***designated order*** of the Tribunal means any of the following:

(a) an order of the Tribunal made under section 64 (Tribunal may restrict disclosures concerning proceedings),

(b) an order of the Tribunal made under section 108 (2) (b), (c), (d) or (e) of the *Anti-Discrimination Act 1977* or an interim order of the Tribunal made under that Act,

(c) an order of the Tribunal made under section 42 of the *Guardianship Act 1987*,

(d) any other order of the Tribunal that a provision of this Act or enabling legislation has declared to be a designated order for the purposes of this section.

(3) A person must not, without reasonable excuse, contravene any other order of the Tribunal made under this Act or any other legislation.

Civil penalty provision.

73 Contempt of Tribunal

(1) The Tribunal has, if it is alleged, or appears to the Tribunal on its own view, that a person is guilty of contempt of the Tribunal committed in the face of the Tribunal or in the hearing of the Tribunal, the same powers as the District Court has in those circumstances in relation to a contempt of the District Court.

(2) A person is guilty of contempt of the Tribunal if the person does or omits to do any thing that, if the Tribunal were a court of law having power to commit for contempt, would be contempt of that court unless the person establishes that there was a reasonable excuse for the act or omission.

(3) Without limiting subsection (1), the Tribunal may vacate or revoke an order with respect to contempt of the Tribunal.

(4) For the purposes of this section:

(a) sections 199, 200 and 202 of the *District Court Act 1973* apply to the Tribunal and any members constituting the Tribunal in the same way as they apply to the District Court and a Judge of the District Court, and

(b) a reference in section 200 of that Act to the registrar of a proclaimed place is taken to be a reference to the principal registrar, and

(c) section 201 of that Act applies to a ruling, order, direction or decision of the Tribunal under those provisions as so applied.

(5) Without limiting the powers of the Tribunal under this section, if it is alleged, or appears to the Tribunal on its own view, that a person is guilty of contempt of the Tribunal (whether committed in the face or hearing of the Tribunal or not), the Tribunal may refer the matter to the Supreme Court for determination.

(6) The Supreme Court is to dispose of any matter referred to it under this section in the manner it considers appropriate.

...

78 Recovery of amounts ordered to be paid

(1) **Recovery of non-penalty amounts** For the purposes of the recovery of any amount ordered to be paid by the Tribunal (including costs, but not including a civil or other penalty), the amount is to be certified by a registrar.

(2) A certificate given under this section must identify the person liable to pay the certified amount.

(3) A certificate of a registrar that:

(a) is given under subsection (1), and

(b) is filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate,

operates as such a judgment.

(4) **Recovery of civil or other penalty amounts** A civil or other penalty ordered to be paid by the Tribunal (other than for a contravention of a civil penalty provision of this

Act) may be registered as a judgment debt in a court of competent jurisdiction and is enforceable accordingly.