IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY
ON APPEAL FROM NSW COURT OF APPEAL

No. S186 of 2017

BETWEEN:

ATTORNEY GENERAL FOR NEW SOUTH WALES
Appellant

and

GARRY BURNS
First Respondent

TESS CORBETT
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM NSW COURT OF APPEAL

No. S187 of 2017

BETWEEN:

ATTORNEY GENERAL FOR NEW SOUTH WALES
Appellant

and

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

NSW CIVIL & ADMINISTRATIVE TRIBUNAL
Fourth Respondent

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM NSW COURT OF APPEAL

No. S188 of 2017

BETWEEN:

STATE OF NEW SOUTH WALES
Appellant

and

GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Fourth Respondent

ANNOTATED SUBMISSIONS IN REPLY OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES AND THE STATE OF NEW SOUTH WALES

Part I: Certification

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

Part II: Argument

The implied limitation

2. As the limitations of the Commonwealth's submissions on Ground 1A of the Commonwealth's Notice of Contention (Joint Appeal Book ("**AB**") at 238-242) are dealt with elsewhere,[1] NSW and the NSW Attorney advance only brief submissions in reply in respect of the Commonwealth's primary argument that there is a constitutional implication prohibiting States from conferring judicial power with respect to a matter in ss 75 and 76 of the Constitution on a body other than a "court of a State": Attorney-General of the Commonwealth's submissions filed 17 August 2017 ("**Commonwealth**") at [23]. NSW and the NSW Attorney agree that the NSW Civil and Administrative Tribunal ("**NCAT**") is not a "court of a State": see Commonwealth at [7.2].

3. As Queensland identifies (at [14](b), [40](b)), the Commonwealth's argument relies on the premise that the Commonwealth Parliament has no legislative power under Chapter III to control the extent to which State judicial power is exercised by bodies which are not courts. If the Commonwealth did have such a power, the implication for which the Commonwealth contends could not be "securely based", let alone 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 134-135 per Mason J): see Queensland at [16], [41].

4. Notwithstanding the premise of the Commonwealth's submissions in respect of its primary argument, in reply it asserts that it does have such legislative power

[1] See: submissions of the Attorney-General for the State of Queensland filed 24 August 2017 ("**Queensland**") at [20]-[72]; submissions of the Attorney-General for the State of Tasmania filed 24 August 2017 ("**Tasmania**") at [16]-[29]; submissions of the Attorney-General for the State of Victoria filed 24 August 2017 ("**Victoria**") at [55]-[62]; submissions of the Attorney General for Western Australia filed 24 August 2017 ("**Western Australia**") at [7]-[29]; and Mr Burns' reply submissions filed 7 September 2017 ("**Burns Reply**") at [4].

pursuant to ss 77 and 51(xxxix) of the Constitution: see Commonwealth Attorney-General's reply submissions filed 31 August 2017 ("**Commonwealth Reply**") at [14]-[15]; see also Western Australia at [21]. Cf Queensland at [6](b), [8], [15], [75]-[76]; Victoria at [53]-[54]; Mr Burns submissions in S185 of 2017 filed 27 July 2017 ("**Burns**") at [16], [20]. However, if the Commonwealth is correct in its reply, NSW and the NSW Attorney submit its primary argument must fail: cf Commonwealth Reply at [16].

Inconsistency

5. Although accepting the importance of characterisation (Commonwealth at [44]), the Commonwealth fails to actually examine the rights, privileges or powers and duties or obligations created by s 39(1) and (2) of the Judiciary Act 1903 (Cth) and instead characterises s 39 by reference to the system of "uniform laws" it was allegedly intended to create: see Commonwealth at [49]. It is submitted that this is the same error as that made by Leeming JA in Burns v Corbett (2017) 316 FLR 448 (AB 150-195) ("**J**"). The Commonwealth's argument – as Victoria explained at [51] – "presupposes that s 39 – properly construed – applies beyond 'Courts of a State' to include bodies" such as NCAT.

6. NSW and the NSW Attorney submit that, properly construed, s 39 of the Judiciary Act does not manifest an intention to control the exercise of State judicial authority with respect to the matters in ss 75 and 76 of the Constitution. If it does manifest any such intention, it is *only* in respect of the courts of the States: cf Commonwealth at [53]. The Commonwealth's submissions elide the distinction between State and federal jurisdiction and between a tribunal that is, and is not, a "court of a State". The fact that federal jurisdiction can be conferred conditionally, and has been so conferred, on the courts of the States under s 39(2) does not carry with it the exclusion of a body that is not a court of a State, like NCAT, from exercising State jurisdiction: cf Commonwealth at [57]-[58]. Previous authority establishes only that such conditional investment in State courts excludes, pursuant to s 109, any concurrent jurisdiction *in the same court*: see NSW Attorney's submissions in S186 of 2017 filed 27 July 2017 at [44]-[49].

Composite submissions of Ms Corbett and Mr Gaynor

7. NSW and the NSW Attorney make the following brief submissions in respect of the eight issues addressed in the composite submissions of Ms Corbett and Mr Gaynor filed 1 September 2017 ("**CS**") and the amended notices of contention filed 25 August 2017 (AB 339-341, 372-374 and 407-409). In respect of issues (i) and (ii), Ms Corbett and Mr Gaynor adopt the Commonwealth's submissions (CS at [4]-[5], [34]) and fail for the same reasons.

8. In respect of issue (iii), Ms Corbett's and Mr Gaynor's submissions do not make clear how this issue differs from the argument advanced in respect of the Commonwealth's notice of contention.

9. As to issue (iv), Leeming JA correctly dismissed the contention that there was no belonging jurisdiction J at [50]-[56] (AB 174-177).

10. Ms Corbett's and Mr Gaynor's submissions in respect of issue (v) and ground 3 of the amended notices of contention, are inconsistent with authority (see eg Victoria at [56]-[57]) and should be rejected.

11. In respect of issue (vi), even if Ms Corbett and Mr Gaynor were correct as to the scope of s 76(iv) of the Constitution,[2] it is unnecessary for this Court to separately consider the issue because it does not affect any change to the analysis of inconsistency under s 109 of the Constitution: Burns Reply at [14]; see Knight v Victoria [2017] HCA 29 at [32].

12. In respect of issue (vii) and ground 2 of the amended notices of contention, the issue was not argued before, or dealt with, by the Court of Appeal (see J[3]-[4] (AB 159)), and should be dealt with by the Supreme Court and Court of Appeal if the appeal is successful.

13. In respect of issue (viii) and Mr Gaynor's notices of cross-appeal filed 13 July 2017 (AB 355-358 and 388-391), as Mr Burns identifies, the composite submissions identify no basis for the grant of special leave: see Burns Reply at [19]. If special leave is granted, NSW and the NSW Attorney relevantly submit that the Court of Appeal's finding in Burns v Corbett; Gaynor v Burns (No 2) [2017] NSWCA 36

[2] As to which, see Leslie Katz, "The history of the inclusion in the Commonwealth Constitution of section 76(iv)" (1991) 2 Public Law Review 228.

(AB 202-221) at [47][3] (AB 218) was open: see Burns v Corbett; Gaynor v Burns (No 2) at [8] (AB 208) and [10]-[11] of NSW and the NSW Attorney's submissions in S187 and S188 of 2017. Furthermore, NSW and the NSW Attorney submit that there was no relevant error in the exercise of the discretion not to make a costs order against NSW and the NSW Attorney: cf CS at [100].

Dated 14 September 2017

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[3] That NSW and the NSW Attorney acted as an intervener on a pure question of constitutional law of general application.