IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S183 OF 2017**
ON APPEAL FROM THE NSW COURT OF APPEAL

BETWEEN: **GARRY BURNS**
Appellant

AND: **TESS CORBETT**
First Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Second Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S185 OF 2017**
ON APPEAL FROM THE NSW COURT OF APPEAL

BETWEEN: **GARRY BURNS**
Appellant

AND: **BERNARD GAYNOR**
First Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Second Respondent

STATE OF NEW SOUTH WALES
Third Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Fourth Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Fifth Respondent

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

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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH IN REPLY TO THE SUBMISSIONS OF THE INTERVENERS

PART I PUBLICATION

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

PART II ARGUMENT

"Matter"

2. Victoria asserts that there was no relevant "matter" within the meaning of s 75 of the Constitution before the Tribunal. There are three large difficulties with that proposition. **First**, the argument appears to be that there exists a class of disputes, between residents of different States that, entirely at the discretion of the relevant State Parliament and by reason only of its selection of a tribunal as the relevant repository of power, are outside s 75(iv). That is said to be so notwithstanding that the tribunal determines rights through the exercise of judicial power, the outcome of which is enforceable by way of an order of a State Supreme Court. If that were to be accepted, then there is no reason why the Commonwealth could not also enact such a scheme. For it would likewise follow that the exhaustive statements of legislative power conferred by ss 76 and 77 would not constrain the Commonwealth Parliament – there not being in issue "any of the matters" referred to in ss 76 and 77. It would further follow that *Brandy v Human Rights and Equal Opportunity Commission*[1] was wrongly decided.

3. None of that is correct. Nor is Victoria's narrow conception of the notion of a "matter". Indeed, the very cases upon which Victoria relies emphasise the *width* of the concept of a "matter". It was, as Griffiths CJ said in *South Australia v Victoria*,[2] a term in common use as at 1900 as "the widest term" to "denote controversies which might come before a Court of Justice". It was that passage that was extracted in *Palmer*[3] (upon which Victoria relies) as encapsulating the point that the term "matter" is not coextensive with a legal proceeding, but rather means the subject matters for determination in a legal proceeding.

4. As the Commonwealth noted by reference to the reasons of Jacobs J in *Commonwealth v Queensland*,[4] Ch III is exhaustive of the "kind" of judicial power (State or federal) that may be conferred or exercised in respect of the subject matters in ss 75 and 76: **Cth [42]**. Only by circular reasoning does one arrive at the conclusion that it is possible to escape that exhaustive statement by the selection of a body other than a court as the relevant repository of judicial power. That is an obvious invitation to avoidance of the scheme Ch III creates.

5. **Secondly**, and in any event, the subject matter of the complaint (i.e. whether particular conduct is "unlawful" under the *Anti-Discrimination Act 1977* (NSW) (**AD Act**)) is clearly capable of giving rise to a controversy which might come before a court. To take an obvious example, a person facing complaints that their future actions will contravene the AD Act would be entitled to seek declaratory relief in the Supreme Court, claiming that their conduct will not be in breach of the law.[5] Similarly, a claim seeking a declaration that the AD Act was inoperative by reason of s 109 in its application to particular conduct could be commenced in the original jurisdiction of this Court.[6] Both cases would necessarily involve consideration of whether the AD Act, properly construed, rendered that conduct unlawful. The second would plainly be a matter in

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1 (1995) 183 CLR 245 at 264, 271 (Mason CJ, Brennan and Toohey JJ).
2 (1911) 12 CLR 667 at 675 (Griffiths CJ).
3 *Palmer v Ayres* (2017) 91 ALJR 325 at 332-333 [26] (Kiefel CJ, Keane, Nettle and Gordon JJ).
4 (1975) 134 CLR 298 at 327-328.
5 *Edwards v Santos Limited* (2011) 242 CLR 421 at 435-436 [37]-[38] (Heydon J).
6 See *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 335 (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ).

federal jurisdiction.

6. **Thirdly**, a significant aspect of Victoria's argument seems to turn on the proposition that a justiciable controversy under the AD Act between residents of different States could not be litigated in this Court (or in any other court): **Vic [26], [27], [41]-[46]**. For the reasons just given, that submission is at least overstated. But it is also wrong for a further reason: the AD Act, at least insofar as it supplies the rights and duties that are in dispute,[7] applies in federal jurisdiction of its own force as part of the matter in respect of which this Court has jurisdiction (it forms part of the single composite body of federal and non-federal law that is applicable to cases determined in federal jurisdiction).[8] Further, unless it is the case that the AD Act derogates from the general jurisdiction of the Supreme Court under s 23 of the *Supreme Court Act 1970* (NSW) (so as to impose a relevant limitation on the jurisdiction of the Supreme Court within the meaning of s 39(2) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**)) the Supreme Court would also have jurisdiction.

7. It is true that, to the extent that the AD Act regulates the exercise of federal jurisdiction, it cannot apply of its own force. But the possible gap is filled by two means: first, this Court has power to pronounce all judgments necessary to do complete justice (s 31 of the Judiciary Act) and the power to grant all remedies available to finally determine the cause of action (s 32 of the Judiciary Act). Secondly, subject to the limitations referred to by this Court in *Rizeq* at [82], s 79 of the Judiciary Act otherwise fills the gap which exists by reason of the absence of State legislative power to govern what a court does in the exercise of federal jurisdiction.[9] Of course, that may require some adjustment of the terms used to identify the curial forum to administer the remedies provided for by s108 of the AD Act – but that is not an unfamiliar task.[10] It may also be the case that some aspects of the scheme could not be picked up by s 79, including the procedure by which a written complaint is first made to the Anti-Discrimination Board (ss 87A and 89A), and the procedure by which that complaint is referred by the President to NCAT (ss 93A, 93B and 95).[11] None of that requires the radical conclusion that the broad constitutional concept of a "matter" is to be read down in the manner suggested by Victoria. Nor could the State provisions just mentioned validly operate so as to deny federal jurisdiction. It may be accepted that they are addressed to the mechanisms by which NCAT's jurisdiction is invoked, not the mechanism by which the jurisdiction of a

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7 Cf *Re East; ex parte Nguyen* (1998) 196 CLR 354, which is distinguishable because, by reason of the constraints imposed by Ch III, the Human Rights and Equal Opportunity Commission could not exercise judicial power, meaning that the Act, in creating the relevant norms, would not readily be construed as giving rise to legally enforceable rights which could be vindicated in this Court under s 75(i) (see at 362-363 [20] and 364-365 [25] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)). Consistently with this the role of the Federal Court was not, in terms, to determine whether there had been a breach of the norm of conduct but rather the 'enforcement' of the Commission's determination that there had been unlawful conduct (see at 364-365 [25] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)). In contrast here, exercising judicial power, the role of NCAT is to authoritatively determine whether there has been unlawful conduct, which confirms that the AD Act does give rise to legally enforceable rights and duties.

8 *Rizeq v Western Australia* (2017) 91 ALJR 707 (***Rizeq***) at 718-719 [52]-[56] (Bell, Gageler, Keane, Nettle and Gordon JJ).

9 *Rizeq* (2017) 91 ALJR 707 at 713-714 [16], [20] (Kiefel CJ) and 726 [90] (Bell, Gageler, Keane, Nettle and Gordon JJ).

10 See, dealing with similar references to State Courts, *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 575 (Gleeson CJ and Gummow JJ); *ASIC v Edensor* (2001) 204 CLR 559 (***Edensor***) at 591 [67], 595 [80] (Gleeson CJ, Gaudron and Gummow JJ); *Forge v ASIC* (2006) 228 CLR at 90-91 [112] (Gummow, Hayne and Crennan JJ).

11 The same is true of the provisions governing enforcement (s 114 of the AD Act and s 78 of the *Civil and Administrative Tribunal Act 2013* (NSW)) and the provisions conferring functions of a non-judicial nature (see eg s 108(2)(d) and (e) of the AD Act and see *Edensor* (2001) 204 CLR 559 at 593 [73] (Gleeson CJ, Gaudron and Gummow JJ)).

Court would be invoked. But, absent specific provision, this Court would exercise its authority in such a matter by the ordinary incidents of the rules of procedure by which it is governed.[12] Were it otherwise, State Parliaments could readily stultify the operation of federal jurisdiction,[13] by the inclusion of such conditions or requirements.

Practical difficulties

8. The existence of federal jurisdiction in respect of ss 75 and 76 matters arising under the AD Act suggests that many of the submissions as to the "practical" difficulties associated with the Commonwealth's submissions are overstated: see **QLD [36]-[38]; WA [38]-[39]**. And, at least in the case of those heads of jurisdiction identified by reference to the character of the parties (ss 75(iii) and (iv)), the need to engage that jurisdiction (in a proper forum) will generally be clear from the outset.[14]

9. Those submissions are overstated for a further specific reason in the case of matters in which some question involving the Constitution arises: see **QLD [37]**. Although Queensland does not identify how such a question might arise, the most obvious possibility is as an aspect of an objection to the jurisdiction of NCAT. But, in such a case, there is no difficulty with an administrative body (be it Commonwealth or State) forming a view or an "opinion" on constitutional issues as a step in determining jurisdiction.[15] The "opinion" in such a case is not the subject matter of registration, does not acquire binding force and therefore does not involve an exercise of judicial power. Likewise, irrespective of the view taken by the administrative body, the question of jurisdiction would remain undetermined as between the parties unless and until that question is authoritatively determined by a court in the exercise of judicial power within its own jurisdiction.[16] As such, those matters give rise to no difficulty under either of the Commonwealth's arguments: see **Cth [7.3] and [7.4]**.

Separation of powers

10. A further theme of the interveners' submissions is that the implication for which the Commonwealth contends is "inconsistent" with what is described as the "deeply entrenched position" that no separation of powers exists at the State level: **QLD [36], [37]**; **Vic [19], [29]-[31]**. That submission seemingly proceeds on the assumption that the Constitution reserves to the States an area of legislative competence to pass legislation that intermingles executive and judicial power. But, as this Court's decision in *Wainohu v New South Wales*[17] demonstrates, the constraints imposed by Ch III will sometimes operate upon State legislatures to produce a similar result to that which flows from the entrenched separation of powers that operates at the Commonwealth level. If accepted, the Commonwealth's implied limitation merely represents a further case where that is so (limited to the determination, by the exercise of judicial power, of the matters in ss 75 and 76).

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12 *Electric Light & Power Supply Corporation Limited v Electricity Commission of New South Wales* (1956) 94 CLR 554 at 559 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ).

13 See *Edensor* (2001) 204 CLR 559 at 591-592 [68] (Gleeson CJ, Gaudron and Gummow JJ); *John Robertson & Co Ltd (in liq) v Ferguson Transformers Pty Limited* (1973) 129 CLR 65 at 88 (Gibbs J).

14 As to the practical effect upon this Court, if the Supreme Court does not have jurisdiction, that may raise the potential issue of validity noted in *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 (***MZXOT***) at 627 [53] (Gleeson CJ, Gummow and Hayne JJ), 628 [59] (Kirby J). But it is well within the legislative capacities of the States to remedy that potential difficulty (by conferring jurisdiction on a State Court).

15 See eg *Re Adams and Tax Agent's Board* (1976) 12 ALR 239 at 241-242 (Brennan J); *Sunol v Collier* (2012) 81 NSWLR 619 at 624 [20] (Basten JA) (departing from an aspect of the reasoning in *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385).

16 *NSW v Kable* (2013) 252 CLR 118 at 140-141 [56] (Gageler J).

17 (2011) 243 CLR 181 at 207-208 [41]-[43] (French CJ and Kiefel J) and at 228-229 [108] (Gummow, Hayne Crennan and Bell JJ).

11. The related appeal to the historical position that applied at or around 1900 (**QLD [52], [53], WA [13]**) is likewise misplaced. In addition to the matters to which the Commonwealth referred at **Cth [35], [36]**, those submissions fall into an error similar to that identified in *MZXOT*:[18] that is, they appear to approach the relationship between federal jurisdiction and State jurisdiction from a vantage point where the State courts (and other repositories of State judicial power) are seen as superior to the operation of the Constitution by reason of their earlier establishment by or pursuant to Imperial legislation. That is simply not so.

Implication

12. Reiterating matters raised by the appellants, the interveners place particular reliance upon the absence of any reference to "tribunals" or to State legislative power in s 77(ii): **QLD [48]-[51]; WA [18]-[26]; Tas [20]-[22]**. But the Commonwealth's argument is not put on the basis of that provision alone and the interveners fail to bring to account what clearly emerges from the text and context of Ch III as a whole. The nine heads of jurisdiction in ss 75 and 76 refer to subject matters that have a particular federal significance.[19] Concerns that might otherwise have arisen about parochialism[20] in the determination of such matters by State repositories of judicial power exercising federal jurisdiction were understood to be unwarranted *because* that function was entrusted to (and only to) courts.[21] That then points to the significance of the repeated references to those organs of government as the only possible vessels for the exercise of federal jurisdiction: ss 71, 72, 73, 77 and 79. The short point is that the Constitution prescribes a particular way of dealing with ss 75 and 76 matters and that way is the *only* way in which those controversies are to be quelled, regardless of whether one is speaking of the sovereign authority conferred by the Commonwealth or by the States to do so. That is how the principle derived from *Boilermakers*[22] is to be understood.

Integrated judicial system

13. An argument of the Commonwealth is that the implication it contends for is supported by the proposition that the Constitution provides for an integrated Australian judicial system (and permits the Commonwealth to provide for uniformity throughout that system). The answer given by Queensland involves reliance upon the entrenched supervisory jurisdiction of the Supreme Court identified in *Kirk*:[23] **QLD [59], [65]**. There are two difficulties with that: **first**, the only institutions that can form part of the integrated system are courts. Tribunals that are not courts cannot be "brought within" that system[24] (cf **QLD [59]**) and are thus beyond the reach of the "necessary" federal control spoken of by Quick and Garran[25] (see **Cth [24]-[25]**). **Secondly**, Queensland overlooks the point made at **Cth [60]** – that is that *Kirk* has no application in a case of non-jurisdictional error of law appearing on the record. The suggestion that all erroneous exercises of judicial power would be capable of correction therefore

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18 *MZXOT* (2008) 233 CLR 601 at 617 [18] (Gleeson CJ, Gummow and Hayne JJ), referring to *Edensor* (2001) 204 CLR 559 at 592 [69] (Gleeson CJ, Gaudron and Gummow JJ).

19 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (**Q&G**) at 724, referring to matters of "specially federal concern".

20 See, by way of analogy in the context of s 92, *Betfair v Western Australia* (2008) 234 CLR 418 at 459-60 [33]-[35] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

21 See **Cth** [32] and see also, as regards s 75(iv), *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 339 (Starke J).

22 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

23 *Kirk v Industrial Relations Court* (NSW) (2010) 239 CLR 531.

24 See eg *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 111 (McHugh J).

25 Q&G at 802.

overstates the position (**QLD [59]**). The potential for a fractured diversity of parallel systems remains.

14. Queensland and Victoria assert that the Commonwealth does not have legislative power to exclude State bodies other than courts from exercising judicial power with respect to ss 75 and 76 matters and, for this reason, the operation of s 39(2) of the Judiciary Act cannot extend that far (**QLD [76]; Vic [53]-[54]**).[26] But that operation of s 39(2) is supported by s 51(xxxix) of the Constitution, as a matter incidental to the execution of the s 77 legislative power.

15. A law will be supported by s 51(xxxix) if it is "reasonably necessary" or "necessary or proper" to make the exercise of the principal power effective.[27] As previously submitted (**Cth [48]-[49]**), s 77 confers legislative power to create a uniform national system for the exercise of jurisdiction with respect to the ss 75 and 76 matters, thus avoiding the perplexities associated with a competing parallel adjudicative authority. To the extent that the exclusion of that authority by State tribunals and administrators is not squarely within that power, it is nevertheless a matter that is "conducive" to the success of legislation enacted under it and is "reasonably necessary" to carry it into effect.[28] The existence of such a power is not a matter of mere "convenience" or "efficiency".[29] Further, s 51(xxxix) here operates to preclude the conferral of jurisdiction on State bodies with respect to ss 75 and 76 matters, not on the rights and liabilities of parties to such disputes (contra **Vic [54]**).[30]

16. There is no logical inconsistency between the two limbs of the Commonwealth's argument (contra **QLD [73]-[75]**). Those two limbs are posited as *alternatives*. They proceed from different starting points but are based on the same underlying concern. Namely, that a "uniform national system" for the exercise of jurisdiction with respect to the ss 75 and 76 matters (whether created by the Constitution itself, or by the exercise of legislative power under s 77(ii) and (iii)) would be undermined by the continued ability of State bodies other than courts to exercise judicial power with respect to such matters (**Cth [23]-[24], [30]-[31], [48]**). The necessity of protecting this uniform system is the reason for the implied limitation asserted by the primary argument or, alternatively, the reason why an exercise of legislative power to protect the system is within s 51(xxxix).

Dated: 31 August 2017

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26 In contrast, Western Australia accepts that the Commonwealth has such power under s 51(xxxix) of the Constitution: **WA [21]**.

27 *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 (***Re Wakim***) at 562 [70] (McHugh J), 579 [118], 580 [122] (Gummow and Hayne JJ); *Rizeq* (2017) 91 ALJR 707 at 717 [46] (Bell, Gageler, Keane, Nettle and Gordon JJ), 744-745 [191] (Edelman J); *Boilermakers'* (1956) 94 CLR 254 at 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

28 *Re Wakim* (1999) 198 CLR 511 at 579-580 [122] (Gummow and Hayne JJ). See also Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152 at 159.

29 Cf *Re Wakim* (1999) 198 CLR 511 at 579 [121] (Gummow and Hayne JJ).

30 Citing *Rizeq* (2017) 91 ALJR 707 at 717 [46] (Bell, Gageler, Keane, Nettle and Gordon JJ).