BURNS v CORBETT & ORS (S183/2017)
BURNS v GAYNOR & ORS (S185/2017)
ATTORNEY GENERAL FOR NEW SOUTH WALES v BURNS & ORS (S186/2017)
ATTORNEY GENERAL FOR NEW SOUTH WALES v BURNS & ORS (S187/2017)
STATE OF NEW SOUTH WALES v BURNS & ORS (S188/2017)

Court appealed from: New South Wales Court of Appeal
[2017] NSWCA 3

Date of judgment: 3 February 2017

Special leave granted: 22 June 2017

These appeals concern the issue of whether the Civil and Administrative Tribunal of New South Wales ("NCAT") has jurisdiction to resolve a complaint under the *Anti-Discrimination Act* 1977 (NSW) ("the Act") that involves a resident of New South Wales and a resident of another State.

In 2013 Mr Garry Burns, a resident of New South Wales, lodged a complaint with the New South Wales Anti-Discrimination Board ("the Board") about statements made by Ms Therese Corbett, a resident of Victoria, that had been published in a newspaper in Victoria and then online by several news providers (including the Sydney Morning Herald). Mr Burns contended that the statements were public acts of homosexual vilification, in contravention of s 49ZT of the Act. The Board referred that complaint to NCAT's predecessor, the Administrative Decisions Tribunal ("the ADT"). In 2014 Mr Burns made similar complaints about statements that had been published online by Mr Bernard Gaynor, who resided in Queensland. Those complaints were referred by the Board to NCAT.

The ADT found that Ms Corbett had contravened s 49ZT of the Act. It ordered her to make both a private apology to Mr Burns (by letter) and a public apology (by publication in the Sydney Morning Herald). After an unsuccessful appeal by Ms Corbett to the Appeal Panel of NCAT, Mr Burns registered the ADT's orders with the Supreme Court of New South Wales as a judgment of that Court, under s 114(3) of the Act. He later applied for orders that Ms Corbett was in contempt of court for having failed to make the apologies. On 26 July 2016 Campbell J ordered that certain questions be determined before further hearing of the contempt claim and that those questions be removed to the Court of Appeal for decision. The questions related to both the jurisdiction of the ADT (and NCAT) to determine the complaint and the enforceability of the ADT orders as registered with the Supreme Court.

In the meantime, NCAT dismissed the other complaints made by Mr Burns, upon finding that s 49ZT of the Act could not apply. This was on the basis that the relevant public acts, Mr Gaynor's posting of statements online, had been done in Queensland and not in New South Wales. Before NCAT's Appeal

Panel had proceeded to hear an appeal filed by Mr Burns, Mr Gaynor applied to the Supreme Court for declarations that NCAT lacked jurisdiction to determine matters involving, or to make binding orders against, residents of States other than New South Wales. That application was removed to the Court of Appeal. Mr Gaynor separately appealed to the Court of Appeal from costs orders that had been made by the Appeal Panel of NCAT.

The Court of Appeal (Bathurst CJ, Beazley P and Leeming JA) heard and determined the three proceedings together, and unanimously held that the ADT and NCAT did not have jurisdiction to resolve Mr Burns's complaints. Since the matters in dispute were between residents of different States, they came within s 75(iv) of the Constitution. Their Honours held that although State courts were invested with federal jurisdiction by s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), s 109 of the Constitution then operated, with the result that State jurisdiction was ousted. That ouster applied, in respect of the complaints made by Mr Burns, to the State judicial power that had been conferred on NCAT to resolve complaints made under the Act. The Court of Appeal therefore further held that neither the ADT orders registered as a Supreme Court judgment nor the NCAT Appeal Panel costs orders were enforceable.

In appeals S183/2017 and S185/2017, the grounds of appeal include:

- The Court of Appeal erred in failing to find the proper construction of the legislative scheme comprised of ss 75, 76, 77(ii) and 77(iii) of the Constitution and s 39 of the Judiciary Act was that State diversity jurisdiction was retained by State tribunals, including NCAT.

- The Court of Appeal erred in finding because s 39(2) of the Judiciary Act vests federal diversity jurisdiction in State courts only, that any State law purporting to vest diversity jurisdiction in a State tribunal is rendered inoperative by s 109 of the Constitution.

In appeals S186/2017, S187/2017 and S188/2017, the sole ground of appeal is:

- The Court of Appeal erred in concluding that a State tribunal which is not a "court of a State" is unable to exercise judicial power to determine matters between residents of different States, because the State law which purports to authorise the tribunal to do so is inconsistent with s 39(2) of the Judiciary Act and is therefore rendered inoperative by virtue of s 109 of the Constitution.

Notices of contention have been filed by Ms Corbett, Mr Gaynor and the Attorney-General of the Commonwealth, while notices of cross-appeal have been filed by Mr Gaynor.

Notices of a constitutional matter have been filed by all appellants and by Ms Corbett, Mr Gaynor and the Attorney-General of the Commonwealth. The Attorneys-General of Victoria, Queensland, Western Australia and Tasmania are intervening in all five appeals.