



## HIGH COURT OF AUSTRALIA

18 April 2018

GARRY BURNS v TESS CORBETT & ORS; GARRY BURNS v BERNARD GAYNOR & ORS;  
ATTORNEY GENERAL FOR NEW SOUTH WALES v GARRY BURNS & ORS; ATTORNEY  
GENERAL FOR NEW SOUTH WALES v GARRY BURNS & ORS; STATE OF NEW SOUTH  
WALES v GARRY BURNS & ORS

[2018] HCA 15

Today the High Court unanimously dismissed five appeals from the Court of Appeal of the Supreme Court of New South Wales. The High Court held that ss 28(2)(a) and (c), 29(1) and 32 of the *Civil and Administrative Tribunal Act 2013* (NSW) were invalid to the extent that they purported to confer jurisdiction upon the Civil and Administrative Tribunal of New South Wales ("NCAT") in relation to matters between residents of different States.

Within Ch III of the Constitution, which establishes the federal Judicature, s 75(iv) relevantly provides that the High Court shall have original jurisdiction in all matters between residents of different States. Section 76 of the Constitution empowers the Commonwealth Parliament to confer additional original jurisdiction on the High Court to determine other kinds of matters. Section 77 of the Constitution empowers the Commonwealth Parliament to make laws defining the jurisdiction of any federal court other than the High Court, 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, and investing State courts with federal jurisdiction.

In 2013 and 2014, Mr Garry Burns made separate complaints to the Anti-Discrimination Board of New South Wales about statements made by Ms Therese Corbett and Mr Bernard Gaynor, which Mr Burns claimed were contrary to s 49ZT of the *Anti-Discrimination Act 1977* (NSW) ("the AD Act"). At all material times, Mr Burns was a resident of New South Wales, Ms Corbett was a resident of Victoria and Mr Gaynor was a resident of Queensland.

The complaint against Ms Corbett was referred to the Administrative Decisions Tribunal of New South Wales ("the ADT"), which was the predecessor to NCAT. The ADT found that Ms Corbett had breached the AD Act and ordered her to make a public and private apology. She appealed unsuccessfully to the Appeal Panel of NCAT, whose orders were entered in the Supreme Court of New South Wales. Thereafter, Mr Burns brought proceedings in the Supreme Court charging Ms Corbett with contempt for failing to make either apology. That aspect of Ms Corbett's defence that contended that neither the ADT nor the Appeal Panel of NCAT had jurisdiction because she was a resident of Victoria was removed to the Court of Appeal.

Mr Burns' complaint against Mr Gaynor was referred to and dismissed by NCAT. While an appeal by Mr Burns to the Appeal Panel of NCAT was yet to be heard, an interlocutory costs order was made against Mr Gaynor. Mr Gaynor obtained leave to appeal to the Court of Appeal in respect of that order and by summons sought a declaration that NCAT had no jurisdiction to determine matters pertaining to residents in a State other than New South Wales.

The Court of Appeal heard the appeals together in order to resolve the common issue of whether NCAT may hear and determine a dispute arising under the AD Act between a resident of New South Wales and a resident of another State. It was common ground before the Court of Appeal that even though, in hearing and determining Mr Burns' complaints, NCAT was exercising

the judicial power of the State, NCAT was not a "court of a State" for the purposes of Ch III of the Constitution. The Court of Appeal held that NCAT had no jurisdiction to hear and determine the complaints against Ms Corbett or Mr Gaynor.

By grant of special leave, the appellants appealed to the High Court. The Attorney-General of the Commonwealth filed a notice of contention in each matter, pursuant to which he submitted that there is an implied constitutional constraint on State legislative power, such that a State law is invalid to the extent that it 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". The Attorney-General of the Commonwealth's alternative submission was that such a law is inconsistent with s 39(2) of the *Judiciary Act* 1903 (Cth) and thus invalid by operation of s 109 of the Constitution.

The High Court unanimously dismissed the appeals. A majority of the Court did so on the basis that Ch III of the Constitution leaves no room for the possibility that adjudicative authority in respect of the matters in ss 75 and 76 might be exercised by, or conferred by any party to the federal compact upon, an organ of government, federal or State, other than a court referred to in Ch III. The constitutional structure erected by Ch III would be undermined were a State Parliament able to confer adjudicative authority with respect to any of the matters identified in ss 75 and 76 on a State tribunal that is not a State court.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*