IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL **No. S183 of 2017**

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
ON APPEAL FROM THE NSW COURT OF APPEAL **No. S185 of 2017**

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

Filed on behalf of Attorney-General for the State of Tasmania

Solicitor-General of Tasmania
Level 8, 15 Murray Street
HOBART TAS 7000

Telephone: 03 6165 3614
Fax: 03 6173 0264
Email: Solicitor.General@justice.tas.gov.au
Ref: Sarah Kay

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 ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA, INTERVENING

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

1. The Attorney-General for the State of Tasmania certifies that these submissions are in a form suitable for publication on the Internet.

Part II: Basis of Intervention

2. Tasmania intervenes to meet the notice of contention of the Attorney-General for the Commonwealth in each of the proceedings that there is an implied limitation on State legislative power the effect of which is that a State law which purports to confer judicial power in respect of any of the matters 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.

Part III: Applicable constitutional and statutory provisions

3. The applicable constitutional provisions are set out in Annexure A to the appellant's submissions in S186 of 2017 filed on 27 July 2017. In particular, Tasmania refers to:

   (a) *The Constitution*, ss 71, 75, 76, 77 and 109.

   (b) *Judiciary Act 1903* (Cth) ss 38, 39, 39A.

Part IV: Submissions as to Constitutional Issues

Summary of Argument

4. Tasmania submits that:

   (a) Where, as in the present case, the implication sought to be established by the Commonwealth is said to be supported by the structure of the Constitution and not its text, the test for the implication is whether it is logically and practically necessary for the preservation of that structure[1].

   (b) The structure of the Constitution does not support a logical and practical necessity for the implication.

Notice of Contention and the Commonwealth's argument

5. Contrary to the Commonwealth's contention, there is no constitutionally implied limitation on State legislative power, preventing the State from making a valid law that purports to confer judicial power on a person or body that is not one of the courts of the State in respect of the matters identified in ss 75 and 76 of the Constitution.[2]

6. The judgment of the Court of Appeal[3] is correct and should be upheld on this issue.

7. The Court of Appeal identified the following strands to the Commonwealth's argument before that Court.

---

1 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
2 cf., Commonwealth's notice of contention date 10 July 2017, ground 1(a).
3 *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 ("CA").

(a) Because there is an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth,[4] the implication is required as a matter of logical or practical necessity to avoid the fragmentation of the institutional structure of Chapter III;[5]

(b) The text and structure of s 77 supports the implication, with the result that the contended implication is subject to a less demanding test than an implication derived from the structure of Chapter III alone;[6]

(c) A number of authorities support the implication.[7]

8. The Commonwealth submits that the implication is "an aspect" of the integrated Australian judicial system.[8]

The test for the implication

9. In order for the Commonwealth's contention to be made good, it must show that the implication is securely based.[9] It is both the text and structure of the Constitution that informs that question.[10]

10. In *Australian Capital Television Pty Ltd v The Commonwealth*[11], Mason CJ reviewed the authorities relating to the test for drawing implications in the Constitution. He concluded that "where the implication is structural rather than textual the term to be implied must be logically or practically necessary for the preservation of that structure."[12]

---

4 CA [36]; referring to *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 102.
5 CA [36].
6 CA [38]; referring to *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135. The CA did not address the manner in which the test for the implication may be addressed. See *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 452 [385].
7 CA [39]-[45]; *Commonwealth v Queensland* (1975) 134 CLR 298 at 328 per Jacobs J; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [153], relying on the submission set out at 507.7; *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385; [2006] NSWCA 349 at [56] and *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85; [2008] FCAFC 104 at [220]; cf., *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601; [2008] HCA 28.
8 Cth [24].
9 *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 453 [389].
10 *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 452 [385].
11 (1992) 177 CLR 106.
12 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135.3.

11. Subject to one reservation,[13] the Commonwealth's notice of contention and its submissions appear to accept the requirement for the logical and practical necessity of the implication.[14] The notice of contention applies only to that part of the Court of Appeal's reasoning that relates to the structure of the Constitution.[15] It does not refer to the Court of Appeal's reasoning that relates to the text.[16] The Commonwealth's submissions concede that the implication has a structural or functional foundation.[17] In that regard, despite the doubts expressed in *APLA*,[18] it is submitted that authorities bespeak necessity as the prevailing test for implications arising from structure.[19]

10 12. Accordingly, the Commonwealth is unable in this Court to rely on the "less demanding" test said to arise from a text based implication.[20]

The structure to be preserved

13. The structure identified for preservation by the Commonwealth is "the institutional landscape envisaged by Chapter III".[21] The landscape constructed by Chapter III is this Court, and "such other federal courts as the Parliament creates" and "such other courts as it invests with federal jurisdiction".[22]

14. However, the mere identification of an integrated Australian judicial system can say little further about its structure, or how it is to function, unless the system is constitutionally immutable.[23] A statement that the system must not be fragmented[24]
20 does not assist in determining what parts of the system may from time to time be created, or preserved or removed by the authority of Parliament.

---

13 Cth [23].
14 Cth [23] and see CA[36].
15 Notice of contention ground 1, referring to CA [65] and [80]-[83].
16 CA [58] – [64].
17 Cth [23] referring the *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 106 [183].
18 Cth [23] referring to *APLA Ltd v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322 at 409 [240] – [242] (Gummow J) and 452-454 [385]-[389] (Hayne J).
19 *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 106 [182] referring "[the] structural expedient can *only* function if...courts are able to act 'judicially'." [Emphasis added]; see also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *MZXOT v Minister for Immigration* (2008) 233 CLR 601 at 656 [171].
20 cf., *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106, 135.
21 Cth [23]; CA [36].
22 *Constitution*, s 71.
23 cf., Cth [24].
24 cf., Cth [23].

15. Even the institutions within the integrated system may change as a result of external forces. While the Constitution has withdrawn the States' power to abolish their Supreme Courts that "does not mean that a State cannot abolish or amend the constitutions of its existing courts"[25], provided that there remains a State Court that is a suitable repository for the judicial power of the Commonwealth.[26]

Logical and practical necessity

16. Tasmania submits that the contended implication is not necessary to protect that structure. The Constitution envisages that the structure is erected to operate in a way that does not permit the implication to be made.

10 17. First, whether or not the argument is confined to the structure of the Constitution does not render the textual arguments irrelevant. The plain text of Chapter III is against the structural implication. It is of note that the notice of contention makes no attack on the Court of Appeal's analysis of the textual arguments.[27] It is submitted that the Court of Appeal's analysis was correct.

18. Secondly, s 71 vests the judicial power of the Commonwealth in the High Court, the federal courts created by Parliament and the State courts in which Parliament invests federal jurisdiction.[28] The delineation of the structure expressed in s 71, including the express legislative choice to create courts and invest federal jurisdiction exposes an immediate problem with the Commonwealth's argument, because the implication
20 must also extend to the preservation of the integrity of that legislative choice.

19. Thirdly, it has been recognised that it rests with the Parliament to make laws affecting the content or exercise of the judicial power of the Commonwealth.[29] Section 109 is the mechanism to resolve any conflict that might arise about a Commonwealth law about federal judicial power and a law of a State that purports to affect the content of that judicial power.

---

25 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 111 (McHugh J) see also 102-3 (Gaudron J).
26 *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 103 (Gaudron J).
27 CA [58] to [64].
28 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 274.
29 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278, referring to the Constitution, ss 76 – 79, noting that there are also legislative powers in ss 71 – 74.

20. Fourthly, the Commonwealth's contention introduces a constitutional interference with State legislative power to confer State jurisdiction on State tribunals, where none exists. Chapter III says nothing about this aspect of State's legislative power, nor does it need to. As the Court of Appeal found,[30] the implication is not sustained by the settled implications that Chapter III prevents the conferral of federal jurisdiction on bodies other than courts, or the conferral of State judicial power on federal courts.

21. The constitutional operation of s 75(iv) is to confer original jurisdiction on the High Court. It does not, however, exclude the jurisdiction of the State Courts in matters which belonged to the Courts of the States. It is s 77 that provides the Commonwealth Parliament with the mechanism to define and organise federal jurisdiction. The text of s 77(ii) recognises that federal jurisdiction is not exclusive, unless the Parliament says so.[31] Section 109 then provides the mechanism to prevent States from legislating inconsistently with the system so defined and organised.

22. A corollary of the "necessary premise" identified by the Commonwealth at [30] of its submissions is that s 77(ii) is itself a constitutional brake on State legislative power. Section 77(ii) says nothing about State legislative power. Moreover, the response described by the Commonwealth to the effect that a State might be able to confer on an administrative body federal jurisdiction excluded from a State court by the Commonwealth is illusory, if it is the legislative will of the Parliament that it should not occur. In matters in which the State would otherwise have a jurisdiction concurrently with federal jurisdiction, s 109 provides a complete structural answer. In matters purely within federal jurisdiction it is not necessary to resort to s 77(ii) to exclude the State's jurisdiction.[32] The federal control asserted by Quick and Garran[33] remains alive without resort to the implication contended for.

---

30 CA [65].
31 s 77(ii).
32 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619 [25].
33 Cth [25].

23. The "belongs to" jurisdiction and the accepted view of its denial described in *MZXOT v Minister for Immigration and Citizenship*[34] overwhelms the implication and, explains the correct function of s 77(ii).

24. Fifthly, as noted by the Court of Appeal, [35] at federation other provisions (namely, ss 106, 107 and 108) of the Constitution secured the judicial power that belonged to the States, subject only to the original jurisdiction that was invested in the High Court.

25. There is no reason either to enhance by implication the constitutional scheme, because it is perfectly adequate to confer federal jurisdiction and to adjust it in the manner required by the Parliament.

Authorities

26. The Court of Appeal noted two difficulties associated with authorities relied on by the Commonwealth in support of its submission.[36] Tasmania respectfully adopts the reasoning of the Court of Appeal and makes the following further observations.

27. The *Commonwealth v Anti-Discrimination Tribunal*[37] does not assist the Commonwealth's argument. As the Commonwealth was a party to the proceedings, the question of State "belonging to" jurisdiction and the legislative power of the States to regulate such jurisdiction, simply did not arise. It is submitted that diversity jurisdiction gives rise to different questions. Further, Kenny J recognised that it was not necessary to discuss the question as to whether the Tribunal was competent to decide the complaint in that case[38] given that the Commonwealth was not bound by the *Anti-Discrimination Act 1998* (Tas) in the first place. In addition, the fact that Kenny J relied upon the combined impact of s 75(iii) of the Constitution and s 39(2) of the *Judiciary Act* [39] is relevant to the conclusions reached in her judgment at [222]. This is played out in her acceptance of the passage from *2UE*[40] at [223] which recognises the role of Parliament under s 77(ii). We contend that this

---

34 (2008) 233 CLR 601, 619 [23] and [24].
35 CA [58].
36 CA [83].
37 (2008) 169 FCR 85.
38 at [194].
39 at [208] - [209].
40 *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385.

is sufficient to answer the Commonwealth's first point about the authorities (at [41]).

28. The conclusion expressed by the Commonwealth at [42] of its submissions that Jacobs J correctly recognised that positive grants of power in Chapter III contain negative implications that deny certain powers to the States cannot be sustained. The demarcation of the federal structure is accurately described in *MZXOT v Minister for Immigration and Citizenship*[41]. The Commonwealth's characterisation of Jacob J's judgment in *Commonwealth v Queensland*[42] overreaches the structure so described. By doing so, the Commonwealth's contended implication seeks to accumulate constitutional power against the structure and to the exclusion of the States.

29. The Commonwealth's notice of contention should be dismissed.

Part V: Estimate Time for Oral Argument

30. Tasmania will need no longer than 10 minutes to present its oral argument.

Dated 24 August 2017

Michael O'Farrell SC
Solicitor-General of Tasmania
T: (03) 6165 3614
F: (03) 6233 2510
E: solicitor.general@justice.tas.gov.au

Sarah Kay
T: (03) 6165 3614
F: (03) 6233 2510
E: sarah.kay@justice.tas.gov.au

41 (2008) 233 CLR 601, 619 to 621 [25]-[31].
42 (1975)134 CLR 298, 327-8.