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High Court confirms that State tribunals cannot exercise judicial power in federal matters

The High Court has unanimously held that a State tribunal that is not a 'court of a State' within the meaning of Ch III of the Constitution is not able to exercise judicial power in any of the matters dealt with in ss 75 and 76 of the Constitution, which includes matters in which the Commonwealth is a party (s 75(iii)).

Burns v Corbett [2018] HCA 15

Background

Mr Burns, a resident of NSW, brought complaints in the NSW Civil and Administrative Tribunal (NCAT). The complaints were against residents of Queensland (Mr Gaynor) and Victoria (Ms Corbett) and alleged that each had engaged in homosexual vilification contrary to the *Anti-Discrimination Act 1977* (NSW). It was common ground that NCAT would exercise judicial power in resolving the complaints, but was not a 'court' within the meaning of Ch III of the Constitution. The proceedings thus came within the subject matter of s 75(iv) of the Constitution, namely 'matters ... between residents of different States'.

The NSW Court of Appeal held that NCAT did not have jurisdiction to hear and determine the complaints. The NSW Attorney-General and Mr Burns appealed this decision to the High Court. The Commonwealth Attorney-General was a respondent to the appeals, having intervened in the NSW Court of Appeal.

Consistent with the Commonwealth's long-standing position, the Commonwealth Attorney-General argued that NCAT did not have jurisdiction either because:

- Ch III of the Constitution, by implication, prevents a State from conferring judicial power in respect of any of the matters identified in ss 75 and 76 of the Constitution on a State tribunal that is not a 'court of the State' (the Ch III implication argument);
- alternatively, by investing State *courts* with federal jurisdiction in ss 75 and 76 matters, s 39 of the *Judiciary Act 1903* (Cth), in combination with s 109 of the Constitution, renders inoperative State laws investing jurisdiction in those same matters in State *tribunals* (the s 109 argument).

Reasoning of the High Court

The Court unanimously dismissed the appeals from the NSW Court of Appeal and held that certain provisions of the *Civil and Administrative Tribunal Act 2013* (NSW) were invalid to the extent that they purported to confer jurisdiction upon NCAT in relation to matters between residents of different States (s 75 (iv)).

A majority of the Court (Kiefel CJ, Bell and Keane JJ ([3]) and Gageler J ([68])) accepted the Ch III implication argument and held that a State law that purports to confer jurisdiction on a State tribunal with respect to any of the matters listed in ss 75 and 76 of the Constitution is inconsistent with Ch III and is therefore invalid.

A minority of the High Court (Nettle, Gordon and Edelman JJ) separately rejected the Commonwealth's Ch III implication argument ([137], [176], [205]). However, both Nettle and Gordon JJ accepted the Commonwealth's s 109 argument and found that s 39(2) of the Judiciary Act, by operation of s 109 of the Constitution, renders inoperative State laws which confer jurisdiction on State tribunals in respect of the matters in ss 75 and 76 of the Constitution (Nettle J at [146], Gordon J at [192]–[193]). Justice Edelman found that ss 38 and 39 of the Judiciary Act operate directly to exclude State laws from conferring jurisdiction on State tribunals in all of the ss 75 and 76 heads ([256]–[257]).

Implications

The Commonwealth has long held the position that only a 'court' within the meaning of Ch III of the Constitution can exercise judicial power in any of the 9 matters set out in ss 75 and 76 of the Constitution. It is for this reason that clause 4.6A of the *Legal Services Directions 2017* provides that the Commonwealth or a Commonwealth agency is not to submit, or object, to the jurisdiction of a State or Territory tribunal, unless approval has been given by the Attorney-General for that position to be taken.

The High Court's decision has confirmed the correctness of the Commonwealth's position. The matters which a State tribunal cannot exercise judicial power to determine include matters:

- in which the Commonwealth is a party (s 75(iii))
- arising under the Constitution, or involving its interpretation (s 76(i))
- arising under any Commonwealth law (s 76(ii))
- in which the parties are residents of different States (s 75(iv)).

Text of the decision is available at:

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2018/15.html>

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