

# The gap in NCAT's jurisdiction & what it means for tenancy

Regarding the NSW Court of Appeal decision known as *Burns & Corbett*

## Background

In 2017 it was found that NCAT (the NSW Civil and Administrative Tribunal) does not have jurisdiction for matters where the parties are resident in different states of Australia.

This is due to a NSW Court of Appeal decision known as *Burns & Corbett*. The full reference is *Burns v Corbett; Gaynor v Burns* [2017] NSWCA 3 (3 February 2017).

The Court of Appeal found that although Commonwealth judicial power may be delegated to state courts, it may not be exercised by non-courts, like NCAT.

Matters between residents of different states are in the original jurisdiction of the High Court of Australia per section 75 of the Australian Constitution. This marks them out as matters of Commonwealth judicial power and so are strictly controlled by the Constitution.

## Some points of clarification

- This issue relates to residents in different states, not territories. So, NCAT still has jurisdiction if a party resides in the ACT or NT.
- A party living overseas makes no difference. NCAT still has jurisdiction if a party resides overseas.
- Corporations as parties make no difference. It does not matter where a corporation is registered. NCAT still has jurisdiction if a party is a corporation.

## Examples

- NCAT has dismissed interstate landlords' applications for orders about rent arrears, including eviction applications, and
- NCAT has dismissed tenants' applications for their bonds where they have moved from NSW to another state.

## What does this mean?

### First, don't panic!

- Your residential tenancy agreement is still a valid contract and
- The *Residential Tenancies Act 2010* still applies
- You don't have to go to the High Court.

### Eviction

NCAT lacking jurisdiction does not permit informal eviction. It is still an offence to enter premises to take possession from a tenant without a Tribunal or Court order (section 120 of the *Residential Tenancies Act 2010*).

### Rent arrears

As the tenancy agreement is still valid, not paying the rent is a breach of contract. Negotiate with the landlord or agent, as usual. See our [Tips: Negotiating with the landlord](#).

### Taking the matter to the Local Court

It is possible to sue on a contract in the Local Court up to an amount of \$100,000. And, the *Residential Tenancies Act* (section 168) also mentions court orders about payment of rental bonds. But see 'Interim measure' below.

## What will happen next?

*Burns & Corbett* is now subject to appeal proceedings in the High Court. The matter has been heard (6/12/17), the decision is reserved.

See below Update, 1 May 2018.

## Interim Measure (work around)

NSW has enacted an interim measure to allow courts to hear matters dismissed by NCAT per *Burns & Corbett*. It allows recommencing in the Local or District Court without paying further fees. Magistrates and Judges will have discretion about costs, the rules of evidence and representation by non-lawyers. See [Part 3A of the NCAT Act](#).

## What should you do if you are affected?

### First, get advice

Tenants can contact their local Tenants Advice and Advocacy Service, see [tenants.org.au/get-advice](http://tenants.org.au/get-advice) or contact details below.

### Second, participate

Engage in the court processes.

### Third, negotiate

See our [Tips: Negotiating with the landlord](#). You can also seek the assistance of a **Community Justice Centre (CJC)**. CJs offer free mediation services. With advice and mediation, disputing parties may achieve practical results. See [cjc.justice.nsw.gov.au](http://cjc.justice.nsw.gov.au).

## Update, 16 February 2018

In February 2018 the NCAT Appeal Panel decided that the Tribunal (NCAT) is a court of record and a *court of a State* for the purposes of the *Australian Constitution*. See *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45.

There are now four *Burns & Corbett* vectors:

1. *Burns & Corbett* in the NSW Court of Appeal,
2. *Burns & Corbett* in the High Court – pending/reserved,
3. The work around – *Justice Legislation Amendment Act 2017*, and
4. *Johnson, Dibbin, Gatsby* at NCATAP.

No. 4 allows the Tribunal to avoid the use of No. 3.

It is reasonable to expect NCAT members will consider themselves bound by No.4. The Appeal Panel is immediately above them in their particular part of the justice hierarchy.

### We expect that NCAT will deal with cases where parties live in different states.

We wait the decision at No.2 and enjoy speculation on appeal proceedings re No. 4.

## Update, 1 May 2018

On 18 April 2018 the High Court dismissed 2 above. The decision and a summary are available at [www.hcourt.gov.au](http://www.hcourt.gov.au). This means that the NSW Court of Appeal decision stands entire.

There is now a number 5 to add to the sequence. The NSW Court of Appeal has heard an appeal of the NCAT Appeal Panel decision in *Johnson, Dibbin & Gatsby*. This decision is reserved.

The High Court does not regard NCAT as a court. So, 3 The work around may be in use again shortly.

## Update, 7 November 2018

Recap the *Burns & Corbett* vectors:

1. *Burns & Corbett* in the NSW Court of Appeal,
2. *Burns & Corbett* in the High Court
3. The work around – *Justice Legislation Amendment Act 2017*,
4. *Johnson, Dibbin, Gatsby* at NCATAP and
5. *Attorney General for NSW v Gatsby* in the NSW Court of Appeal.

On 6 November 2018 the NSW Court of Appeal handed down its judgement in 5 above. The Court has answered three questions:

- Whether the Court had jurisdiction to determine the appeal? **YES**
- Whether the Tribunal was exercising judicial power in terminating a tenancy for breach of agreement? **YES**
- Whether the Tribunal is a “court of a State”? Per the Constitution (s77iii) and the *Judiciary Act* (s39(2) (Cth)). **NO**

The third answer means that the work around (3 above) will have to be used until a better solution is found.

## Further references

NCAT Federal Jurisdiction information page:

<https://ncat.nsw.gov.au/about-ncat/legislation/federal-jurisdiction.html>

NCAT *Federal Jurisdiction* factsheet:

[https://ncat.nsw.gov.au/documents/factsheets/ncat\\_factsheet\\_federal\\_jurisdiction.pdf](https://ncat.nsw.gov.au/documents/factsheets/ncat_factsheet_federal_jurisdiction.pdf)

Local Court (Federal Diversity Jurisdiction) forms:

[http://www.localcourt.justice.nsw.gov.au/Pages/forms\\_fees/forms.aspx#Forms\\_used\\_in\\_civil\\_](http://www.localcourt.justice.nsw.gov.au/Pages/forms_fees/forms.aspx#Forms_used_in_civil_)

The NSW Court of Appeal decision is available at:

<https://www.caselaw.nsw.gov.au/decision/58900a94e4b058596cba3975>

A learned article is available at:

<https://auspublaw.org/2017/04/the-latest-word-on-state-tribunals-and-judicial-power/>

*Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATAP//2018/45.html>

*Attorney General for New South Wales v Gatsby* [2018] NSWCA 254 (6 November 2018):

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA//2018/254.html>

*Information sheet prepared by Grant Arbuthnot, Tenants Union of NSW, January 2018. Updated June 2024.*

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### For free advice, call your local Tenants Advice & Advocacy Service:

#### SYDNEY:

• Eastern	9386 9147
• Inner	9698 5975
• Inner West	9559 2899
• Northern	9559 2899
• Southern	9787 4679
• South West	4628 1678
• Western	8833 0933

#### REGIONAL:

• Blue Mountains	4704 0201
• Central Coast	4353 5515
• Hunter	4969 7666
• Illawarra Sth Coast	4274 3475
• Mid Coast	6583 9866
• Northern Rivers	6621 1022
• Northwest NSW	1800 836 268
• Southwest NSW	1300 483 786

#### ABORIGINAL:

• Sydney	9833 3314
• West NSW	6881 5700
• South NSW	1800 672 185
• North NSW	1800 248 913

**WEB:** [tenants.org.au](http://tenants.org.au)

**NSW FAIR TRADING:** 13 32 20

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