HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	H7/2021
File Title:	Citta Hobart Pty Ltd & Anor v. Cawthorn
Registry:	Hobart
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: CITTA HOBART PTY LTD
First Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

and

DAVID CAWTHORN
Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE

A. Ground 1

2. **Issues arising:** What approach should a State tribunal exercising judicial power, which is not a court, follow in deciding whether it has jurisdiction to entertain a proceeding in which a federal claim or defence is raised by the parties? In particular:

   a. in order to determine whether it has jurisdiction, may (or must) the tribunal consider and conclude upon whether, on its merits, the instant federal claim or defence would succeed or fail?

   b. if that question is answered in the negative, what test is to be applied to identify the cases in which, although a federal claim or defence is raised on the face of the proceeding, it is properly to be concluded that the proceeding does not involve a matter within s 75 or s 76 of the Constitution?

3. The first question is to be answered in the negative. As to the second, the parties and interveners have propounded a variety of tests. On any of them, ground 1 succeeds.

4. **Points of claim and defence before the Tribunal (BOFM pp 22, 30):** The points of claim alleged disability discrimination in relation to access at Parliament Square, Hobart, contrary to s 16(k) of the *Anti-Discrimination Act* 1998 (Tas). The s 109 defence was raised at [21A(b)] of the points of defence (BOFM p 38).

5. **Decision of the Tribunal (AB tab 1 p 6):** The Tribunal correctly decided that, as the s 109 defence arose in federal jurisdiction and was not colourable, it had no jurisdiction to hear and decide the proceeding (AB pp 14-16 [34]-[45]).

6. **Decision of the Full Court (AB tab 4 p 25):** The Full Court held that the Tribunal should have decided the federal defence on the merits in order to determine whether it had jurisdiction to hear and determine the proceeding, including that defence. On the basis of its view that the s 109 defence was to be rejected, the Full Court held that for the Tribunal to have entertained the proceeding would not have involved an exercise of federal jurisdiction (Blow CJ at AB pp 28-29, 34 [4]-[5], [26]-[27], Wood J agreeing at AB p 35 [29]; Estcourt J at AB pp 53-54 [102]-[103]).

7. **The Full Court erred:** The s 109 defence was plainly within s 76(i) of the Constitution and accordingly settled principles of federal jurisdiction compelled the conclusion that the Tribunal lacked jurisdiction to entertain the proceeding: ***first***, it is the raising of a federal claim or defence that gives rise to federal jurisdiction: *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1136 (**vol 5 tab 29**); *Felton v Mulligan* (1971) 124 CLR 367 at 373-374 (**vol 6 tab 40**); *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457 at 476 (**vol 8 tab 53**); ***second***, if any part of the matter is within federal jurisdiction, the entirety is: *Felton* at 373; *Moorgate* at 472, 476-477; ***third***, once a matter is within federal jurisdiction it remains so, whatever the fate of the federal claim or defence: *Moorgate* at 472, 476-477; *R v Bevan; ex p Elias* (1942) 66 CLR 452 at 466 (**vol 9 tab 59**); ***fourth***, State tribunals cannot exercise adjudicative authority in respect of the matters in ss 75 and 76 of the Constitution: *Burns v Corbett* (2018) 265 CLR 304 at [46], [68] (**vol 5 tab 32**). It was not open to the Tribunal to determine the merits of the s 109 defence in order to decide whether it had jurisdiction.

8. **When does the raising of a federal claim or defence by a party not render the matter in federal jurisdiction?**

   a. **Respondent's test of no reasonable prospect of success is plainly unsound:** (1) inappropriate as a test for identifying claims and defences which in truth represent no controversy; (2) no basis in authority, and the doctrine of abuse of process does not support its adoption as submitted; (3) inapposite in its provenance as a summary judgment test, involves undue assessment of merits, and problematic in operation.

   b. **Tests proposed by the Commonwealth, Victoria and Queensland:** Having regard to principle and authority, it is open to adopt these tests, particularly the Commonwealth's. However, there are also difficulties with them: (1) in nature and in operation they are directly concerned with the merits of the federal claim or defence; (2) even the Commonwealth's test may require extensive and complex argument (*General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 (**vol 7 tab 44**); (3) "real and substantial" as suggested by Queensland is a protean notion and has the potential to be applied too widely; (4) on analysis, the s 78B jurisprudence provides only limited support.

   c. **Preferable test is colourability alone:** The colourability test is (1) supported by

dicta of this Court (e.g. *Hopper v Egg and Egg Pulp Marketing Board (Vic)* (1939) 61 CLR 665 at 681 (**vol 7 tab 45**); (2) well established in the Federal Court as being the relevant criterion: *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219 (**vol 13 tab 95**); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at [88] (**vol 14 tab 105**); *Rana v Google Inc* (2017) 254 FCR 1 at [22] (**vol 14 tab 113**); (3) sound in principle, sufficient in its ambit, and such as to take appropriate indirect account of the merits without turning on them as such.

9. **Judicial power:** In hearing and determining the proceeding, the Tribunal would have been exercising judicial power. Section 90 of the *Anti-Discrimination Act* 1998 (Tas) cannot be read down as the AHRC submits. Kenny J's analysis and conclusions in *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85 at [205]-[207], [249]-[255] (**vol 13 tab 99**) are correct.

10. **Respondent's notice of contention dated 3 September 2021:** This will be dealt with in reply, if and as necessary, after hearing the respondent's submissions on it.

B. Ground 2

11. **Legislation:** *Disability Discrimination Act* 1992 (Cth) (**vol 1 tab 4**), ss 4-6, 13, 23, 31-34; *Disability (Access to Premises - Buildings) Standards* 2010 (**vol 1 tab 5**), ss 1.3, 2.1-2.3, 3.1, Schedule 1; *Anti-Discrimination Act* 1998 (Tas) (**vol 1 tab 6**), ss 3, 14, 15, 16(k), 22(1)(c).

12. **Direct inconsistency**: The operation of the federal law (being the Commonwealth Act read with the Disability Standards) is to disapply that Act's general prohibition on disability discrimination, in respect of acts in accordance with the Standards' prescriptive requirements, such as to render those acts not unlawful. The State Act, in purporting to impose a general prohibition on disability discrimination capable of applying in respect of acts done in accordance with the Standards, alters, impairs or detracts from the operation of the federal law, such as to engage s 109 of the Constitution: *Dickson v The Queen* (2010) 241 CLR 491 at [22] (**vol 6 tab 37**).

7 February 2022

D. J. Batt, QC J. D. Watson