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
Document filed:	Form 27C - Intervener's submissions -Commonwealth
Filing party:	Interveners
Date filed:	29 Oct 2021

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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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE COMMONWEALTH (INTERVENING)

PARTS I, II AND III — CERTIFICATION AND INTERVENTION

1. These submissions are in a form suitable for publication on the internet.

2. The Attorney-General for the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) in support of the appellants.

PART IV — ARGUMENT

GROUND 1 — IDENTIFYING A FEDERAL MATTER

Introduction

3. In their defence to a complaint of discrimination under the *Anti-Discrimination Act 1998* (Tas) (the **Tasmanian Act**) in the Anti-Discrimination Tribunal of Tasmania (the **Tribunal**), the appellants contended at paragraph 21A that:[1]

[1] Amended points of defence, paragraph 21A(a)(vi), (a)(vii) and (b): Book of further materials (**BFM**) **37**.

3.1. they had complied with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) made under the *Disability Discrimination Act 1992* (Cth) (respectively, the **Federal Access Standard** and the **Federal Act**);

3.2. it would be inconsistent with the federal scheme for the appellants also to be required to comply with the Tasmanian Act;

3.3. to the extent of the inconsistency, the Tasmanian Act was rendered invalid by s 109 of the Constitution.

4. Ground 1 raises the following issue: What was the proper scope of the Tribunal's role in ascertaining whether, by reason of paragraph 21A of the defence, it was being called upon to determine one of the classes of matter identified in ss 75 and 76 of the Commonwealth Constitution – relevantly, a matter arising under the Constitution or under a law made by the Commonwealth Parliament (a **Chapter III matter**).[2]

5. In considering that issue, the following propositions are not in dispute:

5.1. The Tribunal is not a court of a State within the meaning of s 77(iii) of the Constitution (a "**Chapter III court**").[3]

5.2. The process of determining whether the appellants had contravened a provision of the Tasmanian Act and awarding a remedy for any such contravention would involve the exercise of judicial power.[4]

5.3. A tribunal that is not a court may not exercise judicial power in respect of any Chapter III matter,[5] and a State law that purports to confer such jurisdiction on a State tribunal should be read down (or partially disapplied)[6] so as to confer power on the Tribunal to operate only within those constitutional limits.[7]

5.4. Regardless of whether a tribunal in fact has jurisdiction in a given matter, it has the

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2 Constitution, s 76(i) and (ii).

3 *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 at [239] (Kenny J).

4 *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 at [205]-[207] (Kenny J); Tasmanian Act, ss 89 and 90.

5 *Burns v Corbett* (2018) 265 CLR 304 (***Burns***) at [55] (Kiefel CJ, Bell and Keane JJ), [68]-[69] (Gageler J).

6 *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 at [141] (Gageler), [429]-[432] (Edelman J); *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 (Dixon J).

7 See *Burns* (2018) 265 CLR 304 at [64] (Kiefel CJ, Bell and Keane JJ), [120] (Gageler J) referring to s 31 of the *Interpretation Act 1987* (NSW).

authority to – and indeed must[8] – form an opinion as to whether it has jurisdiction.[9]

5.5. There is a distinction between the determination of a matter on its merits and the anterior exercise of authority to reach a conclusion as to the limits of the tribunal's own authority with respect to a matter.[10] The question raised by Ground 1 is the proper scope of that anterior task.

6. On the approach of the Full Court of the Supreme Court of Tasmania (the **Full Court**), the Tribunal had to determine the s 109 argument in order to decide whether it had jurisdiction.[11] Specifically, on the analysis of Blow CJ (with whom Wood J agreed), it was only if the s 109 argument were determined in the appellants' favour that the Tribunal would have been required to make findings as to whether the appellants had complied with the Federal Access Standard and thereby purport to exercise adjudicative authority in respect of a Chapter III matter.[12]

7. The Commonwealth submits that the decision of the Full Court was wrong. In summary, that is because the question for the Tribunal was not whether the constitutional argument was right, but whether the appellants had advanced a defence to the discrimination claim that arose under the Constitution or a law of the Commonwealth and that defence was neither colourable nor so clearly untenable that it could not possibly succeed.

Federal jurisdiction: A defence sourced in Commonwealth law

8. Whether a court is exercising federal or State jurisdiction depends on the source of its "authority to adjudicate".[13] Federal jurisdiction is authority to adjudicate that is derived

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8 *Gaynor v Attorney General (NSW)* (2020) 102 NSWLR 123 at [130]-[131] (Leeming JA).

9 *Wilson v Chan & Naylor Parramatta Pty Ltd* (2020) 103 NSWLR 140 (***Wilson v Chan***) at [17] (Leeming JA, Macfarlan JA agreeing); *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148 (***Qantas v Lustig***) at [91] (Perry J); *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 (***Re Adams***) at 245 (Brennan J).

10 *Wilson v Chan* (2020) 103 NSWLR 140 at [17] (Leeming JA, Macfarlan JA agreeing). See the discussion in paragraph 24 below.

11 **AB 34** at [26]-[27] (Blow CJ, Wood J agreeing). See also [103] AB54 (Estcourt J).

12 **AB 34** at [26] (Blow CJ, Wood J agreeing).

13 *Rizeq v Western Australia* (2017) 262 CLR 1 at [49]-[50] (Bell, Gageler, Keane, Nettle and Gordon JJ); *Lipohar v The Queen* (1999) 200 CLR 485 at [78] (Gaudron, Gummow and Hayne JJ); *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 (***Baxter***) at 1142 (Isaacs J).

from the Constitution or Commonwealth law.[14] "State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws".[15]

9. The jurisdiction of a court or tribunal is "invoked by making a claim" in that court or tribunal.[16] In this case, the initial complaint that the respondent made, and the authority to decide that complaint, were sourced in State law. Thus, at the time the complaint was made, the jurisdiction that the Tribunal was to exercise was State jurisdiction.

10. However, it has long been settled that, if a party to proceedings raises a defence or answer to a claim that "arises under" [17] Commonwealth law or the Constitution, then the "matter" in which that claim is raised can only be determined by an exercise of federal jurisdiction, there being no State jurisdiction to determine such claims.[18] Accordingly, the authority to decide the matter must derive from the Constitution or a law made under the Constitution.[19] That is so whether or not the shift to federal jurisdiction is appreciated by the parties or the court.[20] Significantly for present purposes, and subject to the qualifications discussed in the next section of these submissions, it is the raising of (relevantly) a federal defence that means that the matter can be determined only by an exercise of federal jurisdiction, whether or not that defence is ultimately accepted on its merits.[21]

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[14] *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at [24] (French CJ, Kiefel, Bell and Keane JJ) and cases cited there.

[15] *Rizeq v Western Australia* (2017) 262 CLR 1 at [50] (Bell, Gageler, Keane, Nettle and Gordon JJ), quoting *Baxter* (1907) 4 CLR 1087 at 1142.

[16] Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) pp 3, 36. See also *Rana v Google Inc* (2017) 254 FCR 1 at [21], [26] (Allsop CJ, Besanko and White JJ).

[17] A matter arises under federal law "if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law" or "if the source of a defence which asserts that the defendant is immune from the liability or obligation alleged against him is a law of the Commonwealth": *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

[18] In the case of State courts, the "accepted view" is that this is a result of s 109 of the Constitution operating by reference to ss 38 and 39 of the Judiciary Act: *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [24] (Gleeson CJ, Gummow and Hayne JJ). In the case of State tribunals the result follows directly from Ch III of the Constitution: *Burns* (2018) 265 CLR 304.

[19] *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536 at 543-544 (Dixon CJ); *Felton v Mulligan* (1971) 124 CLR 367 at 408 (Walsh J); *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 476 (Stephen, Mason, Aickin and Wilson JJ); *Baxter* (1907) 4 CLR 1087 at 1136.

[20] See *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [32] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at [134] (Gummow J); *Republic of Turkey v Mackie Pty Ltd* [2021] VSCA 77 at [1]-[4], [115]-[117] (Tate JA, Beach JA agreeing).

[21] See, eg, *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 472 (Gibbs J), 477 (Stephen, Mason, Aickin and Wilson JJ); *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987)

11. The Full Court erred in proceeding on the basis that it was necessary to decide the federal issues on their merits in order to determine whether the dispute before the Tribunal involved a federal matter (and, therefore, could not be determined by the Tribunal)[22] because, subject to the discussion in the next section of these submissions, the merits of the federal issues were irrelevant to the jurisdiction of the Tribunal.[23] The proper approach is exemplified in the reasons of the Tribunal,[24] which was entirely correct to conclude that, once the appellants raised a defence based on Commonwealth law and on s 109 of the Constitution, it could not proceed to exercise jurisdiction with respect to "any part"[25] of the matter because to do so would be to purport to exercise judicial power to determine a matter that Chapter III of the Constitution reserves exclusively for determination by a court.

Qualifications: "colourable" and "clearly untenable" claims

12. While the general principle is well established that it is the raising of a constitutional argument or a defence relying upon federal law that brings a matter within federal jurisdiction, that proposition is not unqualified. However, this Court has yet to give close consideration to the nature of the relevant qualification.

13. The Commonwealth submits that the question whether a proceeding involves a matter "arising under this Constitution, or involving its interpretation" or "arising under any laws made by the Parliament" is a question of substance. As Toohey J stated in *Re Finlayson; Ex parte Finlayson*,[26] in observations quoted with approval by Gummow, Hayne and Callinan JJ in *Glennan v Commissioner of Taxation*,[27] "a cause does not 'involve' a matter arising under the Constitution or involving its interpretation merely because someone

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18 FCR 212 (***Burgundy Royale***) at 219; *Qantas v Lustig* (2015) 228 FCR 148 at [83] (Perry J); *Rana v Google Inc* (2017) 254 FCR 1 at [21] (Allsop CJ, Besanko and White JJ).

22 Thereby seemingly producing the "extremely inconvenient result that the existence or absence of jurisdiction to deal with a particular claim would depend upon the substantive result of that claim: cf *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 per Dixon J at 391": *Burgundy Royale* (1987) 18 FCR 212 at 219.

23 *Hopper v Egg and Egg Pulp Marketing Board (Vic)* (1939) 61 CLR 665 (***Hopper***) at 681 (Evatt J). See also 673 (Latham CJ).

24 **AB 15** [40].

25 *Wilson v Chan* (2020) 103 NSWLR 140 at [11] (Leeming JA, Macfarlan JA agreeing). See also *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 477 and 481 (Stephen, Mason, Aickin and Wilson JJ), quoting *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [7] (Gleeson CJ, Gaudron and Gummow JJ).

26 (1997) 72 ALJR 73 at 74.

27 (2003) 198 ALR 250 at [14]. See also *Re Culleton* (2017) 91 ALJR 302 at [29] (Gageler J); *Narain v Parnell* (1986) 9 FCR 479 at 486-489 (Burchett J); *Croker v Commonwealth* [2011] FCAFC 25 at [29]-[30] (Siopis, Tracey and Gilmour JJ).

asserts that it does". The same is true of whether a matter arises under a Commonwealth law. Once it is recognised that assertion is not enough to engage federal jurisdiction, it must follow that it is necessary to assess, as a matter of substance, whether the controversy between the parties that is to be quelled by the exercise of judicial power really does involve a question that can be determined only in the exercise of the judicial power of the Commonwealth.

14. In point of principle, a court should be able to decide that no such question arises in at least two classes of case. ***First***, where any federal claim is "'colourable' in the sense that [it was] made for the improper purpose of 'fabricating' jurisdiction".[28] ***Second***, where the federal claim is "so *clearly* untenable that it cannot *possibly* succeed"[29] (even if the party raising the point sincerely, but misguidedly, believes the point to have substance).

Colourable claims

15. There are many statements in the authorities that federal jurisdiction is not attracted if a federal claim is "colourable", in the sense that it was made for the purpose of fabricating jurisdiction. That said, it is not immediately apparent why the bona fides of the party raising a federal claim is relevant to whether that claim engages federal jurisdiction (which must be an objective question). The likely explanation is that, in the rare case where a court can conclude that a federal claim has been advanced for the purpose of fabricating jurisdiction, it would logically follow that the federal claim is not truly part of the controversy between the parties that is to be quelled by the exercise of judicial power.

16. The most frequently cited authority in this area is *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation*,[30] where a Full Court of the Federal Court rejected the applicant's federal claims, but held that that rejection did not have the consequence that the Court lost its jurisdiction to deal with the applicant's common law claims in the same matter. In brief *obiter* observations that have been regularly cited ever since, the Full Court recognised that the "position may have been different if the claims … had been 'colourable'

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[28] *Burgundy Royale* (1987) 18 FCR 212 at 219.

[29] *Spencer v Commonwealth* (2010) 241 CLR 118 at [55] (Hayne, Crennan, Kiefel and Bell JJ), quoting *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 (Barwick CJ), with their Honours' emphasis (albeit discussing the strike out test, rather than any question of federal jurisdiction)

[30] (1987) 18 FCR 212.

in the sense that they were made for the improper purpose of 'fabricating' jurisdiction". [31] Interestingly, the Full Court immediately went on to say that there was no room for such a suggestion in that case, before stating that "[t]he applicants' case … cannot be said to be unarguable; and we think it was pursued bona fide".[32] *Burgundy Royale* itself therefore suggests that the arguability of a federal claim is relevant, separately from the question whether it is pursued bona fide.

17. Nevertheless, the subsequent authorities commonly merge consideration of the arguability of a federal claim with the question whether that claim is colourable. Specifically, in a number of authorities the fact that a federal claim is very weak is identified as a possible basis to infer that the claim was advanced for the purpose of fabricating jurisdiction. For example, in *Qantas Airways Ltd v Lustig*, Perry J observed that there may be rare cases where "a claim is so obviously untenable, and would have been so to those who propounded it, that the claim is found to be colourable".[33] Her Honour referred, among other decisions, to *Cook v Pasminco Ltd*,[34] in which Lindgren J held that the claims were not genuine and were colourable on the basis that they were "obviously doomed to fail", "clearly untenable" and "quite hopeless". Similarly, in *WG & B Manufacturing Pty Ltd v Tesla Farad Pty Ltd*,[35] Finkelstein J also connected "hopelessness" to "genuineness", reasoning that one way to determine the genuineness of a claim is to ask "whether the claim is unarguable" because if "the federal claim is hopeless then it is difficult to see how an applicant could contend that it was pursuing the claim bona fide".

Clearly untenable or unarguable claims

18. The Commonwealth submits that the fact that a federal claim is "so *clearly* untenable that it cannot *possibly* succeed"[36] (that being a formulation that has been described as a test of "demonstrated certainty of outcome"[37]) is directly relevant to whether federal jurisdiction is engaged, rather than being relevant only indirectly to the extent that it supports an

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[31] *Burgundy Royale* (1987) 18 FCR 212 at 219. See also *Rana v Google Inc* (2017) 254 FCR 1 at [22] (Allsop CJ, Besanko and White JJ).

[32] *Burgundy Royale* (1987) 18 FCR 212 at 219 (emphasis added). See also *Fitzroy Motors Pty Ltd v Hyundai Automotive Distributors Australia Pty Ltd* (1995) 133 ALR 445 at 450.

[33] *Qantas v Lustig* (2015) 228 FCR 148 at [88] (Perry J) (emphasis added).

[34] (2000) 99 FCR 548 at [14]-[17]. Cf *Karlsson v Griffith University* (2020) 103 NSWLR 131 at [27] (Payne and White JJA).

[35] [1999] FCA 1776 at [11].

[36] *Spencer v Commonwealth* (2010) 241 CLR 118 at [55] (Hayne, Crennan, Kiefel and Bell JJ, original emphasis); *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 (Barwick CJ).

[37] *Spencer v Commonwealth* (2010) 241 CLR 118 at [55] (Hayne, Crennan, Kiefel and Bell JJ).

inference that a federal claim has been raised in order to fabricate jurisdiction. That is not to submit that the existence of federal jurisdiction turns upon whether a federal claim will succeed or fail on its merits. Contrary to the Full Court's approach, that plainly is not the law. It is, however, to submit that – if the existence of a matter engaging federal jurisdiction is to be assessed as a matter of substance – then the fact that a party has advanced a clearly untenable or unarguable federal claim should not be sufficient to deprive State tribunals of the State jurisdiction that they would otherwise have been free to exercise had a party not advanced that untenable or unarguable claim.

19. There are a number of statements in the authorities that support that submission (although in many of them there is also some reference to bona fides or colourability). For example, in *Hopper v Egg and Egg Pulp Marketing Board (Vic)*,[38] Latham CJ (with whom McTiernan J agreed) said that the failure of a constitutional argument did not "deprive the court of jurisdiction if 'the facts relied on were bona fide raised, and were such as to raise' the question".[39] In the same case, Starke J said that "an allegation of some contravention of the Constitution which on its face is not such a contravention does not attract or found the original jurisdiction conferred upon this court".[40] That was so if the allegations did not "raise any real question involving the interpretation of the Constitution" and were "in truth fictitious".[41] Similarly, in *R v Cook; Ex parte Twigg*,[42] Gibbs J (with whom Stephen, Mason and Wilson JJ agreed) implied that the arguability of a claim was relevant to whether the jurisdiction of the Court under s 75(v) had been enlivened, stating that although the prosecutor primarily sought certiorari, he did not abandon his claim for prohibition, which "[could not] be said to have been unarguable".[43]

20. Numerous authorities concerning the closely analogous question of whether notice needs to be given under s 78B of the Judiciary Act (and whether the court is thereby under a duty not to proceed unless and until the Attorneys-General have had a reasonable time to

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[38] (1939) 61 CLR 665.

[39] *Hopper* (1939) 61 CLR 665 at 673 (emphasis added), referring to *Troy v Wrigglesworth* (1919) 26 CLR 305 at 311; cf *Hopper* (1939) 61 CLR 665 at 681 (Evatt J).

[40] *Hopper* (1939) 61 CLR 665 at 677 (emphasis added). That said, to the extent that Starke J's judgment suggests that if a constitutional claim is contrary to High Court authority then there is no matter arising under the Constitution, it sets the bar too high. A claim of that kind is not necessarily so clearly untenable that it cannot possibly succeed.

[41] *Hopper* (1939) 61 CLR 665 at 677.

[42] (1980) 147 CLR 15 at 26.

[43] See also *Johnson Tiles* (2000) 104 FCR 564 at [88] referring to *Nikolic v MGICA Ltd* [1999] FCA 849 at [9].

consider whether to intervene) likewise suggest that clearly untenable or unarguable claims do not engage federal jurisdiction. That duty arises under s 78B(1) where a cause "involves a matter arising under the Constitution or involving its interpretation" (that language precisely mirroring that of s 76(i) of the Constitution). In *Green v Jones*,[44] Hunt J explained for a matter to arise under the Constitution "it is not sufficient that the plaintiff bona fide and genuinely believes that his challenge involves [such a matter]. [The plaintiff] must establish that it does".[45] A constitutional point that is "patently without substance" or is "patently not arguable" is "not a live issue in the proceedings"[46] and is not a matter arising under the Constitution.[47] In such circumstances, "there is no matter arising under the *Constitution* in the sense that it cannot be established that there is a matter that really and substantially or genuinely arises under the *Constitution* as opposed to it merely being asserted".[48] Applying that approach, it has been held that the following contentions did not enliven s 78B: a submission that the Supreme Court of New South Wales did not have capacity to exercise federal jurisdiction;[49] a constitutional point that depended entirely on an erroneous construction of an Act;[50] a contention that the Constitution was a nullity;[51] a claim based on s 92 of the Constitution where it had no relevant operation in the circumstances;[52] and claims based on the "integrity of the rule of law" and the notion of representative and responsible government.[53]

21. Consistently with the above authorities, in *Re Culleton*,[54] in which Senator Culleton sought to challenge the validity of the conferral of jurisdiction on the High Court as the Court of Disputed Returns, Gageler J dismissed the summons that attempted to raise that question

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44 [1979] 2 NSWLR 812.

45 *Green v Jones* [1979] 2 NSWLR 812 at 818A. And see *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74 (Toohey J) referring to *Green v Jones*. See also *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 4 NSWLR 549 at 565 (McHugh JA).

46 *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431 at [17], [19] (Debelle J, Sulan and Vanstone JJ agreeing) referring to *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74 and *Green v Jones* [1979] 2 NSWLR 812.

47 *ACCC v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at [12]-[14] (French J) referring to *Green v Jones* [1979] 2 NSWLR 812. See also *Nikolic v MGICA Ltd* [1999] FCA 849 at [11].

48 *Danielsen v Onesteel Manufacturing Pty Ltd* [2009] SASC 56 at [31] (Gray J, Sulan and David JJ agreeing).

49 *Australia and New Zealand Banking Group Ltd v Evans* [2016] NSWSC 1742 at [79]-[80] (Garling J).

50 *Narain v Parnell* (1986) 9 FCR 479 at 486-489 (Burchett J).

51 *Nikolic v MGICA Ltd* [1999] FCA 849.

52 *Green v Legal Profession Admission Board* [2020] NSWSC 1655 at [77]-[78] (Adamson J).

53 *Mao v AMP Superannuation Ltd* [2017] NSWSC 987 at [67], [70], [127] (Ward CJ in Eq).

54 (2017) 91 ALJR 302.

notwithstanding the fact that s 78B notices had not been issued.[55] His Honour described the argument as "untenable", and observed that a constitutional point must be "real and substantial" in order to give rise to a matter arising under the Constitution for the purposes of s 78B.[56]

22. As a matter of principle, if the clearly untenable character of an argument is relevant to whether there is a "matter arising under the Constitution, or involving its interpretation" for the purposes of s 78B of the Judiciary Act, it should likewise be relevant to whether a matter arises under the Constitution or involves its interpretation for the purpose of determining whether jurisdiction actually arises under s 76(i) of the Constitution. And, if that is correct, it should likewise be relevant to whether an argument that is said to arise under Commonwealth law engages s 76(ii) of the Constitution, and the reciprocal negative implication identified in *Burns*.

The Tribunal can form an opinion as to the limits of its own jurisdiction

23. Consistently with the above authorities, a State tribunal can properly form an opinion about whether a constitutional or other argument arising under federal law is "colourable" or "so clearly untenable that it cannot possibly succeed", that being an opinion it is entitled to form in order to determine whether it can properly embark upon an exercise of jurisdiction.[57] For a Tribunal to proceed in that way is "not contrary to the Commonwealth Constitution; rather, it vindicates the constitutional limitation".[58] That is because the tribunal is doing no more than identifying whether the issue that the parties seek to bring before it for resolution can be decided only in the exercise of the judicial power of the Commonwealth, in order that it may "appropriately mould its conduct".[59]

24. To proceed in that way is not to engage in the adjudication or resolution of any federal issue, even if the tribunal concludes that it lacks jurisdiction because in light of *Burns* the matter can only be determined by a court.[60] Specifically, a tribunal is not purporting to

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55 *Re Culleton* (2017) 91 ALJR 302 at [26], [28].

56 *Re Culleton* (2017) 91 ALJR 302 at 308 [29].

57 All courts, whether superior or inferior, have the same power (and, indeed, duty): see *State of New South Wales v Kable* (2013) 252 CLR 118 at [31]; *Re Nash [No 2]* (2017) 263 CLR 443 at [16] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

58 *Wilson v Chan* (2020) 103 NSWLR 140 at [13].

59 *Wilson v Chan* (2020) 103 NSWLR 140 at [74] (White JA) referring to *Re Adams* (1976) 12 ALR 239.

60 *Wilson v Chan* (2020) 103 NSWLR 140 at [14] (Leeming JA, Macfarlan JA agreeing). See also *Gaynor v Attorney-General (NSW)* (2020) 102 NSWLR 123 at [22] (Bell P), [100] (Basten JA), [134], [137]

determine a matter that can be determined only by a court "[when it] forms an opinion on whether the claim amounts to one invoking federal jurisdiction, and acts upon that opinion by dismissing the proceedings for want of jurisdiction, or transferring them to a court, if it is of the opinion that the claim is outside its jurisdiction".[61] In such a case the tribunal does no more than attempt to conform its own behaviour to the law. On the other hand, if a tribunal concludes that a federal claim is so clearly untenable that it cannot possibly succeed, as a matter of substance it is doing no more than deciding that a claim is so weak that it can properly be put out of account, leaving the tribunal free to resolve the real dispute between the parties in the exercise of State jurisdiction. The contrary view would give an inappropriately wide operation to the negative implication from Ch III that was identified in *Burns*, because even clearly untenable federal claims would deprive State tribunals of capacity to exercise State jurisdiction.

25. The Commonwealth apprehends[62] that the Respondent will rely on *Re Adams and the Tax Agents' Board*[63] and *Sunol v Collier*[64] to support the proposition that, "while the [Constitution] prevents a State tribunal from exercising Commonwealth judicial power, it does not preclude a State (or Commonwealth) tribunal from forming an opinion on a federal constitutional issue".[65]

26. *Re Adams* concerned a provision of the *Income Tax Assessment Act 1936* (Cth) that required the Tax Agents' Board – in the exercise of administrative power – to cancel the registration of an individual tax agent upon his bankruptcy. The tax agent argued that that provision was invalid under the Constitution, and the issue arose whether the Board could determine that issue. Justice Brennan, sitting as the President of the Administrative Appeals Tribunal (**AAT**), held that in principle the Board (and the AAT on review) could "form an opinion" on a constitutional issue that limits the Tribunal's authority, in order that "it may appropriately mould its conduct" to avoid exceeding those limits.[66] Justice

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(Leeming JA). As to the distinction between orders dismissing a matter for want of jurisdiction and those on the merits, see also *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [17].

61 *Wilson v Chan* (2020) 103 NSWLR 140 at [14] (Leeming JA), [73], [74] (White JA).

62 Response to Special Leave Application at [18]-[19].

63 (1976) 12 ALR 239.

64 (2012) 81 NSWLR 619.

65 *Qantas v Lustig* (2015) 228 FCR 148 at [62] (Perry J), referring to *Sunol v Collier* (2012) 81 NSWLR 619 at [17]-[20] (Bathurst CJ, Allsop P and Basten JA) and *Re Adams* (1976) 12 ALR 239.

66 *Re Adams* (1976) 12 ALR 239 at 242, 245.

Brennan was, however, emphatic that "[a]n opinion formed by an administrative body on such a question does not … produce any effect in point of law", and that "[i]t is to a court in which the judicial power of the Commonwealth is vested that questions of constitutional validity of federal legislation are submitted for decision".[67] *Re Adams* therefore lends no support to the proposition that a tribunal exercising judicial power can reach conclusions on the merits of questions of law that are outside its jurisdiction (as opposed to reaching a conclusion on the anterior issue of whether the tribunal has jurisdiction to consider those questions) on the basis that any such conclusions are merely "opinions".

27. *Sunol v Collier*[68] concerned a complaint brought in the Administrative Decisions Tribunal of New South Wales (the predecessor of NCAT) that Mr Sunol had contravened the *Anti-Discrimination Act 1977* (NSW). Mr Sunol raised an argument that provisions of the *Anti-Discrimination Act 1977* (NSW) were invalid under the Constitution, and the issue arose as to whether the Administrative Decisions Tribunal could resolve that issue. Delivering the judgment of the New South Wales Court of Appeal, Basten JA held that the Tribunal could resolve that issue, because the Tribunal's view of the constitutional point would only be an opinion: the opinion itself would not be registered as a judgment or be enforceable.[69]

28. As the majority held in *Burns*, a State law that purports to confer judicial power on a tribunal that is not a court with respect to any of the matters listed in ss 75 and 76 of the Constitution is invalid.[70] A State tribunal that exercises judicial power cannot express an "opinion" that constitutional arguments (or other arguments raising matters listed in ss 75 or 76 of the Constitution) fail on their merits without purporting to decide issues that Ch III implicitly provides may be decided only by courts.[71] To the extent that *Sunol v Collier* is inconsistent with that submission, it should be overruled.

The Tribunal was correct to dismiss the proceeding

29. In this case, the appellants' defence based on s 109 of the Constitution obviously was not so clearly untenable that it cannot possibly succeed, and there is no suggestion that the

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[67] *Re Adams* (1976) 12 ALR 239 at 241, citing *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 104 (Rich J).

[68] (2012) 81 NSWLR 619.

[69] *Sunol v Collier* (2012) 81 NSWLR 619 at [20].

[70] *Burns* (2018) 265 CLR 304. See also *Hume v Palmer* (1926) 38 CLR 441.

[71] *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385 at [76], [80]; *Qantas v Lustig* (2015) 228 FCR 148 at [91].

claim was colourable (as the Full Court accepted: AB 29 [5]). It follows that the Tribunal was correct to conclude that, once that defence was raised, the claim before it involved a matter arising under the Constitution and/or under Commonwealth law, with the consequence that in light of *Burns* it was not entitled to proceed to determine the complaint.[72] In those circumstances, the Tribunal was correct to dismiss the proceeding.[73]

30. Ground 1 of the Notice of Contention contends that the Tribunal ought to have formed an opinion about whether the federal defence was "reasonably arguable and not misconceived",[74] and that the "only opinion that the Tribunal could properly have formed" was that that defence was not reasonably arguable and/or was misconceived. The proposition that the Tribunal was required to determine whether the federal claim was "reasonably arguable" goes too far, for it would require the Tribunal to engage in a closer evaluation of the merits of a federal claim than Ch III permits. However, even if that were the appropriate test, for the reasons advanced with respect to Ground 2 the defence based on s 109 of the Constitution was at least reasonably arguable (indeed, it was correct). Ground 1 of the Notice of Contention should therefore be rejected.

31. Ground 2 of the Notice of Contention proposes an alternative course of action (which the respondent did not propose to the Tribunal), whereby the Tribunal ought to have adjourned the proceeding with a view to the appellants applying for prohibition in the Tasmanian Supreme Court to prevent the Tribunal acting in excess of its jurisdiction. However, for the reasons discussed above, it was the Tribunal's duty to form its own view about the limits of its authority. Having done so, it decided not to proceed. A writ of prohibition would potentially have been relevant if the Tribunal had sought to exercise jurisdiction it did not have, but that is not what occurred.

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[72] AB 15 [40].

[73] See similarly *Qantas v Lustig* (2015) 228 FCR 148 at [91]. As the Tribunal had no power under the Tasmanian Act to refer questions of law to a superior court, the divergence of opinion in the New South Wales Court of Appeal as to the legitimacy of that course (and its effect on the jurisdiction being exercised by the Tribunal) does not arise: *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385 at [90] (Spigelman CJ, suggesting that the State tribunal could have referred the constitutional question as a question of law to the Supreme Court); cf *Sunol v Collier* (2012) 81 NSWLR 619 at [17] (Basten JA, for the Court).

[74] Notice of contention, ground 1(a): **AB 76**.

GROUND 2 — INCONSISTENCY

32. The s 109 issue in this appeal arises in the following way:

32.1. Both the Federal Act (in Part 2) and the Tasmanian Act (in Part 4) prohibit discrimination on the basis of disability. Both statutes give persons who say that they have been subject to such discrimination the right to make a complaint and, ultimately, if the complaint is made out, to a remedy.

32.2. Under the Federal Act, the Minister may formulate "disability standards" in relation to any area in which it is unlawful for a person to discriminate (s 31). It is unlawful for a person to contravene a disability standard (s 32). Conversely, if a person acts in accordance with a disability standard, the prohibitions on discrimination in the Federal Act do not apply to the person's conduct (s 34). A disability standard "may provide that the disability standard, in whole or in part, is or is not intended to affect the operation of a law of a State or Territory" (s 31(2)(b)).

32.3. The Minister has made a disability standard under the Federal Act relating to access to particular categories of buildings, defined above as the Federal Access Standard. That Standard does not say whether it is or is not intended to affect the operation of a law of a State or Territory.

32.4. The Federal Act is expressed not to be intended to exclude or limit the operation a State law dealing with disability discrimination, provided that it is capable of operating concurrently with the Federal Act.[75] However, the Federal Act also expressly provides that that intention does not apply in relation to the Division of the Federal Act under which the disability standards are made (s 13(3A)).

33. Inconsistency, for the purposes of s 109 of the Constitution, ultimately comes down to whether a "real conflict" exists between the laws under consideration.[76] However, it remains orthodox to test whether there is a real conflict by asking: [77]

33.1. whether a State law would "alter, impair or detract from" the operation of a

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[75] Federal Act, s 13(2) and (3).

[76] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 (***Jemena***) at [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

[77] *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 (***Outback Ballooning***) at [31]-[33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also *Victoria v Commonwealth* (***The Kakariki***) (1937) 58 CLR 618 at 630 (Dixon J); *Jemena* (2011) 244 CLR 508 at [39]-[41] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

Commonwealth law ("direct inconsistency"); and

33.2. whether a Commonwealth law is intended as a complete statement of the law governing a particular subject matter, such that it "leaves no room for the operation of a State … law dealing with the same subject matter"[78] ("indirect inconsistency").

34. In order to determine whether there is a "real conflict", the starting point is an analysis of the true construction[79] of the laws in question.[80]

The Commonwealth scheme

35. The Federal Act expressly contemplates that standards made under Division 2A of Part 2 may exclude or limit the operation of State and Territory laws,[81] even if those standards are capable of operating concurrently with those laws. That is manifest from s 13(3A), which provides that the general provision expressing the intention that the Federal Act not exclude or limit the operation of State laws that are capable of operating concurrently with the Federal Act "does not apply in relation to Division 2A of Part 2 (Disability standards)".

36. The effect of disability standards on State laws will therefore depend on the content of the particular standard in question. That is confirmed by s 31(2)(b) of the Federal Act, which enables the Minister, in formulating a disability standard, to stipulate that a disability standard, or part of it, "is or is not intended to affect the operation of a law of a State or Territory". Section 31(2)(b) therefore permits an express statement of intention, such as appears in s 13 of the Federal Act, to be made in disability standards. It also confirms that, under the Commonwealth scheme, the effect of a disability standard may be to exclude the operation of State law. No doubt that is the reason why consultation with relevant State Ministers is required before making a disability standard (under s 31(3)).

37. In this case, there is no express stipulation in the Federal Access Standard of whether it is or is not intended to affect the operation of State law. However, that simply presents the question of construction. It means that the operation of the standard must be construed without the benefit of an express statement that would (given the terms of s 31(2)(b) of the

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[78] *Outback Ballooning* (2019) 266 CLR 428 at [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

[79] *Momcilovic* (2011) 245 CLR 1 at [242] (Gummow J); *Outback Ballooning* (2019) 266 CLR 428 at [29], [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

[80] *Momcilovic* (2011) 245 CLR 1 at [258], [261]; see also *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500 at [52] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

[81] For convenience, we will refer only to State laws in the remainder of the submissions.

Federal Act) have resolved the question whether there is inconsistency between the Federal Access Standard and State law. No useful inference can be drawn from the Minister's omission to specify the intended operation, particularly as an express statement could have pointed in either direction. Furthermore, just as an express statement of intent as to concurrent operation "cannot … eliminate a case of direct inconsistency or collision" between the Commonwealth and State law,[82] the absence of such a statement cannot determine whether, as a matter of proper construction, the standards are intended to be a complete and exhaustive set of rules on a given subject.[83] The Federal Act does not oblige the Minister to specify any intent to "cover the field", such that the absence of such specification would be determinative of at least indirect inconsistency; rather, it gives the option to be explicit about the intended effect of the standards, including, significantly, the option to be explicit if the intended effect is not to affect the operation of State law.

38. The legislative history confirms the analysis above.[84] Section 13(3A), which is the provision that provides that the s 13(3) statement of intent as to concurrent operation "does not apply in relation to Division 2A of Part 2 (Disability standards)", was inserted into the Federal Act by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (the **Federal Amendment Act**).[85] The Federal Amendment Act also repealed and replaced s 31.[86] In relation to the new s 31, the explanatory memorandum stated that "new section 31 also partly implements Productivity Commission Recommendation 14.2 to amend the Disability Discrimination Act to clarify that where the disability standards and State and Territory legislation address the same matter, the disability standards should prevail".[87] The explanatory memorandum stated that this intention was "carried into effect" through the new s 31(2)(b) which "provides that the

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[82] *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation (Australia)* (1977) 137 CLR 545 at 563 (Mason J). See also, *Momcilovic* (2011) 245 CLR 1 at [654] (Crennan and Kiefel JJ).

[83] Cf **AB 32-33** at [17] (Blow CJ).

[84] See *Acts Interpretation Act 1901* (Cth), s 15AB, noting that the Report of the Productivity Commission referred to below was required by s 12 of the *Productivity Commission Act 1998* (Cth) to be tabled in each House of Parliament. See also eg *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818 at 823 [13] (Kiefel CJ, Nettle and Gordon JJ) referring to *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

[85] Federal Amendment Act, Sch 2, item 21.

[86] Federal Amendment Act, Sch 2, item 62.

[87] Explanatory memorandum, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth) (**Federal Amendment Bill**) at 15 [92] and at 1, referring to the Report of the Productivity Commission. It appears that the other (and in fact the main) "part" of the implementation of recommendation 14.2 was through the insertion of s 13(3A) into the Federal Act.

Standards themselves may provide how they are to operate".[88] However, it is clear that s 31 does not itself require such a statement to be made in order to exclude the operation of State law. The explanatory memorandum further stated that the "power is moderated" by the operation of s 31(3), which requires that standards may not be made without the Minister taking into account comments made by the Minister's State or Territory counterparts.[89]

39. The Productivity Commission report referred to in the explanatory memorandum was a 2004 report entitled *Review of the Disability Discrimination Act 1992*[90] (the **PC Report**). As already noted, recommendation 14.2 in that report was that the Federal Act "should be amended to clarify that where disability standards and State and Territory legislation address the same specific matter, the disability standards should prevail".[91] In the discussion preceding that recommendation, the PC report stated that "[a]llowing States and Territories to impose greater obligations than those contained in disability standards would create uncertainty for organisations subject to inconsistent requirements".[92] The PC Report also stated that it is "generally inappropriate" for the State and Territory governments to impose higher levels of compliance, given that they were involved in negotiating the disability standards,[93] and that "where a [Disability Discrimination Act] standard and a provision contained in State or Territory legislation address the same specific matter, the disability standards should prevail over that provision".[94]

The Federal Access Standard

40. The objects of the Federal Access Standard are: [95]

    (a) to ensure that dignified, equitable, cost-effective and reasonably achievable access to buildings, and facilities and services within buildings, is provided for people with a disability; and

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88 Explanatory memorandum, Federal Amendment Bill at 16 [92].

89 Explanatory memorandum, Federal Amendment Bill at 16 [92].

90 Australian Government, *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report No. 30, 30 April 2004, submitted to the Treasurer in accordance with s 11 of the *Productivity Commission Act 1998* (Cth).

91 PC Report at 415.

92 PC Report at 414.

93 PC Report at 415.

94 PC Report at 415.

95 Federal Access Standard, s 1.3 (emphasis added).

(b) to give certainty to building certifiers, building developers and building managers that, if access to buildings is provided in accordance with these Standards, the provision of that access, to the extent covered by these Standards, will not be unlawful under the Act.

41. According to the explanatory statement for the Federal Access Standard, it was developed in consultation with State and Territory officials (consistently with the requirement in s 31(3) of the Federal Act), and it was "intended to harmonise" the requirements of the Federal Act with the cooperative scheme of building regulation applying in States and Territories.[96] In particular, the Access Code (discussed below) was prepared by the Australian Building Codes Board and is based on provisions of the Building Code of Australia.[97] Amendments to the Building Code of Australia "are adopted by reference in each State and Territory on 1 May of each year".[98]

42. The Federal Access Standard applies to "an action concerning the provision of access to relevant buildings (and facilities and services within them) to the extent that the provision of access is a matter in relation to which, under Part 2 of the Act, it is unlawful to discriminate".[99] "Relevant buildings" are certain specified new buildings and new parts of buildings, including office buildings, retail shops and shops that supply services to the public such as cafes, restaurants and car parks.[100]

43. Schedule 1 to the Federal Access Standard is an "Access Code for Buildings". The Federal Access Standard requires that building certifiers, developers and managers, in respect of a "relevant building", ensure that the "building complies with the Access Code" (s 3.1(1)), subject to certain exceptions and concessions.[101] The Access Code specifies mandatory performance requirements. A building can satisfy the performance requirements by complying with the "deemed-to-satisfy provisions" or formulating an alternative solution for compliance.[102] The deemed-to-satisfy provisions are "prescriptive technical

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[96] Explanatory statement, *Disability (Access to Premises—Buildings) Standards 2010* (Cth) (**Explanatory Statement**) at 5 [29]-[30], 10 [68].

[97] Federal Access Standard, s 1.4, see Note to the definition of "Access Code".

[98] Explanatory Statement at 5 [30].

[99] Federal Access Standard, s 2.3.

[100] Federal Access Standard, s 2.1; Access Code, cl A4.1. Federal Access Standard, s 1.4, "relevant building" is defined as a building to which the Standard applies under s 2.1, which refers to various classes of buildings set out in cl A4.1 of the Access Code.

[101] See Federal Access Standards, Part 4 and Part 5.

[102] See Access Code, cl A1.1, definition of "performance requirement".

requirements within the Access Code that describe one way to satisfy the Performance Requirements".[103]

44. Part D of the Access Code deals with, relevantly, entry to and exit from buildings, and cll DP1 to DP9 set out the relevant performance requirements. Of immediate relevance to the present proceeding, cl DP1(a)(i) and (ii) require that access must be provided to the degree necessary to enable people to "approach the building" from the road boundary, from car parking spaces and from accessible associated buildings. Clause D3.2 is a deemed-to-satisfy provision for the purposes of cl DP1, and requires that an accessway must be provided to a building from the main points of a pedestrian entry at the allotment boundary, and through not less than half of all pedestrian entrances including the principal entrance.

The Tasmanian Act and its inconsistency with the Commonwealth Scheme

45. The Tasmanian Act, in s 16, provides that a person must not discriminate against another person on enumerated grounds, including disability. The respondent claims that the appellants have directly and indirectly discriminated[104] against him, on the basis that one of the entrances to Parliament Square is via stairs, which the respondent is (in common with members of the class) unable to climb because of his disability.[105] The respondent contends that the failure to provide for a wheelchair accessible entrance at that location constitutes discrimination in connection with the "provision of facilities, goods and services" within the meaning of s 22 of the Tasmanian Act.[106] The respondent made a complaint under s 60 of the Tasmanian Act to the Commissioner, and the complaint was referred to the Tribunal under s 78 for inquiry.

46. The appellants say that the provision of access to Parliament Square complies with the Federal Access Standard.[107] If that is correct,[108] then s 34 of the Federal Act means that the relevant prohibitions on discrimination in Part 2 of that Act do not apply to the development.

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[103] Explanatory Statement at 7 [46].

[104] See ss 14 and 15 of the Tasmanian Act.

[105] Amended Points of Claim, 5 February 2019: **BFM 22-27**.

[106] Amended Points of Claim, paragraph 8: **BFM 23**.

[107] Respondents amended points of defence, paragraph 21A(a)(vi) and (vii): **BFM 36-37**.

[108] Respondent's amended points of defence, paragraph 21A(a)(vi)(4) and (a)(vii)(3) states that this is a matter that was to be the subject of expert evidence: **BFM 37**.

47. To the extent that the Tasmanian Act purports to impose a prohibition on discrimination on the basis of disability in respect of the provision of access to buildings covered by the Federal Access Standard, it purports to enter a field intended exclusively to be covered by the Federal Access Standard and the Federal Act. If the Tasmanian Act can operate in that field, it would undermine the certainty intended to be afforded to building certifiers and others as to the precise rules that, if followed, will ensure that "dignified, equitable, cost-effective and reasonably achievable access to buildings, and facilities and services within buildings, is provided for people with a disability". That is because, even if the highly prescriptive rules in the Federal Access Standard were followed, it would remain possible for a general prohibition on discrimination to be judged on an *ad hoc* basis in individual complaint proceedings to require compliance with an unspecified and prospectively unascertainable higher standard.

48. The federal scheme gives primacy to the specific rules in the Standard over the general prohibitions on discrimination in Part 2 of the Federal Act, by providing that the general prohibitions on discrimination in the Federal Act will not apply if "a person acts in accordance with a disability standard" (s 34). That primacy would be undermined if, at all times and regardless of compliance with the Federal Access Standard, the general prohibitions in the Tasmanian Act continued to apply. For the above reasons, the Tasmanian Act is indirectly inconsistent with the Federal Act (and the Federal Access Standards thereunder), and is invalid to that extent by reason of s 109 of the Constitution.

PART V — ESTIMATE OF TIME

49. It is estimated that up to 1 hour will be required for the presentation of the Commonwealth's oral argument.

Dated: 29 October 2021

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No H7 of 2021

BETWEEN: **CITTA HOBART PTY LTD**

First Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD

Second Appellant

10 **AND**:

DAVID CAWTHORN

Respondent

ANNEXURE TO THE ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

Pursuant to paragraph 3 of the *Practice Direction No 1 of 2019*, the Commonwealth sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

Commonwealth		Provision(s)	Version
1.	*Acts Interpretation Act 1901*	15AB	Current
2.	Commonwealth Constitution	ss 75, 76, 77, 109	Current
3.	*Disability Discrimination Act 1992*	ss 1, 13, 31, 32,34	Current (Compilation No 33)
4.	*Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*	s 3; Sch 2, items 21 and 62	As passed
5.	*Disability (Access to Premises – Buildings) Standards 2010*	ss 1.3, 1.4, 2.1, 2.3, 3.1, Sch 1, cll A1.1, A4.1, DP1,	Compilation prepared on 1 May 2011

		D3.2	
6.	*Productivity Commission Act 1998*	ss 11, 12	Compilation prepared on 15 December 2001
7.	*Judiciary Act 1903*	s 78B	Current
State			
8.	*Anti-Discrimination Act 1998* (Tas)	ss 14, 15, 16, 22, 60, 78, 89, 90	Version current from 8 May 2019 to date