



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: H7/2021
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H7 of 2021

BETWEEN

CITTA HOBART PTY LTD

First Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD

Second Appellant

AND

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DAVID CAWTHORN

Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE
ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING**

PART I: PUBLICATION

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

PART II: ARGUMENT

- 20 2. On the assumption that the Tasmanian Anti-Discrimination Tribunal (**Tribunal**) would have been exercising judicial power in relation to the determination of the complaint before it, it was correct in its holding that there was matter within the meaning of ss 76(i) and (ii) of the Constitution and that such a matter could not be heard by it, a body that was not a “court of a State” within the meaning of s 77(iii) of the Constitution. See Written Submissions (**WS**) of Attorney General for NSW at [26]-[31]. This follows from the decision of this Court in Burns v Corbett (2018) 265 CLR 304 (**Burns**). See WS [3]-[6], [20]-[22].
- 30 3. The Tribunal was not, however, precluded from considering whether, given the limitation on State legislative power identified in Burns and the correspondingly limited nature of any general conferral of State jurisdiction, it had jurisdiction to hear and determine the proceedings. Such consideration does not contravene the

constitutional implication identified in Burns; to the contrary, it “vindicates” it: Wilson v Chan & Naylor Parramatta Pty Ltd (2020) 103 NSWLR 140 (**Wilson**) at [13]. In considering its jurisdiction, a State tribunal does not determine the underlying justiciable controversy and so the “matter” for the purposes of ss 75 and 76 of the Constitution and such consideration does not alter the nature of the jurisdiction being exercised by it, being State jurisdiction. See WS [23]-[25], [41]-[42].

4. To the extent that a State tribunal exercises judicial power in hearing and determining a proceeding on its merits, a contravention of the constitutional implication identified in Burns (in respect of s 76(i)) is not avoided by a State tribunal forming an opinion about the merits of any constitutional question and acting in accordance with that opinion: Qantas Airways Ltd v Lustig (2015) 228 FCR 148 at [91]; cf Sunol v Collier (2012) 81 NSWLR 619 at [8]-[9] and [20]. See WS [32]-[37].
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5. If it is not accepted that the Tribunal was exercising judicial power in hearing the complaint in question, the judgment of Brennan J in Re Adams and the Tax Agent’s Board (1976) 12 ALR 239 may need to be considered. Brennan J noted (at 241) that a definitive answer to a question of the constitutional validity of a statute can only be given by a court exercising the judicial power of the Commonwealth. This raises the question of whether an administrative body ought to come to a decision that is wholly or partly based on a finding of invalidity of a statute or whether it should leave a decision of this kind to a court. See WS at [34] and [37]; Cooper v Canadian Human Rights Commission [1996] 3 SCR 854 at 875 per Lamer CJ.
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Dated: 7 February 2022



M G Sexton SC SG



M O Pulsford