HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H7 of 2021

**BETWEEN:**

**CITTA HOBART PTY LTD**
First Appellant

and

**PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD**
Second Appellant

and

**DAVID CAWTHORN**
Respondent

# SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

## PART I: Internet publication

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

## PART II: Basis of intervention

2. The Attorney-General for Queensland ('Queensland') intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth), not in support of any party.

## PART III: Reasons why leave to intervene should be granted

3. Not applicable.

Filed on behalf of the Attorney-General for the State of Queensland, Intervening

26 November 2021

Document No: 12382398

## PART IV: Submissions

### SUMMARY OF ARGUMENT

4. On the facts of this case, there is no foundation for the assumption, made by the parties, that in hearing and determining the complaint made by Mr Cawthorn and the ParaQuad Association of Tasmania Inc, the Anti-Discrimination Tribunal (**the Tribunal**) would have exercised judicial power. In that respect, Queensland adopts the submissions made by the Australian Human Rights Commission (seeking leave to intervene or to be heard as amicus curiae) at **AHRC [6], [10], [12]-[80].**

5. However, if the parties' assumption that the Tribunal would have exercised judicial power is correct, Queensland makes the following alternative submissions:

   a) The Full Court erred in allowing the appeal, but the appellants misstate the principles which underlie that conclusion.

   b) The Tribunal should have asked itself whether determining the complaint brought by Mr Cawthorn and the ParaQuad Association of Tasmania Inc would require it to exercise judicial power with respect to a subject matter identified in ss 75 or 76 of the *Constitution*. The difference between that question, and a question about whether there is a 'matter' requiring 'an exercise of federal jurisdiction',[1] is not merely pedantic. While it would not have led to a different result in this case, it may in other cases.

   c) For the same reasons that the Full Court should not have determined the question of inconsistency between the *Anti-Discrimination Act 1998* (Tas) (**Tasmanian Act**) and the *Disability Discrimination Act 1992* (Cth) (**Commonwealth Act**), this Court should not determine that question.

   d) In the alternative, if the second ground is reached, there is no inconsistency between the Tasmanian Act and the Commonwealth Act.

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[1] *Cawthorn and Paraquad Association of Tasmania Inc v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd* [2019] TASADT 10, [10], [23(d)], [40].

## STATEMENT OF ARGUMENT

*The Burns implication and its consequences*

6. The recent decision of *Burns v Corbett*[2] does not establish that 'a State tribunal that is not a court of a State cannot exercise federal jurisdiction' (**AS [17]**). 'Federal jurisdiction' is 'the authority to adjudicate derived from the Commonwealth Constitution and laws',[3] and comprises the 'authority to exercise, within the limits permitted by or under s 75, s 76 or s 77, the judicial power of the Commonwealth'.[4] The inability of State tribunals to be conferred with, or exercise, federal jurisdiction follows from long-standing authority.[5]

7. Instead, *Burns* newly recognised an implied limitation on State legislative power to confer State jurisdiction. Understanding the scope of that implied limitation begins with recognition that State jurisdiction, which State courts possess 'under the State constitution and laws',[6] is capable of encompassing at least some of the subject matters in ss 75 and 76 of the *Constitution*.[7] Relevantly, the State jurisdiction of State courts would, but for the operation of ss 38 and 39 of the *Judiciary Act 1903* (Cth) and s 109

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2 (2018) 265 CLR 304 ('*Burns*').

3 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J); *Rizeq v Western Australia* (2017) 262 CLR 1, 12 [8] (Kiefel CJ), 22 [50] (Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Rizeq*').

4 *Rizeq* (2017) 262 CLR 1, 23 [52] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Lorenzo v Carey* (1921) 29 CLR 243, 252 (Knox CJ, Duffy, Powers, Rich and Starke JJ), explaining that the phrase 'federal jurisdiction' 'denotes the power to act as the judicial agent of the Commonwealth'.

5 In *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355, Griffith CJ explained that as s 71 provides that 'the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court, and in such other Courts as it invests with federal jurisdiction', '[i]t follows that the Parliament has no power to entrust the exercise of judicial power to any other hands'. See also *New South Wales v Commonwealth* (1915) 20 CLR 54, 62 (Griffith CJ), 80-90 (Isaacs J), 106 (Powers J); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 441-2 (Griffith CJ), 467 (Isaacs and Rich JJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

6 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J); *Rizeq* (2017) 262 CLR 1, 12 [8] (Kiefel CJ), 22 [50] (Bell, Gageler, Keane, Nettle and Gordon JJ).

7 *Burns* (2018) 265 CLR 304, 331 [23] (Kiefel CJ, Bell and Keane JJ), 381 [168] (Gordon J), 396 [213] (Edelman J).

of the *Constitution*,[8] comprise authority to adjudicate matters within s 76(i) and s 76(ii).[9]

8. *Burns* decided that, while State judicial power may otherwise be conferred on a non-court, a State Parliament cannot confer State jurisdiction on a non-court with respect to a subject matter identified in s 75 or s 76. As Gageler J explained, that restriction on State legislative power arises from a constitutional implication to the effect that:[10]

> … judicial power with respect to the subject matters identified in ss 75 and 76 of the *Constitution* is confined to judicial power of a kind that is: (1) exercisable in respect of justiciable controversies answering the constitutional description of "matters"; and (2) conferred on or invested in institutions answering the constitutional description of "courts".

9. Commonwealth legislative power is restricted by the same implication.[11] The reasoning of Kiefel CJ, Bell and Keane JJ was to the same effect.[12]

10. Three observations of present relevance should be made about the constitutional implication set out above.

11. *First*, the scope of what is denied to a State tribunal as State jurisdiction is not coextensive with the scope of what may be conferred upon a court as federal jurisdiction. For example, although State jurisdiction is not otherwise limited to 'matters',[13] the *Burns* implication would prevent a State tribunal exercising judicial power of the kind purportedly conferred on the High Court by Part XII of the *Judiciary Act 1903* (Cth), found invalid in *In Re Judiciary and Navigation Acts*.[14] Accordingly,

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8 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 619 [24] (Gleeson CJ, Gummow and Hayne JJ); *Felton v Mulligan* (1971) 124 CLR 367, 373 (Barwick CJ), 391-4 (Windeyer J), 411-13 (Walsh J); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 471 (Gibbs J) ('*Moorgate Tobacco*').

9 *Burns* (2018) 265 CLR 304, 347 [72] (Gageler J), 379-80 [165] (Gordon J).

10 *Burns* (2018) 265 CLR 304, 360 [106] (Gageler J).

11 *Burns* (2018) 265 CLR 304, 360 [106] (Gageler J).

12 *Burns* (2018) 265 CLR 304, 326 [3], 336-7 [45] (Kiefel CJ, Bell and Keane JJ).

13 *Burns* (2018) 265 CLR 304, 347 [71] (Gageler J).

14 Part XII would have required the Court to give 'not merely an opinion but an authoritative declaration of the law'. That was 'clearly a judicial function', but not one which was an exercise of part of the judicial power of the Commonwealth, given there was no 'matter': *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 263-6 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ). Accordingly, such a power would retain its character as 'judicial', even if conferred upon a tribunal. See also *Burns* (2018) 265 CLR 304, 360 [105]

asking whether there is a 'matter' within 'federal jurisdiction' is inapt as a test to determine whether the *Burns* implication denies a State tribunal jurisdiction in a particular case. It would make little sense for the concept of 'matter' to identify *when* the limits on legislative power identified in *Burns* apply, given that, as Gageler J explained, 'matter' defines one aspect of those limits.

12. *Second*, and relatedly, the *Burns* implication cannot be avoided by reasoning that a controversy over rights created under State law, but unenforceable in a court, does not give rise to a 'matter'.[15]

13. *Third*, because the question is directed to the scope of an implied restriction on State legislative power, there can be no simple transposition of 'established principles concerning the exercise of federal jurisdiction' (**AS [17]**). The appellants' submission that three of those principles (**AS [22]-[25]**) 'readily resolve' the questions in this case (**AS [17]**) should be rejected. In particular, the related principles that:

> 'a court exercising federal jurisdiction will be "clothed with full authority essential for the complete adjudication of the matter", rather than merely decision of the question which attracted jurisdiction' (**AS [24]**[16])

and

> 'once a matter arises in federal jurisdiction, it does not "cease to be federal because the matter that attracted federal jurisdiction is either not dealt with, or is decided adversely to the [party who raised it]"' (**AS [25]**[17])

are of limited assistance.

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(Gageler J, explaining the significance of Jacobs J's reasoning in *Commonwealth v Queensland* (1975) 134 CLR 298, 327-8), and 339-40 [52], [53], 343 [61] (Kiefel CJ, Bell and Keane JJ).

[15] That was the reasoning adopted by Basten JA in *Attorney-General (NSW) v Gatsby* (2018) 99 NSWLR 1, 52-3 [247]-[250]; cf *Abebe v Commonwealth* (1999) 197 CLR 510, 527-8 [31]-[33] (Gleeson CJ and McHugh J) ('*Abebe*'). The reasoning may not be correct in any event: in *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361 at 408 [146] the Victorian Court of Appeal disagreed with Basten JA on the basis that the 'forum-driven understanding of "matter" is inconsistent with the institutional arrangements of the States'. Rejecting Basten JA's approach does not entail the view that every dispute involving the Commonwealth (for example) requires the exercise of judicial power (cf *Gatsby* (2018) 99 NSWLR 1, 48 [234] (Basten JA)), because the *Burns* implication is unconcerned with non-judicial functions: *Gaynor v Attorney-General (NSW)* (2020) 102 NSWLR 123, 157 [138] (Leeming JA). However, it must be correct, following *Burns*, that only a court may exercise judicial power in a dispute to which the Commonwealth is a party.

[16] *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 130 (Starke J); *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 465-6 (Starke J); *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

[17] *Moorgate Tobacco* (1980) 145 CLR 457, 472 (Gibbs J).

14. Each of those principles is concerned with the *exercise* of federal jurisdiction by courts. The first (the 'full authority principle') arises from the need to ensure the efficacy of the judicial power of the Commonwealth to quell controversies. As explained in *Fencott v Muller*, '[a] judicial power which is not exercised to determine the whole of the controversy is, generally speaking, not appropriately and conveniently exercised', because 'the controversy is not quelled', and the parties 'must litigate anew to have the outstanding questions and issues determined'.[18] Realities concerning the exercise of judicial power therefore dictate an expansive approach to 'matter':[19]

> The power judicially to determine the whole of a dispute is inconsistent with a limitation which would restrict the Court to resolving only the federal claim and what is necessary for that purpose. To adopt a more restrictive approach to the ascertainment of the ambit of a matter is to ensure that the obstacles of arid jurisdictional dispute will beset the path of a party who must invoke federal jurisdiction … The judicial power of the Commonwealth would at once prove insufficient to accomplish its purpose and productive of inefficiency in the exercise of the judicial power of the States.

15. The full authority principle is informed by practical considerations[20] and 'depends at basis' on the principle that 'the grant of jurisdiction, like the grant of power, carries with it all that is necessary to enable the jurisdiction (or the power) to be exercised effectively'.[21]

16. The second principle referred to above, identified by the appellants at **AS [25]**, has two aspects: first, that only a *claim* is necessary to attract federal jurisdiction;[22] and second, that once federal jurisdiction is attracted, the whole matter remains within federal

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18 *Fencott v Muller* (1983) 152 CLR 570, 608-9 (Mason, Murphy, Brennan and Deane JJ).

19 *Fencott v Muller* (1983) 152 CLR 570, 608-9 (Mason, Murphy, Brennan and Deane JJ).

20 Such as the speedier determination of disputes: see *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 514 (Mason J) ('*Philip Morris*'); *Fencott v Muller* (1983) 152 CLR 570, 609 (Mason, Murphy, Brennan and Deane JJ).

21 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 281 (Gibbs CJ); see also 293 (Mason, Brennan and Deane JJ) ('*Stack v Coast Securities*'); *Abebe* (1999) 197 CLR 510, 534 [47] (Gleeson CJ and McHugh J).

22 *R v Carter; Ex parte Kisch* (1934) 52 CLR 221, 223-4 (Evatt J); *Hopper v Egg and Egg Pulp Marketing Board (Vic)* (1939) 61 CLR 665, 673 (Latham CJ), 681 (Evatt J). See also *Palmer v Ayres* (2017) 259 CLR 478, 491-2 [30] (Kiefel, Keane, Nettle and Gordon JJ).

jurisdiction, irrespective of the disposal of the federal claim.[23] The first aspect simply reflects that jurisdiction is attracted by a *controversy* regarding rights, duties or liabilities.[24] The second aspect gives effect to the full authority principle and (in a State court) to the operation of s 109, which renders State jurisdiction inoperative 'to the extent of the inconsistency' with the investiture of federal jurisdiction. As Gageler J explained in *Burns*, '[f]or the Commonwealth law investing federal jurisdiction … to have unimpeded operation, the federal jurisdiction it invests in the State court must become the court's sole operative source of jurisdiction with respect to the matter or matters concerned'.[25]

17. As those observations make clear, the principles upon which the appellants rely are informed by practical considerations and constitutional values relevant to a different context. Consistently with *Abebe*, those principles should be seen as turning on the scope of the legislative power in s 77 to invest federal or State courts with federal jurisdiction.[26]

18. Moreover, the unqualified transposition of principles concerning the exercise of federal jurisdiction to the present context would significantly hamper the operation of State tribunals, depriving them of adjudicative authority in circumstances far removed from vindication of the *Burns* implication. The application of such principles would mean that, for example:

    a) if the appellants had disclaimed their reliance on the Commonwealth Act and s 109 of the *Constitution* before the Tribunal, the Tribunal would nonetheless have remained bereft of jurisdiction;[27]

    b) had a statutory mechanism existed for the Tribunal to refer the constitutional question to a court, that mechanism could not have assisted (because even once the

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[23] *Moorgate Tobacco* (1980) 145 CLR 457, 471-2 (Gibbs CJ), 477 (Stephen, Mason, Aickin and Wilson JJ).

[24] *Palmer v Ayres* (2017) 259 CLR 478, 490 [25] (Kiefel, Keane, Nettle and Gordon JJ).

[25] *Burns* (2018) 265 CLR 304, 351 [81]. See also *Felton v Mulligan* (1971) 124 CLR 367, 412 (Walsh J).

[26] *Abebe* (1999) 197 CLR 510, 528-9 [34]-[35], 533-4 [47] (Gleeson CJ and McHugh J).

[27] *Moorgate Tobacco* (1980) 14 CLR 457, 477 (Stephen, Mason, Aickin and Wilson JJ).

constitutional question was answered, the 'matter' would remain in federal jurisdiction);[28]

c) similarly, while the process of obtaining a declaration or prerogative relief from the Supreme Court of Tasmania could have been invoked to answer the constitutional question, the Tribunal would have remained incapable of resolving any residual issues regarding the application of the Tasmanian Act.[29]

19. In each of the above examples, the 'matter' would remain in 'federal jurisdiction', notwithstanding the reality that the Tribunal was not being called upon to exercise a judicial power in relation to any of the subject matters in s 75 or s 76. The result would be that where (as here) no court was conferred with the same jurisdiction as the Tribunal, the complaint made to the Tribunal would become unresolvable, notwithstanding that the federal claim might ultimately be misconceived, or even 'so clearly untenable that it could not possibly succeed'.[30] The appellants' approach fails to recognise that, as Kirby J observed in *Abebe*, '[p]articular aspects of [a] controversy may be appropriate to different treatment, before different courts according to their different jurisdictions'.[31] That observation may be extended to State tribunals, where they are invested with State jurisdiction.

20. Considerations of convenience and practicality[32] have informed the development of the principles concerning the exercise of federal jurisdiction by courts. Their transposition to the present context would, ironically, be productive of 'immense practical

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28 See *Sunol v Collier* (2012) 81 NSWLR 619, 623-4 [17] (Basten JA, delivering judgment for the Court).

29 In the context of the exercise of federal jurisdiction, 'matter' is 'not co-extensive with a legal proceeding', and 'is identifiable independently of proceedings brought for its determination and encompasses all claims made within the scope of the controversy': *Palmer v Ayres* (2017) 259 CLR 478, 490-1 [26] (Kiefel, Keane, Nettle and Gordon JJ). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 540 [3] (Gleeson CJ), 546 [26] (Gaudron J), 585-7 [140]-[147] (Gummow and Hayne JJ).

30 Cf *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130. Moreover, the Tribunal would be incapable of making any order for costs incurred in relation to 'non-jurisdictional' issues: *Wilson v Chan* (2020) 103 NSWLR 140, 157-9 [84]-[91] (White JA).

31 *Abebe* (1999) 197 CLR 510, 589 [228] (Kirby J). See also *Stack v Coast Securities* (1983) 154 CLR 261, 280-3 (Gibbs CJ).

32 See, for eg, *Stack v Coast Securities* (1983) 154 CLR 261, 280 (Gibbs CJ); *Fencott v Muller* (1983) 152 CLR 570, 609 (Mason, Murphy, Brennan and Deane JJ); *Philip Morris* (1981) 148 CLR 457, 514 (Mason J).

problems'.[33] That result should only be accepted if the *Constitution* compels it. It is submitted that it does not.

21. What is at stake in this case is the scope of a 'negative implication', arising from Ch III and restricting State legislative power.[34] For the reasons given above, the question of when that implication is engaged is not satisfactorily answered by the concept of 'matter', as that concept has developed to enable the *exercise* of federal jurisdiction. It is an answer which is both too broad (having deleterious practical effects unrelated to the reason for the implication) and too narrow (permitting circumvention of the *Burns* implication where judicial power does not concern a 'matter').

22. Instead, consistently with what was decided in *Burns*, the negative implication should be recognised as engaged wherever a State tribunal is called upon to exercise 'judicial power with respect to the subject matters identified in ss 75 and 76 of the *Constitution*'.[35] Ordinarily, a relevant 'subject matter' will be easily identified where it depends upon the identity of the parties. More difficult questions will arise where the question concerns s 76(i) or s 76(ii). However, where a question in the proceeding, arising under the *Constitution* or a Commonwealth law, has been answered by a court via an appropriate procedural mechanism, in most cases it will be plain that a State tribunal will not, thereafter, exercise judicial power with respect to an impermissible subject matter.

23. In other circumstances, where a claim based on the *Constitution* or a Commonwealth law is made in a tribunal, it will be necessary for the tribunal (in the course of deciding whether it has jurisdiction[36]) to consider whether its exercise of judicial power would relate to a subject matter identified in s 76(i) or s 76(ii). For the reasons given by the Commonwealth Attorney-General (**CS [20]-[22]**), and the respondent (**R [12]-[20]**), the answer to that question will be 'yes' where the point arising under the *Constitution* or

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33 *Abebe* (1999) 197 CLR 510, 531 [41] (Gleeson CJ and McHugh J).

34 *Burns* (2018) 265 CLR 304, 337 [47] (Kiefel CJ, Bell and Keane JJ).

35 *Burns* (2018) 265 CLR 304, 360 [106] (Gageler J). That there is a conceptual distinction between the 'subject matters' identified in ss 75 and 76 and a 'matter' capable of founding the exercise of federal jurisdiction had been earlier recognised: see, for example, *Commonwealth v Queensland* (1975) 134 CLR 298, 327 (Jacobs J) and *Abebe* (1999) 197 CLR 510, 523-4 [24] (Gleeson CJ and McHugh J, describing the power in s 77(i) as a power to make laws giving federal courts 'authority to decide subject matters that answer any of the descriptions in pars (i)-(v) of s 75 or pars (i)-(iv) of s 76').

36 *Wilson v Chan* (2020) 103 NSWLR 140, 144 [13] (Leeming JA, McFarlan JA agreeing).

the Commonwealth law is 'real and substantial'.[37] No such point is raised where it is pleaded merely as a 'sham', for the purpose of invoking the *Burns* implication and divesting a tribunal of jurisdiction, or where it is raised in good faith but is hopeless and bound to fail. The cases concerning s 78B of the *Judiciary Act 1903* (Cth) provide a useful analogy, because they focus attention on whether the Court is being asked to decide a real controversy concerning a constitutional question, and not on the scope of the Court's jurisdiction.[38] One additional point is that, in determining its own jurisdiction, a tribunal should be mindful that the subject matter identified in s 76(ii) does not extend to matters merely 'involving the interpretation of' Commonwealth laws.

24. Whether a constitutional question, or claim made under a Commonwealth law, will raise a 'real and substantial' point sufficient to engage the *Burns* implication may at times involve difficult 'line drawing'. However, the drawing of that line is a matter for resolution by a State tribunal in performing its duty to consider the limits of its own jurisdiction, subject to the supervision of the relevant State Supreme Court.[39]

25. In this case, the Tribunal was asked to exercise judicial power with respect to a subject matter identified in s 76(i) and s 76(ii). The issue concerning a potential inconsistency between the Commonwealth Act and the Tasmanian Act was real and substantial, and no procedural mechanism was invoked to enable its resolution in a court. Accordingly, in performing the 'anterior'[40] step of deciding its own jurisdiction, the Tribunal correctly held that the *Burns* implication denied it jurisdiction. It follows that the Full Court erred in allowing the appeal.

26. It also follows that the Full Court erred in embarking upon consideration of the s 109 point (although its resolution of that point was, as it happens, correct). Of course, the Full Court would have had jurisdiction to determine the s 109 point, if the point had

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37 *Re Culleton* (2017) 91 ALJR 302, 307-8 [26], [28]-[29] (Gageler J).

38 'If the asserted constitutional point is frivolous or vexatious or raised as an abuse of process, it will not attach to the matter in which it is raised the character of a matter arising under the Constitution or involving its interpretation': *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292, 297 [14] (French J). See also *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431, [17]-[19] (Debelle J), [21] (Sulan J), [22] (Vanstone J); *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73, 74 (Toohey J); *Green v Jones* [1979] 2 NSWLR 812, 818A (Hunt J).

39 *Kirk v Industrial Relations Court (NSW)* (2010) 239 CLR 531.

40 *Wilson v Chan* (2020) 103 NSWLR 140, 144 [13]-[17] (Leeming JA), 156 [74] (White JA).

properly arisen in the proceeding before it.[41] However, the proceeding before the Full Court was an appeal from the decision of the Anti-Discrimination Tribunal by way of re-hearing.[42] The decision of the Tribunal concerned the 'anterior' question of its own jurisdiction, which involved the identification of a constitutional issue, not its resolution. On appeal, the Full Court was confined to determining that question.[43] For the same reasons, and as the appellants acknowledge (**AS [49]**), this Court should not decide the s 109 point in this proceeding unless (contrary to the above submissions) the appellants fail on their first ground.

*There is no inconsistency under s 109*

27. If this Court does reach the s 109 question, it should find that there is no inconsistency between the Commonwealth Act and the Tasmanian Act. In support of that submission, Queensland makes the following three points.

28. *First*, that the appellants describe the purported inconsistency as 'direct' (**AS [50]**), and the Commonwealth describes it as 'indirect' (**CS [48]**), highlights the extent of overlap between the 'two approaches'[44] to identifying s 109 inconsistency. The distinction between the two approaches is particularly difficult to discern where, as here, 'direct' inconsistency is said to arise because the State law would intrude upon an 'area of liberty designedly left' by the Commonwealth law (cf **AS [56]**). The phrase 'area of liberty', applied in *Dickson*,[45] originated in *Wenn v Attorney-General (Vic)*, in a passage in which Dixon J described the device of legislating '*upon a subject exhaustively* to the intent that the areas of liberty designedly left should not be closed up'.[46] As Gummow J observed in *Momcilovic v The Queen*, the Commonwealth law in *Dickson*, 'upon its true

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41 Section 39 of the *Judiciary Act 1903* (Cth).

42 Tasmanian Act, s 100(2) and (4) (as in force 8 May 2019 to 4 November 2021); *Supreme Court Civil Procedure Act 1932* (Tas), s 46.

43 More generally, an appeal from a Tribunal is not a mechanism which will enable a court to resolve questions which *Burns* places outside the Tribunal's jurisdiction, because (subject to the relevant statute) the jurisdiction of the appellate court will be confined to the jurisdiction exercised by the Tribunal: Cf *Thiess Pty Ltd and Hochtief AG v Industrial Court (NSW)* (2010) 78 NSWLR 94, 108-9 [73] (Spigelman CJ, Beazley and Basten JJA agreeing); Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, Federation Press, 2020) 287.

44 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 446 [31] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) ('*Outback Ballooning*').

45 *Dickson v The Queen* (2010) 241 CLR 491, 505 [25] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) ('*Dickson*').

46 (1948) 77 CLR 84, 120 (emphasis added).

construction may be seen to have contained an implicit negative'.[47] Yet identifying an 'implicit negative proposition' is the 'essential notion of *indirect* inconsistency'.[48]

29. In *Ex parte McLean*, Dixon J said where Commonwealth and State laws on the same subject matter are 'susceptible of simultaneous obedience', inconsistency 'depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'.[49] Where such an intention is shown, a State law upon the same subject matter 'is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent'.[50]

30. In the present proceeding, identifying a 'real conflict'[51] between the laws necessarily depends on discerning, in the Commonwealth law, an 'implicit negative proposition' that there shall be no other law on the subject matter with which it deals. That is true irrespective of whether the purported inconsistency is described as 'direct' or 'indirect'.[52]

31. *Second*, in attempting to demonstrate the existence of a negative implication, the Commonwealth points to the legislative history (**CS [38]-[39], [41]**) of both ss 13 and 31 of the Commonwealth Act, and the *Disability (Access to Premises – Buildings) Standards 2010* (**Standard**). However, for the following reasons, that legislative history does not support such an implication.

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47 (2011) 245 CLR 1, 122 [276].

48 *Outback Ballooning* (2019) 266 CLR 428, 448 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (emphasis added); see also 473 [106] (Edelman J).

49 (1930) 43 CLR 472, 483. See also *Momcilovic* (2011) 245 CLR 1, 235 [637] (Crennan and Kiefel JJ, expressing the view that '[w]hat is required in every case' is to construe the Commonwealth law, to determine whether its 'coverage of the subject matter is complete, exhaustive or exclusive'); *Awabdy v Electoral Commission of Queensland* (2019) 347 FLR 274, 284 [38] (Sofronoff P), 287 [52] (Fraser JA), 287 [53] (Douglas J).

50 *Victoria v Commonwealth ('The Kakariki')* (1937) 58 CLR 618, 630 (Dixon J); *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 136 (Dixon J). The point made at **AS [50, fn 51]** should be accepted.

51 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ.

52 Cf *Outback Ballooning* (2019) 266 CLR 428, 472-3 [105] (Edelman J, observing that 'direct' and 'indirect' 'are simply attempts to describe the different ways that [inconsistency] can occur'). Reference to the 'two approaches' will be most useful in cases (unlike this one) where the 'two approaches' do not overlap.

32. The legislative history of s 13 indicates that the Commonwealth Parliament declined, in the face of an express recommendation made by the Productivity Commission,[53] to include an explicit statement that disability standards would prevail over State and Territory legislation. Instead, the Parliament '*partly* implemented'[54] the recommendation, by conferring a discretion on the Minister to provide that a standard 'is or is not intended to affect the operation of a law of a State or Territory'. In fact, in response to the Productivity Commission Report, the Government expressed its 'view that it would be desirable for State and Territories to incorporate disability standards directly into their own anti-discrimination legislation.'[55] Hence, the comments in the Productivity Commission's Report referred to at **CS [39]** do not assist in construing the Standard. Inconsistently with those comments, the Parliament decided to enact a regime which recognised that, in some circumstances, it *will* be appropriate for a State law to continue to operate, although it is addressed to the 'same specific matter' as a Commonwealth standard (cf **CS [39], [48]**).

33. As to the Standard itself, the explanatory statement says that it was 'anticipated that the States and Territories will adopt or apply similar application provisions to those in Parts 1-4 of these Standards', 'leading to an essentially uniform set of requirements'.[56] Such a process would be unnecessary if the Standard left 'no room for the operation of a State or Territory law dealing with the same subject matter'.[57] In other words, the fact that compliance with the Access Code (sch 1 of the Standard) is a requirement under Tasmanian law[58] denies, rather than confirms, that the Commonwealth scheme contains the necessary 'implicit negative proposition'.

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[53] Australian Government, *Review of the Disability Discrimination Act 1992*: Productivity Commission Inquiry Report No. 30 (30 April 2004) recommendation 14.2 ('Productivity Commission Report').

[54] Explanatory statement, Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, 15-6 [92] (emphasis added).

[55] Australian Government, *The Productivity Commission's Review of the Disability Discrimination Act 1992: Government Response* (February 2005) <https://www.pc.gov.au/inquiries/completed/disability-discrimination>. The Response was tabled in Parliament on 8 February 2005.

[56] Explanatory statement, *Disability (Access to Premises – Buildings) Standards 2010* (Cth), 2 [8]-[9].

[57] *Outback Ballooning Pty Ltd* (2018) 266 CLR 428, 447 [33] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). Cf CS [47].

[58] *Building Act 2016* (Tas), Part 2.

34. *Third*, when construed as a whole, the Standard does not contain an implicit negative proposition that it is to be the *only* law with respect to non-discriminatory access to building premises by persons with a disability.

35. That conclusion follows from the following key features of the Act:

a) s 13(3), which establishes that (apart from Div 2A of Part 2 (Disability Standards)) the Act is intended to operate concurrently with State or Territory laws dealing with discrimination on the grounds of disability;

b) s 32, which makes it unlawful for a person to contravene a disability standard;

c) s 34, which operates to disapply Part 2 of the Commonwealth Act (except for Div 2A) if a person acts in accordance with a disability standard. That is, compliance with the Standard is tied to lawfulness under the Commonwealth Act.

36. Both the appellants (**AS [61]**) and the Commonwealth (**CS [40]**) rely on the objects clause of the Standard in support of their respective submissions that there is a direct or indirect inconsistency between the federal scheme and the Tasmanian Act.

37. Contrary to the appellants' submissions (**AS [62]**), it is not of 'no significance' that the object of the Standard is to give certainty that the provision of access to buildings will 'not be unlawful *under the Act*'.[59] It is 'well-established'[60] that meaning must be given to every word of a statutory provision. The words 'under the Act' operate, consistently with the features of the Act identified above, to limit the scope of the Standard to satisfying compliance with the Commonwealth Act. The Full Court was correct to find that the terms of the Standard do not 'have a force or life of their own beyond the [Commonwealth] Act'.[61] These words deny the suggestion that it is possible to derive from the Standards, a negative implication of the kind which would be necessary to found either a direct, or indirect, inconsistency. They show that there is no 'real conflict' for the purposes of s 109.

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[59] Standard, s 1.3(b) (emphasis added). 'Act' is defined in the Standard to mean the *Disability Discrimination Act 1992*: see s 1.4(1).

[60] *Northern Land Council v Quall* (2020) 94 ALJR 904, 917 [61] (Kiefel CJ, Gageler and Keane JJ).

[61] Appeal Book, 36 [37] (Wood J).

38. Nor does the absence of the words 'under the Act' in the first objects clause (1.3(a)) lead to the converse conclusion that the Standard *is* intended to deal completely and exclusively with non-discriminatory access to premises (cf **AS [62]**, **CS [47]**). The concurrent operation of State anti-discrimination legislation with respect to disability does not take away from the Standard's ability to provide 'dignified, equitable, cost-effective and reasonably achievable access to buildings'. Rather, it provides a *supplementary* protection from discrimination on the grounds of disability.

## PART V: Time estimate

39. It is estimated that 15 minutes will be required for presentation of Queensland's oral argument.

Dated: 26 November 2021

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H7 of 2021

**BETWEEN:**

**CITTA HOBART PTY LTD**
First Appellant

and

**PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD**
Second Appellant

and

**DAVID CAWTHORN**
Respondent

## ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

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

| No. | Legislation | Provision(s) | Version |
|---|---|---|---|
| **Commonwealth** | | | |
| 1. | Commonwealth Constitution | ss 75, 76, 77, 109 | Current |
| 2. | *Disability Discrimination Act 1992* | ss 13, 31, 32 34 | Current (Compilation No 33) |
| 3. | *Disability (Access to Premises – Buildings) Standards 2010* | s 1.3 | Compilation prepared on 1 May 2011 |
| 4. | *Judiciary Act 1903* | ss 38, 39, 78B | Current (Compilation No 48) |
| **State** | | | |
| 5. | *Anti-Discrimination Act 1998* (Tas) | s 100 | Version current from 8 May 2019 to 4 November 2021 |
| 6. | *Building Act 2016* (Tas) | Part 2 | Current version as at 5 November 2021 |
| 7. | *Supreme Court Civil Procedure Act 1932* (Tas) | s 46 | Current version as at 9 September 2019 |