HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H7/2021

BETWEEN:

CITTA HOBART PTY LTD
First Applicant

and

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Applicant

and

DAVID CAWTHORN
Respondent

OUTLINE OF ORAL SUBMISSIONS
ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND

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

8 February 2022

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PART I: Internet publication

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II: Outline

Non-judicial power

2. Qld adopts the AHRC submissions as to judicial power (**QS [4]**), and emphasises the following point: *Burns* recognised an implied limit on *State legislative power*.

   Burns v Corbett (2018) 265 CLR 304, 325 [1], [2] (Kiefel CJ, Bell and Keane JJ); 345-6 [67]-[69] (Gageler J) [**JBA 5:32:1553-4 and 1573-4**].

3. Section 3 of the *Acts Interpretation Act 1931* (Tas) therefore straightforwardly requires that the word 'may' in s 90 of the *Anti-Discrimination Act 1998* (Tas) must be read subject to the *Burns* limit on the State's legislative power, unless 'it appears affirmatively that it was not part of the legislative intention that so much as might have been validly enacted should become operative without what is bad'.

   Clubb v Edwards (2019) 267 CLR 171, 218 [141] (Gageler J) [**JBA 6:34:1769**].

4. Once read in accordance with s 3 of the *Acts Interpretation Act*, s 90 does not apply if an order has been made under s 89(1) where the relevant inquiry involved a subject matter within ss 75 or 76 of the *Constitution*.

The *Burns* implication

5. The appellants' reply to Queensland (**AR [8]**) betrays a misunderstanding of *Burns*. *Burns* recognised an implied limit on the States' legislative power to confer *State* jurisdiction: **QS [7], [8]**.

6. That is why the principles concerning the *exercise* of *federal jurisdiction* by courts are not directly applicable. Further, those principles should not be transposed: they are unhelpful in the present context, for the following reasons:

   (a) *First*, asking whether there is a 'matter' within 'federal jurisdiction' is inapt as a test for determining whether the *Burns* implication is engaged. *Burns* can deny a State tribunal State jurisdiction, even where there is no 'matter' (**QS [11], [12]**).

Burns (2018) 265 CLR 304, 360 [106] (Gageler J); 336 [45] (Kiefel CJ, Bell and Keane JJ) [**JBA 5:32:1588 and 1564**]

(b) *Second*, the principles concerning the exercise of federal jurisdiction by courts have been developed to ensure the efficacy of Commonwealth judicial power and are informed by practical considerations (such as the speedier resolution of disputes and the avoidance of 'arid' jurisdictional disputes) (**QS [13]-[17]**). They are designed to solve different constitutional problems and are ill-suited to solving this constitutional problem.

Fencott v Muller (1983) 152 CLR 570, 608-9 (Mason, Murphy, Brennan and Deane JJ) [**JBA 7:41:2242**]; ***Stack v Coast Securities (No 9) Pty Ltd*** (1983) 154 CLR 261, 281 (Gibbs CJ) [**JBA 11:78:4164**]; ***Abebe v Commonwealth*** (1999) 197 CLR 510, 534 [47] (Gleeson CJ and McHugh J) [**JBA 4:21:950**].

(c) *Third*, the principles would deprive a State tribunal of adjudicative authority in many cases where the Tribunal was *not* called upon to exercise judicial power in relation to an impermissible subject matter (**QS [18]-[20]**).

i. The appellants' submission that the Federal Court could decide the federal defence, followed by fresh proceedings in the Tribunal (**AR [8], fn 8**) ignores the fact that separate proceedings concerning the same controversy may involve a single 'matter' (**QS [18](c), fn 29**).

ii. Even if a State or federal court would have jurisdiction and power to resolve the dispute (cf **SA [24]-[36]**) (which may be doubted), that is not to the point. The point is that the principles would hamper the operation of State tribunals in a way not demanded by Ch III.

7. The correct approach is to ask whether 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*' (**QS [22]**). The cases concerning s 78B of the *Judicial Act 1903* (Cth) provide a useful analogy in answering that question where the subject matter is that identified in s 76(i). Qld adopts the Commonwealth's submissions at **[12]-[22]**.

Inconsistency

8. In this case, there is no inconsistency because:

(a) The DDA indicates a legislative intention that, generally, disability standards will operate concurrently with State laws: see ss 13(4), 34 (see **SA [45]-[51]**).

(b) However, ss 13(3A) and 31(2)(b) make clear that disability standards may sometimes be 'intended to affect the operation of a law of a State'. The intention can be specified either way, but because the 'default' position is concurrency, the capacity to specify an intention to affect State laws is more significant (cf **CS [37]**).

(c) Where not expressed, an intention to affect State laws may be inferred. But no such inference can be drawn here. The object in s 1.3(b) of the Standard is expressly confined to lawfulness 'under [the DDA]'. Section 1.3(a) is more ambiguous, but alongside s 1.3(b), the intention to ensure the provision of access of a certain kind for people with a disability, does not give rise to an 'implicit negative proposition'.

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