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 Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

and

DAVID CAWTHORN
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PARTS I, II & III: CERTIFICATION AND INTERVENTION

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

2. The Attorney-General for the State of Victoria (**Victoria**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of neither the appellants nor the respondent.

PART IV: ARGUMENT

3. Victoria's submissions address certain issues of principle presented by ground 1 in the notice of appeal and grounds 1 and 2 in the notice of contention.

4. In summary, Victoria's submissions are as follows:

   4.1 a State tribunal that is not a court, such as the Anti-Discrimination Tribunal (**Tribunal**), must observe the limits on its jurisdiction, and can do so by forming an opinion about whether it has jurisdiction to hear and determine a proceeding;

   4.2 where the jurisdiction of a State tribunal that is not a court is invoked in a proceeding in which the tribunal is called on to exercise judicial power, in order to observe the limits on its jurisdiction, the tribunal must form an opinion about whether the subject matter of the proceeding is a matter of the kind described in s 75 or s 76 of the Constitution;

4.3 the formation of such an opinion does not transgress the limit on the jurisdiction of State tribunals identified in *Burns v Corbett*[1] because forming such an opinion does not involve the exercise of judicial power;

4.4 in forming an opinion about whether the subject matter of a proceeding is a matter of the kind described in s 76(i) or (ii) of the Constitution, the following questions will be relevant:

(i) *first*, whether there is a claim or defence that is properly characterised as "arising under" the Constitution or a Commonwealth law (or "involving [the] interpretation" of the Constitution);

(ii) *second*, if there is, whether that claim or defence forms part of the same matter as the other claims raised in the proceeding;

(iii) *third*, whether that claim was made or defence was raised for the improper purpose of fabricating federal jurisdiction, and thus depriving the tribunal of jurisdiction; and

(iv) *fourth*, whether that claim or defence is manifestly untenable;

4.5 whether the claim or defence is manifestly untenable:

(i) may be relevant to whether the claim was made or defence was raised for the improper purpose of fabricating federal jurisdiction; and

(ii) may show, independently of any opinion about the purpose for which the claim was made or defence was raised, that the claim or defence is not a real or genuine part of the controversy, and therefore does not form part of the matter.

(a) A State tribunal can form an opinion about whether it has jurisdiction to hear and determine a proceeding

5. Where jurisdiction is conferred on an entity, and that jurisdiction is subject to limits, the entity is bound to observe those limits. That is so regardless of whether the entity is

[1] (2018) 265 CLR 304 at [2]-[3] (Kiefel CJ, Bell and Keane JJ), [67]-[69] (Gageler J).

capable of making a binding determination about those limits,[2] or whether it is not capable of doing so.[3]

6. An entity that is not capable of making a binding determination about the limits of its jurisdiction can, nevertheless, comply with its duty to observe those limits by "forming an opinion" about whether it has jurisdiction and then "determining its own action" accordingly.[4] The capacity to form such an opinion is a necessary incident of the conferral of limited authority on an entity that is bound to observe those limits.

7. This appeal concerns a particular limit on the jurisdiction of State tribunals: although such a tribunal may exercise judicial power, a State tribunal that is not a court within the meaning of Ch III of the Constitution cannot exercise judicial power in a matter of the kind described in s 75 or s 76 of the Constitution.[5]

8. Because of that limit, where the jurisdiction of such a tribunal is invoked in a proceeding in which the tribunal is called on to exercise judicial power,[6] whether the tribunal has jurisdiction will depend on whether the subject matter of the proceeding is a matter of the kind described in s 75 or s 76.

9. As discussed in paragraph 6 above, a State tribunal that is not a court can comply with its duty to observe that limit on its jurisdiction by forming an opinion about whether the subject matter of a proceeding in which it is called on to exercise judicial power is a matter of the kind described in s 75 or s 76, and determining its action accordingly.[7]

10. Forming an opinion of that kind does not involve the tribunal impermissibly exercising judicial power in a matter of the kind described in s 75 or s 76. That is because forming

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2 See *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Company Ltd* (1911) 12 CLR 398 at 415 (Griffith CJ); *New South Wales v Kable* (2013) 252 CLR 118 (***Kable [No 2]***) at [34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

3 *Re Adams and The Tax Agents' Board* (1976) 12 ALR 239 (***Adams***) at 242 (Brennan J); *Attorney-General (NSW) v Gatsby* (2018) 99 NSWLR 1 (***Gatsby***) at [281] (Leeming JA; Bathurst CJ and Beazley P agreeing); *Gaynor v Attorney-General (NSW)* (2020) 102 NSWLR 123 (***Gaynor***) at [131]-[132] (Leeming JA; Basten JA agreeing); *Wilson v Chan* (2020) 103 NSWLR 140 at [14] (Leeming JA; Macfarlan JA agreeing).

4 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 (***Hickman***) at 618 (Dixon J). See also *Adams* (1976) 12 ALR 239 at 242 (Brennan J); *Gatsby* (2018) 99 NSWLR 1 at [281] (Leeming JA; Bathurst CJ and Beazley P agreeing); *Gaynor* (2020) 102 NSWLR 123 at [131]-[137] (Leeming JA; Basten JA agreeing); *Wilson v Chan* (2020) 103 NSWLR 140 at [12]-[14] (Leeming JA; Macfarlan JA agreeing).

5 *Burns v Corbett* (2018) 265 CLR 304 at [2]-[3] (Kiefel CJ, Bell and Keane JJ), [67]-[69] (Gageler J).

6 Where the jurisdiction of the tribunal is invoked in a proceeding in which the tribunal is not called on to exercise judicial power (for example, an application to the Victorian Civil and Administrative Tribunal under s 50 of the *Freedom of Information Act 1982* (Vic) for review of a decision made under that Act), then no limit on the jurisdiction of the tribunal arising from Ch III of the Constitution will be engaged.

7 Subject, of course, to any order in the nature of prohibition or mandamus made by a superior court.

such an opinion does not involve the exercise of judicial power:[8] an opinion produces no legal effect and quells no controversy, and therefore lacks an essential feature of an exercise of judicial power.[9] Further, formation of the opinion occurs at a stage anterior to any exercise of judicial power in respect of the subject matter of the proceeding.[10]

11. Whether the subject matter of a proceeding is a matter of the kind described in s 75 or s 76 may depend on a variety of factors — for example, whether the parties are residents of different States, or whether a party is being sued on behalf of the Commonwealth. In forming an opinion about these factors, a State tribunal may be required to form an opinion about the answers to questions of fact and law — but that does not render the task in which the tribunal is engaged an exercise of judicial power.[11]

12. Nor does the fact that a State tribunal may act on its opinion that it lacks authority to hear and determine a proceeding by dismissing the proceeding render the formation of the opinion by the tribunal an exercise of judicial power. By dismissing a proceeding for want of jurisdiction, the tribunal does not quell any controversy; it merely acts on its opinion that it has no authority to take any other step to deal with the substance of the proceeding.[12]

(b) Questions relevant to the formation of an opinion about whether there is a matter under s 76(i) or (ii)

13. At issue in this appeal is the extent to which it was relevant to consider the merits of the appellants' defence based on Commonwealth law and s 109 of the Constitution in

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8 *Hickman* (1945) 70 CLR 598 at 618 (Dixon J). See also *Adams* (1976) 12 ALR 239 at 241-242 (Brennan J); *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148 (***Lustig***) at [91] (Perry J); *Gaynor* (2020) 102 NSWLR 123 at [137] (Leeming JA; Basten JA agreeing); *Wilson v Chan* (2020) 103 NSWLR 140 at [15] (Leeming JA; Macfarlan JA agreeing).

9 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ); *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 269 (Deane, Dawson, Gaudron and McHugh JJ); *Rizeq v Western Australia* (2017) 262 CLR 1 (***Rizeq***) at [52] (Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Lustig* (2015) 228 FCR 148 at [91] (Perry J). By contrast, a superior court can make a binding determination on whether a tribunal has jurisdiction to hear and determine a proceeding, and then order prohibition or mandamus accordingly.

10 *Wilson v Chan* (2020) 103 NSWLR 140 at [17] (Leeming JA; Macfarlan JA agreeing).

11 See *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

12 See *Wilson v Chan* (2020) 103 NSWLR 140 at [17], [19] (Leeming JA; Macfarlan JA agreeing). Ground 2 in the notice of contention suggests that, where a State tribunal forms an opinion that it does not have authority to hear and determine a proceeding, the appropriate course is for it to adjourn the proceeding to allow a party to seek prohibition. Victoria submits that, where such a tribunal forms the opinion that it lacks jurisdiction, it is permissible, and more desirable, for the tribunal to dismiss the proceeding for want of jurisdiction — subject to any order for mandamus.

forming an opinion about whether the subject matter of the proceeding before it was a matter of the kind described in s 76(i) or (ii) of the Constitution — that is, a matter arising under the Constitution or involving its interpretation, or a matter arising under a Commonwealth law.

14. Before turning to that issue, these submissions address more generally the questions that will be relevant when a State tribunal forms an opinion about whether the subject matter of a proceeding is a matter "arising under" the Constitution or a Commonwealth law within the meaning of s 76(i) and (ii).

15. Victoria submits that the following questions will be relevant to the formation of that opinion:

15.1 *first*, whether there is a claim or defence "arising under" the Constitution or a Commonwealth law;

15.2 *second*, if there is, whether that claim or defence forms part of the same matter as the other claims raised in the proceeding;

15.3 *third*, whether that claim or defence was raised for the improper purpose of fabricating federal jurisdiction, and thus depriving the tribunal of jurisdiction; and

15.4 *fourth*, whether the claim or defence is manifestly untenable.

16. ***First question***. In forming an opinion about whether the subject matter of a proceeding is a matter "arising under" the Constitution or a Commonwealth law, it will be necessary for a State tribunal to examine the claims made and defences raised by the parties in the proceeding, and consider whether the proceeding involves:

16.1 a claim of a right or duty that owes its existence to the Constitution or a Commonwealth law, or depends on such a law for its enforcement;[13] or

16.2 a defence that a party is not subject to a claimed obligation or duty by reason of the Constitution or a Commonwealth law.[14]

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13 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 (***Barrett***) at 154 (Latham CJ); *Felton v Mulligan* (1971) 124 CLR 367 at 405-409 (Walsh J); *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 (***Moorgate***) at 476 (Stephen, Mason, Aickin and Wilson JJ); *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 (***LNC Industries***) at 581-582 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

14 *Felton v Mulligan* (1971) 124 CLR 367 at 405-409 (Walsh J); *Moorgate* (1980) 145 CLR 457 at 476 (Stephen, Mason, Aickin and Wilson JJ); *LNC Industries* (1983) 151 CLR 575 at 581 (Gibbs CJ, Mason,

17. A matter will only be one "arising under" the Constitution or a Commonwealth law if a claim or defence of that nature is raised by a party, or is otherwise necessary to decide in order to dispose of the matter.[15] It is not sufficient if the Constitution or a Commonwealth law is merely "lurking in the background" of the controversy.[16] Nor is it sufficient to bring a matter within s 76(ii) that it involves the interpretation of a Commonwealth law[17] — although a matter "involving [the] interpretation" of the Constitution will be a matter under s 76(i).

18. There are cases where, although a party claimed that a matter was one "arising under" the Constitution or a Commonwealth law, on proper analysis, the matter involved no claim or defence of the kind described in paragraph 16 above — with the result that the matter was not one of the kind described in s 76(i) or (ii).[18]

19. In order to form an opinion about whether it has jurisdiction to hear and determine a proceeding, a State tribunal must therefore form an opinion about whether the claims or defences answer the description in paragraph 16 above. This does not depend on the merits of the claims or defences, but instead on whether they are properly characterised as "arising under" the Constitution or a Commonwealth law (or "involving [the] interpretation" of the Constitution).

20. ***Second question***. If there is a claim or defence of that kind, the State tribunal must also ask whether that claim or defence forms part of the same matter as the other claims raised in the proceeding. That will require the tribunal to consider whether the claims arise out of "common transactions and facts" or are instead "completely separate and distinct".[19] If, on proper analysis, the subject matter of the proceeding involves two (or

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Wilson, Brennan, Deane and Dawson JJ); *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 (***Agtrack***) at [29]-[32] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

15 *Moorgate* (1980) 145 CLR 457 at 476 (Stephen, Mason, Aickin and Wilson JJ).

16 *Felton v Mulligan* (1971) 124 CLR 367 at 391 (Windeyer J); *LNC Industries* (1983) 151 CLR 575 at 582 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

17 *Barrett* (1945) 70 CLR 141 at 154 (Latham CJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 540 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *Felton v Mulligan* (1971) 124 CLR 367 at 374 (Barwick CJ), 382 (Menzies J), 396 (Owen J), 408 (Walsh J), 416 (Gibbs J). Commonwealth laws form part of the single composite body of law that is applicable to cases determined in the exercise of State jurisdiction: see *Rizeq* (2017) 262 CLR 1 at [56] (Bell, Gageler, Keane, Nettle and Gordon JJ).

18 In the context of s 40 of the *Judiciary Act*, see, eg, *Hogan v Ochiltree* (1910) 10 CLR 535 at 537-538 (Griffith CJ; Barton, O'Connor and Isaacs JJ agreeing); *Heimann v Commonwealth* (1935) 54 CLR 126 at 130 (Evatt J). In the context of s 78B of the *Judiciary Act*, see, eg, *Green v Jones* [1979] 2 NSWLR 812 at 817-818 (Hunt J); *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74 (Toohey J).

19 *Fencott v Muller* (1983) 152 CLR 570 at 607-608 (Mason, Murphy, Brennan and Deane JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [140] (Gummow and Hayne JJ). See also *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 512 (Mason J; Stephen J agreeing).

more) matters, only one of which is a matter of the kind described in s 75 or s 76, then the tribunal can proceed to deal with the matter that does not answer that description.

21. In written submissions (**RS [52]-[61]**),[20] the respondent contends that the proceeding before the Tribunal involved two matters, in part because the appellants' defence relying on s 109 of the Constitution "cut in at an anterior stage to deny the operation of the relevant aspects of the applicable State law" (**RS [54]**). Victoria submits that the defence in this case could not properly be said to be "completely separate and distinct" from the claim to which it responded: both the claim and the defence arose from a common substratum of facts; perhaps more importantly, the defence had no relevance if divorced from the claim. Properly analysed, the proceeding before the Tribunal involved one matter.

22. ***Third question***. The third relevant question is whether the claim or defence was made for the improper purpose of fabricating federal jurisdiction, and thus depriving the tribunal of jurisdiction. Although, historically, the making of fictitious claims was an accepted means for invoking the jurisdiction of particular courts,[21] decisions of this Court support the proposition that a claim or defence will only be capable of bringing a matter within s 75 or s 76 of the Constitution if it is made *bona fide*.[22]

23. Victoria submits that this qualification is best explained on the basis that, if a claim or defence is raised solely for the purpose of fabricating federal jurisdiction, then it is properly characterised as not being a real or genuine part of the controversy, and therefore not forming part of the matter.[23]

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20 Although these paragraphs of the respondent's written submissions are cast as addressing ground 2 in the notice of contention, they in fact address a different argument premised on the existence of separate matters in the proceeding before the Tribunal.

21 See Milsom, *Historical Foundations of the Common Law*, (2nd ed, 1981) at 61-65; Manousaridis, "The Common Law Courts: Origins, Writs and Procedure", in Gleeson, Watson and Higgins (eds), *Historical Foundations of Australian Law: Volume I*, (2013) at 44-45.

22 *Troy v Wrigglesworth* (1919) 26 CLR 305 at 311 (Barton, Isaacs and Rich JJ); *Hume v Palmer* (1926) 38 CLR 441 at 446 (Knox CJ); *Hopper v Egg and Egg Pulp Marketing Board (Vic)* (1939) 61 CLR 665 (***Hopper***) at 673 (Latham CJ; McTiernan J agreeing), 681 (Evatt J); *Stock Health Service Pty Ltd v Brebner* (1964) 112 CLR 113 at 117 (Taylor J; Kitto J agreeing); *R v Marshall; Ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595 (***Marshall***) at 609 (Mason J; Gibbs, Stephen and Jacobs JJ agreeing); *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 26 (Gibbs J; Mason and Wilson JJ agreeing). See also *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219 (the Court); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 (***Johnson Tiles***) at [88] (French J; Beaumont and Finkelstein JJ agreeing).

23 In *Agtrack* (2005) 223 CLR 251 at [32], Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ said that the question whether federal jurisdiction has been engaged in a legal proceeding is one of "objective assessment". Victoria submits that this statement should not be understood as precluding an inquiry as to whether a claim or defence was raised for the purpose of fabricating federal jurisdiction. Rather, the

24. This analysis is consistent with the fact that this Court has referred to the *bona fide* requirement in the context of both s 75(v)[24] and s 76(i).[25] The only requirement common to both of those provisions is that there must be a "matter". Thus, the relevant effect (for jurisdictional purposes) of the fact that a claim or defence is not made *bona fide* must be that the claim or defence does not form part of the matter.

25. Consistently with this analysis, Victoria submits that, if a State tribunal forms the view that a claim or defence relying on the Constitution or a Commonwealth law has been made for the purpose of fabricating federal jurisdiction, the appropriate course is for the tribunal to treat the claim or defence as it would a separate matter with respect to which it lacks jurisdiction — that is, by putting it out of account as not forming part of the controversy,[26] and proceeding to deal with the matter before it (assuming the matter is otherwise within the tribunal's jurisdiction).

26. ***Fourth question***. As noted in paragraph 13 above, at issue in this appeal is the extent to which it was relevant to consider the merits of the appellants' defence based on Commonwealth law and s 109 of the Constitution in forming an opinion about whether the subject matter of the proceeding before it was a matter of the kind described in s 76.

27. The fact that a claim or defence relying on the Constitution or a Commonwealth law is weak,[27] rejected,[28] disclaimed[29] or not necessary to decide[30] does not prevent the matter in which that claim or defence is raised from being characterised as one arising under the Constitution or a Commonwealth law. However, Victoria submits that the merits of

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statement appears to have been intended to summarise the proposition explained in the following two sentences of the plurality's reasons — namely, that the question whether federal jurisdiction has been engaged "is not a question of establishing an intention to engage federal jurisdiction or an awareness that this has occurred".

24 *Marshall* (1975) 132 CLR 595 at 609 (Mason J; Gibbs, Stephen and Jacobs JJ agreeing); *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 26 (Gibbs J; Stephen, Mason and Wilson JJ agreeing).

25 *Troy v Wrigglesworth* (1919) 26 CLR 305 at 311 (Barton, Isaacs and Rich JJ); *Hume v Palmer* (1926) 38 CLR 441 at 446 (Knox CJ); *Hopper* (1939) 61 CLR 665 at 673 (Latham CJ; McTiernan J agreeing), 677 (Starke J), 681 (Evatt J).

26 For example, by striking it out: in Victoria, see *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 75.

27 See *Hopper* (1939) 61 CLR 665 at 681 (Evatt J). See also *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410 at 415-416 (Gummow J); *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 at 481-482 (the Court); *Johnson Tiles* (2000) 104 FCR 564 at [86] (French J; Beaumont and Finkelstein JJ agreeing).

28 See *Hume v Palmer* (1926) 38 CLR 441 at 454 (Higgins J); *Hopper* (1939) 61 CLR 665 at 673 (Latham CJ; McTiernan J agreeing), 674 (Rich J). See also *Johnson Tiles* (2000) 104 FCR 564 at [85] (French J; Beaumont and Finkelstein JJ agreeing).

29 *Moorgate* (1980) 145 CLR 457 at 477 (Stephen, Mason, Aickin and Wilson JJ).

30 *Moorgate* (1980) 145 CLR 457 at 476 (Stephen, Mason, Aickin and Wilson JJ).

such a claim or defence are, nevertheless, relevant in two ways where a State tribunal forms an opinion about whether a matter is one of the kind described in s 76:

27.1 *first*, if a claim or defence relying on the Constitution or a Commonwealth law is manifestly untenable, that may be relevant to the tribunal forming an opinion that the claim or defence was made for the purpose of fabricating federal jurisdiction,[31] with the consequences described in paragraphs 22 to 25 above; and

27.2 *second*, if a claim or defence relying on the Constitution or a Commonwealth law is manifestly untenable, that may also show — independently of any opinion about the purpose for which the claim or defence was made — that the claim or defence is properly characterised as not being a real or genuine part of the controversy, and therefore not forming part of the matter.

28. It is necessary to say something further about the second of those propositions.

29. Victoria submits that, as a matter of principle, it is possible for a claim or defence to be so manifestly untenable that it cannot properly be said to be a real or genuine part of a controversy, even in the absence of a finding that the claim was made or the defence was raised for an improper purpose. Where such a claim or defence is raised in a proceeding, it cannot give the subject matter of the proceeding the character of a matter "arising under" the Constitution or a Commonwealth law; instead, it is properly dealt with as if it forms no part of the matter.

30. There are many different labels that might be applied to a claim or defence of the kind described above. The Commonwealth has proposed "so clearly untenable that it cannot possibly succeed" (**CS [18]**). In these submissions, Victoria has used "manifestly untenable".[32] Whatever label is applied, it is likely to be a rare case where a claim or defence is so lacking in merit that it can properly be said not to form part of the matter in which it is raised. Victoria does not submit that the appellants' defence based on Commonwealth law and s 109 of the Constitution could be described in that way.

31. Victoria submits that the proposition that it is possible for a claim or defence to be so manifestly untenable that it cannot properly be said to be a real or genuine part of a

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31 See *Cook v Pasminco Ltd* (2000) 99 FCR 548 at [14], [16] (Lindgren J); *Lustig* (2015) 228 FCR 148 at [88] (Perry J). Cf *Johnson Tiles* (2000) 104 FCR 564 at [88] (French J; Beaumont and Finkelstein JJ agreeing).

32 See *Re Young* (2020) 94 ALJR 448 at [13] (Gageler J).

controversy is reflected in the reasoning of several members of this Court in cases concerning federal jurisdiction, including in the context of ss 40 and 78B of the *Judiciary Act*.[33] Although these decisions have applied different labels, not all of which might now be embraced,[34] Victoria contends that the reasoning in these cases reflects a recognition of the core proposition outlined above. In particular:

31.1 in *Hume v Palmer*, Knox CJ regarded it as relevant to the question whether federal jurisdiction was being exercised by a magistrate that an argument relying on s 109 of the Constitution that was raised before the magistrate was both "substantial" and "raised bona fide";[35]

31.2 in *Hopper*, Rich J considered it relevant to the question whether there was a matter under s 76 that the cause "really and substantially" involved the interpretation of the Constitution;[36]

31.3 in the same case, Starke J (in dissent on the question of jurisdiction) described a claim as being "fictitious" and "not rais[ing] any real question involving the interpretation of the Constitution" on the basis that the claim was foreclosed by authority, without separately finding that the claim was not raised *bona fide*;[37]

31.4 in *In re An Application by Public Service Association of NSW*, on an application by the Commonwealth Attorney-General for removal of a cause into the High Court under s 40(1) of the *Judiciary Act* (which application s 40(1) requires to be granted "as of course"), Williams J said that the cause must "really and substantially" arise under the Constitution or involve its interpretation before the Court would have "no option but to" grant the application;[38]

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33 As to the relevance of decisions concerning ss 40 and 78B of the *Judiciary Act* in this context, see *Agtrack* (2005) 223 CLR 251 at [27] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

34 See, in particular, the criticism of the word "substantial" in Leeming, *Authority to Decide*, (2nd ed, 2020) at 115-117.

35 (1926) 38 CLR 441 at 446.

36 (1939) 61 CLR 665 at 674, citing *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 74 (Isaacs J). However, in that passage, Isaacs J appeared to regard the question whether a cause "really and substantially" arises under the Constitution or involved its interpretation as being relevant to whether the cause should be remitted, rather than whether there was a matter in federal jurisdiction.

37 (1939) 61 CLR 665 at 677.

38 (1947) 75 CLR 430 at 433. Williams J held that the cause did "really and substantially" arise under the Constitution even though there was "close and authoritative" High Court authority on the question that the Attorney-General applied to have removed into the High Court. In the context of s 40 of the *Judiciary Act*, see also *Re Stubberfield's Application* (1996) 70 ALJR 646 at 647 (McHugh J); *Walker v Speechley* (1998) 72 ALJR 1378 at 1378 (Gaudron J). Cf *Helljay Investments Pty Ltd v Deputy Commissioner of Taxation (Cth)* (1999) 74 ALJR 68 at [18] (Hayne J).

31.5 in *R v Cook; Ex parte Twigg*, Gibbs J (with whom Stephen, Mason and Wilson JJ agreed) regarded it as relevant to the Court's jurisdiction under s 75(v) not only that prohibition had been sought against an officer of the Commonwealth "in good faith", but also that the claim for prohibition "cannot be said to have been unarguable";[39]

31.6 in *Fencott v Muller*, Mason, Murphy, Brennan and Deane JJ said that "federal judicial power is attracted to the whole of a controversy only if the federal claim is a substantial aspect of that controversy";[40] and

31.7 in *Re Culleton*, Gageler J said that, in order for s 78B to be engaged, "the constitutional point must be real and substantial".[41]

32. As the Commonwealth has identified (**CS [20]-[22]**), in the context of s 78B of the *Judiciary Act*, the principle that it is possible for a claim or defence to be so manifestly untenable that it cannot properly be said to be a real or genuine part of a controversy has been applied many times in lower courts.

33. If a claim or defence arising under the Constitution or a Commonwealth law is so manifestly untenable that it can properly be said not to form part of the matter in which it is raised, then Victoria submits that the claim or defence can be treated like any other federal claim or defence that does not form part of the matter: the tribunal cannot dismiss the claim on its merits,[42] but must put it out of account as not forming part of the controversy, and proceed to deal with the matter before it (assuming the matter is otherwise within the tribunal's jurisdiction).

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39 (1980) 147 CLR 15 at 26.

40 *Fencott v Muller* (1983) 152 CLR 570 at 609. Different explanations for the meaning of this paragraph of the plurality's reasoning have been advanced: see *Johnson Tiles* (2000) 104 FCR 564 at [84] (French J; Beaumont and Finkelstein JJ agreeing); Leeming, *Authority to Decide*, (2nd ed, 2020) at 116-117.

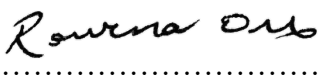
41 (2018) 91 ALJR 302 at [29]. In support of that proposition, his Honour cited *ACCC v C G Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at [14], where French J said that s 78B "does not impose on the Court a duty not to proceed pending the issue of a notice no matter how trivial, unarguable or concluded the constitutional point may be".

42 See *Wilson v Chan* (2020) 103 NSWLR 140 at [11] (Leeming JA; Macfarlan JA agreeing).

PART V: ESTIMATE OF TIME

34. It is estimated that up to 10 minutes will be required for the presentation of Victoria's oral argument.

Dated: 26 November 2021



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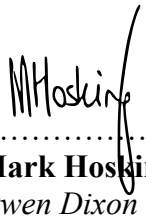

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H7/2021

BETWEEN:

CITTA HOBART PTY LTD
First Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

and

DAVID CAWTHORN
Respondent

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

Pursuant to Practice Direction No. 1 of 2019, Victoria sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
	Constitutional provisions		
1.	*Commonwealth Constitution*		Ch III, ss 75, 76, 109
	Statutes		
2.	*Freedom of Information Act 1982* (Vic)	Current	s 50
3.	*Judiciary Act 1903* (Cth)	Current	ss 40, 78A, 78B
4.	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)	Current	s 75