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 27F - Outline of oral argument for A-G Victoria
Filing party:	Interveners
Date filed:	08 Feb 2022

Important Information

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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

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

PART I: CERTIFICATION

1. This outline is in a form suitable for publication on the internet.

PART II: OUTLINE

2. Victoria makes submissions about two broad topics in relation to the jurisdiction of State tribunals:

   2.1 the nature of the task a State tribunal should perform when called on to exercise judicial power in a proceeding where the subject matter of that proceeding may be a matter of the kind described in s 75 or s 76 of the Constitution; and

   2.2 how a State tribunal should go about performing that task where the subject matter of the proceeding may be a matter of the kind described in s 76(i) or (ii) of the Constitution.

(a) The nature of the task

3. A State 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: VS [5]-[6].

- *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 618 (JBA 9 tab 65)
- *Re Adams and The Tax Agents' Board* (1976) 12 ALR 239 at 242 (JBA 14 tab 114)

4. Where the jurisdiction of a State tribunal 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: VS [7]-[9].

- *Burns v Corbett* (2018) 265 CLR 304 at [2]-[3], [67]-[69] (JBA 5 tab 32)

5. The formation of such an opinion occurs at a stage anterior to the exercise of any judicial power in relation to the subject matter of the proceeding: VS [10].

6. Further, the formation of such an opinion does not itself involve the exercise of judicial power, because its outcome is not the resolution of any controversy between the parties, but is instead that the tribunal "determin[es] its own action" — that is, whether or not it will hear and determine the proceeding: VS [10]-[12].

- *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 618 (JBA 9 tab 65)
- *Rizeq v Western Australia* (2017) 262 CLR 1 at [52] (JBA 10 tab 74)

(b) How a tribunal should perform that task

7. 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:

7.1 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) (a **federal claim or defence**): VS [16]-[19];

7.2 if there is, whether the federal claim or defence forms part of the same matter as the other claims raised in the proceeding: VS [20]-[21];

7.3 whether the federal claim or defence was raised for the improper purpose of fabricating federal jurisdiction, and thus depriving the tribunal of jurisdiction: VS [22]-[25]; and

7.4 whether the federal claim or defence is manifestly untenable: VS [26]-[33].

8. The third and fourth questions are relevant because, if the federal claim or defence was raised for the improper purpose of fabricating federal jurisdiction or is manifestly untenable, it will not be a real or genuine part of the controversy between the parties to

the proceeding and will therefore not render the controversy a matter of the kind described in s 76(i) or (ii) of the Constitution: VS [23], [29].

9. The proposition that a claim or defence that is raised by a party in a proceeding may not form a real or genuine part of the controversy between the parties to the proceeding is supported by authorities indicating that a claim or defence made in a proceeding will only be capable of rendering the subject matter of the proceeding a matter under s 75 or s 76 of the Constitution if the claim or defence is raised *bona fide*: VS [22], [24].

- *Troy v Wrigglesworth* (1919) 26 CLR 305 at 311 (JBA 11 tab 81)
- *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 26 (JBA 9 tab 63)

10 10. The fact that this Court has referred to the *bona fide* requirement in the context of both s 75(v) and s 76(i) indicates that the relevant effect (for jurisdictional purposes) of a claim or defence not being made *bona fide* must be that the claim or defence does not form part of the matter: VS [24].

11. The proposition that a claim or defence raised by a party in a proceeding may not form a real or genuine part of the controversy between the parties to the proceeding is also supported by authorities indicating that a claim or defence made in a proceeding will only be capable of rendering the subject matter of the proceeding a matter under s 76(i) or (ii) of the Constitution if the claim or defence is "real" or "substantial": VS [31].

12. A federal claim or defence may not be a real or genuine part of the controversy between
20 the parties because it is so lacking in substance that it is not truly or genuinely an issue in dispute — the term Victoria has used to capture this situation is "manifestly untenable", but other terms could be used: VS [29]-[30].

13. Forming an opinion about whether a federal claim or defence is a real or genuine part of the controversy does not involve the substantive resolution of the claim or defence: VS [33].

Dated: 8 February 2022

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