HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY
BETWEEN: CITTA HOBART PTY LTD
First Appellant
PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant
and
DAVID CAWTHORN
Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

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

PART II: REPLY

2. ***Correct approach to determining whether a matter arises in federal jurisdiction:*** The correct approach to ascertaining whether a matter arises in federal jurisdiction is that described in Victoria's submissions (**VS**) at [4.4]-[4.5], with the caveat that the "fourth question" in [4.4] (whether the claim is "manifestly untenable") is not a separate question but rather (as [4.5] in part suggests) part of the first three questions. The appellants therefore do not agree that the Commonwealth's "second qualification" (whether a claim[1] is "so clearly untenable that it cannot possibly succeed") is applicable as an independent question in its own right: cf Commonwealth Submissions (**CS**) [14], [18].

3. Whether a claim is properly characterised as arising under a federal law (i.e. Victoria's first question) is a question of substance, turning on the subject-matter of the claim, not its merits.[2] Some claims that cannot possibly succeed will not be able to be characterised as arising under a federal law. But that will be because the necessary components giving rise to federal jurisdiction cannot be identified (for example, because there is no real controversy[3]), rather than because of a claim's lack of merit *per se*. The analysis must always be directed to identification of the elements necessary for federal jurisdiction.

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1 Or defence. For simplicity, in the remainder of this Reply references are simply to claims.
2 *Boensch v Pascoe* (2016) 311 FLR 101 at [20] (Leeming JA); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 (***Johnson Tiles***) at [84] (French J).
3 See e.g. *Nikolic v MGICA Ltd* [1999] FCA 849 (***Nikolic***) at [5], [9] (French J).

4. Once a claim has been characterised as arising under a federal law, the matter necessarily involves federal jurisdiction, unless the claim is for a colourable purpose. There is no occasion for a further, independent, assessment of the merits of the claim. Indeed, assessment of the merits at that stage, in the absence of a colourable purpose, would involve an exercise of federal jurisdiction.

5. Federal Court judges have considered and rejected the proposition that *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation*[4] provides support for an argument that a federal claim must be arguable in order to invoke federal jurisdiction: cf CS [26] and Respondent's Submissions (**RS**) [16].[5] Rather, "the test adopted in *Burgundy Royale* was simply a test of genuineness", where "genuine" is the inverse of "colourable".[6]

6. The Commonwealth's second qualification would also have the unsatisfactory consequence that, in proceedings in courts, wherever an asserted federal claim was "so clearly untenable that it [could] not possibly succeed", the court would be compelled to dismiss the proceeding not on the merits but because the court lacked jurisdiction to hear it.

7. Contrary to RS [18], the appellants' submissions in chief are consistent with the s 78B jurisprudence of this Court. Although a court may conclude that a claim which is frivolous, vexatious or an abuse of process, does not arise under a federal law, that conclusion will obtain because the claim does not disclose the existence of a real controversy that can attract the operation of federal jurisdiction, rather than for the reason, of itself, that the claim is frivolous, vexatious or an abuse of process.[7]

8. Queensland's submission that federal jurisdiction should be subject to different strictures when exercised by State tribunals is to be rejected: Queensland's Submissions (**QS**) [18]-[20]. There is one source of federal jurisdiction and that is the Constitution. There is no question of "transposition of principles": cf QS [18]. The asserted circumstance[8] that the principles concerning the exercise of federal

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4 (1987) 18 FCR 212 at 219 (Bowen CJ, Morling and Beaumont JJ).

5 *Fitzroy Motors Pty Ltd v Hyundai Automotive Distributors Australia Pty Ltd* (1995) 133 ALR 445 (***Fitzroy Motors***) at 450 (Wilcox CJ); *Cook v Pasminco Ltd* (2000) 99 FCR 548 at [1]-[16] (Lindgren J); *Ahmed v Harbour Radio Pty Ltd* (2009) 180 FCR 313 at [57]-[58] (Foster J).

6 *Fitzroy Motors* (1995) 133 ALR 445 at 450 (Wilcox CJ).

7 See, e.g., *Nikolic* [1999] FCA 849 at [5], [9] (French J).

8 Contrary to QS [19], the respondent's complaint would not be "unresolvable": the issue the subject of the federal defence could be determined in the Federal Court, and consideration could be given to a fresh complaint in the Tribunal thereafter subject to the outcome in the Federal Court.

jurisdiction would "significantly hamper the operation of State tribunals" cannot justify departure from the negative implications of Ch III.

9. Western Australia's submissions on Ground 1 should be rejected for the reasons given in the appellants' submissions in chief, as well as at CS [25]-[28].

10. ***"Reasonable prospect of success" and abuse of process:*** The respondent submits that federal jurisdiction will not be invoked where a federal claim has "no reasonable prospect of success" because colourability is "an aspect of all courts' implied authority to protect themselves against abuses of process" and there is "no principled basis" to distinguish between improper purpose and other abuses such as "palpably weak claims": RS [7], [9]-[22].

11. However, settled authority establishes that federal jurisdiction does not turn upon the merits of a claim: see [3] above. In *Johnson Tiles*[9] it was specifically held that federal jurisdiction was not lost when the federal claims originally giving rise to federal jurisdiction were held to disclose no reasonable cause of action. This was at a time when the relevant test was whether the action was "so clearly untenable that it cannot succeed".[10] The conclusion in *Johnson Tiles* is incompatible with the Commonwealth's second qualification, let alone the adoption of a general test of "reasonable prospects". The respondent does not address this authority or principle but simply proceeds as if it does not exist. In any event, the abuse of process doctrine concerns the power of superior courts to prevent abuses in the exercise of their jurisdiction and is informed by matters that include the need to protect the public interest in, and public confidence in, the administration of justice.[11] The doctrine could hardly be a general informing principle for administrative bodies determining the anterior question of whether, in proceedings that might be said to involve federal claims, they have jurisdiction.

12. ***Inconsistency:*** The respondent's submission that, unless a Disability Standard expressly displaces State and Territory laws, concurrency should be inferred (RS [32], [43]-[44]) should be rejected. No inference can be drawn from the absence of an express statement, in circumstances where any such statement could equally have indicated an intention to displace State laws as not to do so: see CS [37]-[38].

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9 (2000) 104 FCR 564 at [47]-[49], [83]-[88] (French J).
10 *Johnson Tiles* (2000) 104 FCR 564 at [49] (French J).
11 *Williams v Spautz* (1992) 174 CLR 509 at 518, 520 (Mason CJ, Dawson, Toohey, McHugh JJ).

13. ***Notice of Contention - First Ground:*** It follows from what is said on this ground at RS [51] that it cannot assist the respondent.

14. ***Notice of Contention - Second Ground:*** There is no substance in the respondent's contention that the Full Court erred by failing to find that the Tribunal ought to have adjourned its inquiry to enable the appellants to make an application to a court with federal jurisdiction to determine the appellants' federal defences: RS [52]-[61].

15. This contention is disposed of by the respondent's own conduct before the Tribunal. Counsel for the respondent submitted to the Tribunal that the appellants should pursue their federal claims in a court with federal jurisdiction.[12] The Tribunal raised the prospect of directing that an application be made in such a court. Counsel for the respondent rejected this but submitted that there should be an adjournment to allow the appellants to make such an application.[13] The Tribunal then asked counsel for the respondent "what if they don't bring an application in the period of adjournment", to which counsel responded, "this tribunal should push on and determine the matter".[14] The appellants submitted to the Tribunal in writing that there was no onus on them to initiate proceedings in a Ch III Court and that the Tribunal should dismiss the complaint.[15] The Tribunal dismissed the complaint. In these circumstances, the respondent cannot now complain that the Tribunal dismissed the proceeding.

16. Further and in any event, the Tribunal made no error in not adjourning the proceeding. There was no obligation on it to do so and it was a matter for the parties as to how they wished to run the case.

17. The respondent's contention that his complaint and the appellants' s 109 defence constituted two matters (RS [53]-[56]) should be rejected for the reasons set out in South Australia's submissions at [18]-[20].

18. ***Notice of Contention - Third Ground*****:** As best as the appellants can follow RS [62]-[67], the respondent appears to contend that the Full Court erred in not finding that, because the Disability Standards are incorporated into a State legislative scheme, they should have been construed as subject to the State Act. But whatever the State

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12 Respondent's Further Materials (**RFM**), Transcript of Tribunal hearing, T85.45, RFM 147.
13 RFM, Transcript of Tribunal hearing, T88.42-43, RFM 150, T89.03, RFM 151.
14 RFM, Transcript of Tribunal hearing, T89.19-.24, RFM 151.
15 RFM, Respondents' Submissions in Reply to the Complainant's Supplementary Jurisdictional Submissions dated 5 June 2019 [22], [32], RFM 199, 200.

scheme, the Standards would continue to have independent operation as a federal law. The ground should be rejected.

19. ***Notice of Contention - Fourth Ground*:** The fourth ground is to be rejected because there was no occasion for the Full Court to have determined the issues it seeks to raise. The Full Court was confined to considering errors in the decision of the Tribunal, and the issues sought to be agitated under the fourth ground were not the subject of decision by the Tribunal.

20. ***Australian Human Rights Commission - Leave:*** The AHRC should not be granted leave to file submissions or make oral submissions. The proceeding concerns constitutional issues, not issues of discrimination on the ground of disability or human rights issues: cf AHRCS [4]. Further, the appellants and respondent do not assume that the Tribunal was exercising judicial power. The Tribunal considered that issue and decided that it was exercising judicial power.[16] The respondent did not appeal against that finding to the Full Court.[17] The Full Court did not consider that issue. It not apparent how the AHRC can now raise that issue in circumstances where there is no ground of appeal going to the question of judicial power.

21. ***Exercise of judicial power:*** In any event, the contentions that there was no exercise of judicial power, and that s 90 of the State Act can be read down, are misconceived: cf AHRC [6], [10], [12]-[80]; QLD [4]. In *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*,[18] Kenny J accepted as clear that, when the Tribunal conducts an inquiry into a complaint under the State Act, it is exercising judicial power, and that s 90 could not be read down as it was intended to operate fully and according to its terms or not at all.

Dated: 3 December 2021

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16 Reasons of Tribunal, Core Appeal Book (**CAB**) page 15, [39].
17 Notice of Appeal, CAB page 65; Notice of Contention, CAB page 76.
18 (2008) 169 FCR 85 at [205]-[207], [254].