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 - Respondent's Outline of oral argument
Filing party:	Respondent
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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

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The Tribunal was exercising executive, not judicial, power (further notice of contention)

2. The respondent adopts the argument of the AHRC and QLD. If the Tribunal was exercising executive power, then there is no question that it was entitled to form a view, which would not be final and conclusive, on the merits of the s 109 defence and, in doing so, was not exercising federal jurisdiction.

- *Re Adams and the Tax Agents Board* (1976) 12 ALR 239 at 242 (**JAB V14:T114**)

A claim that can be summarily dismissed does not engage federal jurisdiction (appeal ground one; notice of contention ground one)

3. Federal jurisdiction under ss 76(i) and (ii) of the Constitution is engaged if a party relies upon a right, immunity or defence derived from the Constitution or federal law, which is a matter of objective assessment: **RS [15]**.

- *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [32] (**JBA V4:T22**).

4. It is not enough merely for a party to assert that such a right, immunity or defence is in issue, because parties do not have an unqualified "right" to invoke jurisdiction. That right is dependent upon the adjudicative body having authority to decide the claim and upon that body's powers to protect its own processes from abuse: **RS [9]**

- See *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [96]

5. Federal jurisdiction is not engaged by claims which abuse the processes of the adjudicative body, whether because they are colourable claims brought for an improper purpose or because they are claims foredoomed to fail: **RS [10]-[13]**.

- *Williams v Spautz* (1992) 174 CLR 509 at 522 (**JBA V12:T88**); *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130 (**JBA V7:T42**); *Walton v Gardiner* (1993) 177 CLR 378 at 393 (**JBA V11:T85**); *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 (**JBA Vol 13, Tab 95**).

6. Looking beyond improper purpose is consistent with the case law on ss 40 and 78B of the *Judiciary Act 1903* (Cth), where the claim must be "real and substantial": **RS [18]**.

- *Re Culleton* (2017) 91 ALJR 302 at 307-308 [26], [28]-[29] (**JBA V14:T115**); *In re the Application by the Public Service Association of NSW* (1947) 75 CLR 430 at 433.

7. The degree of unarguability is a matter of verbal formulae only. Abuse of process is a doctrine that is always sensitive to context and resistant to rigid and exhaustive definition. The language from *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 and *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 should not be treated as set in stone: **RS [22].**

- *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [9] (**JBA Vol5:T28**)

8. In any event, the Full Court below should be taken to have concluded that the s 109 defence should have been summarily dismissed. One of the grounds of appeal upheld by Estcourt J was that the s 109 defence was not tenable or reasonably arguable [**CAB 54 [104], 22 (Ground 8)]**. Blow CJ (Wood J agreeing) agreed with Estcourt J's disposition of the appeal (**CAB, page 28 [3]**) and described the defence as "misconceived" [**CAB, page 29 [5]**] (which is a ground for summary dismissal of a complaint under the AD Act).

Alternatively, there were two matters (notice of contention, ground 2)

9. The respondent's claim under the AD Act was one that only the Tribunal could determine. The jurisdiction to order the relief contemplated by the Tasmanian Parliament was the Tribunal's alone. No Ch III Court could exercise that jurisdiction: **RS [54]**; **contra SA [24]-[36]**.

- *Rizeq v Western Australia* (2017) 262 CLR 1 at 32-35 [81]-[82], [86]-[88] (**JBA V10:T74**).

10. It follows that the dispute after the appellants had raised the s 109 defence in the Tribunal involved two matters because two decision-making bodies would always be needed to determine all of the issues in controversy between the parties. Treating the complaint and the s 109 defence as one matter resulted in it becoming a non-justiciable controversy as the Tribunal's orders prevented any relief being granted in the matter even if the s 109 defence was misconceived and not tenable or reasonably arguable: **RS [53]-[59].**

- *Abebe v Commonwealth* (1999) 197 CLR 510 at 529 [36] (**JBA V4:T21**)

The s 109 defence was foredoomed to failure (notice of appeal, grounds one and two; notice of contention, ground four)

11. The *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (**Access Standards**) and State and Territory building laws comprise a national scheme. The Access Standards neither expressly nor impliedly exclude State law. The national scheme reveals the opposite: under that scheme, the Access Standards were intended to operate as supplemental to and cumulative upon State and Territory building laws, which were to govern access to buildings in Australia by persons with a disability: **RS [30]-[50]**.

- Access Standards cll 1.3, 1.4(1), 2.1, 2.3, 4.1, 4.2, note to 5.3 and Note to Sch 1 (**JBA V1:T5**); Explanatory Memorandum to the Access Standards at [3] – [9] (**JBA V17:T125**); Guide to the Building Code of Australia 2011 p 190 (**JBA V20:T128**)

- cf *Dickson v The Queen* (2010) 241 CLR 491 at [24] and [25] (**JBA V6:T37**) and *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 at 52 (Windeyer J); *Ex parte Maclean* (1930) 43 CLR 472 at 483 (**JBA V6:T38**); *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 447 [32] (**JBA V12:T89**)

Section 24(a) of the AD Act (notice of contention ground 3)

12. The ground is not pressed.

Access to facilities not in a building (notice of contention, grounds one and four)

13. If there is s 109 inconsistency between the Access Standards and the AD Act, the inconsistency is limited to the subject matter of the Access Standards. The part of the respondent's complaint as to access to services and facilities in Parliament Square not in a building is unaffected as the Access Standard only applies to access to buildings and facilities in them: **RS [62]-[67]; AB FM pages 22-27 [3a], [3e], [8] [17], [19]** and **[4a]** of the Orders sought.

- Access Standards, cl 2.3 and DP1 and D3.2(1)(a) (**JBA V1:T5**)

Date: 8 February 2022

Ron Merkel **Simeon Beckett** **Christopher Tran** **Laura Hilly**