HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

CITTA HOBART PTY LTD & ANOR APPELLANTS

AND

DAVID CAWTHORN RESPONDENT

Citta Hobart Pty Ltd v Cawthorn
[2022] HCA 16
Date of Hearing: 8 & 9 February 2022
Date of Judgment: 4 May 2022
H7/2021

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 to 3 of the Full Court of the Supreme Court of Tasmania made on 23 December 2020 and, in their place, order that the appeal to that Court be dismissed.*

3. *There be no order as to costs.*

On appeal from the Supreme Court of Tasmania

Representation

D J Batt QC with J D Watson for the appellants (instructed by Page Seager Lawyers)

R Merkel QC with S A Beckett, C J Tran and L E Hilly for the respondent (instructed by Hobart Community Legal Service)

S P Donaghue QC, Solicitor-General of the Commonwealth, and F I Gordon with R S Amamoo for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M O Pulsford for the Attorney-General for the State of New South Wales, intervening (instructed by NSW Crown Solicitor's Office)

J A Thomson SC, Solicitor-General for the State of Western Australia, with S R Pack for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M J Wait SC, Solicitor-General for the State of South Australia, with K M Scott for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

R J Orr QC, Solicitor-General for the State of Victoria, with M A Hosking for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor's Office)

S K Kay SC, Solicitor-General for the State of Tasmania, with D R Osz for the Attorney-General for the State of Tasmania, intervening (instructed by Office of the Solicitor-General (Tas))

C L Lenehan SC with D P Hume for the Australian Human Rights Commission, appearing as amicus curiae (instructed by Australian Human Rights Commission)

CATCHWORDS

Citta Hobart Pty Ltd v Cawthorn

Constitutional law (Cth) – Chapter III – Where respondent's complaint made under *Anti-Discrimination Act 1998* (Tas) ("State Act") was referred to Anti-Discrimination Tribunal ("Tribunal") – Where appellants in defence asserted provisions in State Act inconsistent with *Disability Discrimination Act 1992* (Cth) and *Disability (Access to Premises – Buildings) Standards 2010* (Cth) – Where Tribunal dismissed complaint for want of jurisdiction without addressing merits of defence – Where Full Court of Supreme Court of Tasmania on appeal considered merits of, and rejected, defence – Where Tribunal not "court of a State" within meaning of ss 77(ii) and 77(iii) of *Constitution* – Where Chapter III implication recognised in *Burns v Corbett* (2018) 265 CLR 304 prevents State Parliament conferring on State tribunal that is not "court of a State" judicial power with respect to any matter of kind described in ss 75 and 76 of *Constitution* – Whether Tribunal exercised judicial power when determining complaint under State Act – Whether Tribunal had jurisdiction to hear and determine complaint – Whether defence needed to meet some threshold of arguability to give rise to matter of kind described in ss 76(i) and 76(ii) of *Constitution*.

Words and phrases – "abuse of process", "claim or defence that amounts to 'constitutional nonsense'", "colourable", "genuinely in controversy", "involving no 'real question'", "issue capable of judicial determination", "judicial power", "justiciable controversy", "limits of jurisdiction", "manifestly hopeless", "matter", "no reasonable prospects of success", "not incapable on its face of legal argument", "single justiciable controversy", "State jurisdiction", "State tribunal", "summarily dismissed", "threshold of arguability".

Constitution, Ch III, ss 75, 76, 77, 109.
Anti-Discrimination Act 1998 (Tas), ss 89, 90.

1 KIEFEL CJ, GAGELER, KEANE, GORDON, STEWARD AND GLEESON JJ. *Burns v Corbett*[1] held that a State Parliament lacks legislative capacity to confer on a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the *Constitution* judicial power with respect to any matter of a description in s 75 or s 76 of the *Constitution*. To ensure validity, a State law conferring State jurisdiction on a State tribunal must therefore be construed in accordance with applicable State interpretation legislation[2] to exclude jurisdiction with respect to all such matters.

2 In *Burns*, State jurisdiction was found to have been denied to a State tribunal in a matter, referred to in s 75(iv) of the *Constitution*, between residents of different States. A matter meets the description of a matter between residents of different States if the parties to the justiciable controversy which comprises the matter are natural persons who are in fact resident in different States[3].

3 Following *Burns*, this appeal concerns the exclusion from State jurisdiction conferred on a State tribunal of matters, referred to in s 76(i) or s 76(ii) of the *Constitution*, arising under the *Constitution* or arising under laws made by the Commonwealth Parliament. How is a justiciable controversy to be identified as a matter answering one or other of those descriptions?

4 The question arises in the context of a referral to the Anti-Discrimination Tribunal ("the Tribunal") under the *Anti-Discrimination Act 1998* (Tas) ("the State Act") of a complaint by the respondent[4] that the appellants discriminated on the ground of disability in the provision of a facility by failing to provide adequate wheelchair access in the construction of Parliament Square in Hobart. In their formal defence to the complaint, the appellants asserted to the Tribunal that the

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1 (2018) 265 CLR 304.

2 In *Burns* s 31 of the *Interpretation Act 1987* (NSW), here s 3 of the *Acts Interpretation Act 1931* (Tas).

3 *Dahms v Brandsch* (1911) 13 CLR 336; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 623-625; *Foxe v Brown* (1984) 59 ALJR 186 at 188; 58 ALR 542 at 546.

4 Prior to the commencement of the *Tasmanian Civil and Administrative Tribunal (Consequential Amendments) Act 2021* (Tas).

State Act is in relevant part inoperative by force of s 109 of the *Constitution* because it is inconsistent with the *Disability Discrimination Act 1992* (Cth) ("the Commonwealth Act") and the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) made under it ("the Commonwealth Standards").

5 Finding that constitutional defence to be "not colourable", the Tribunal ordered that the complaint be dismissed for want of jurisdiction[5].

6 On appeal from the order of the Tribunal to the Supreme Court of Tasmania[6], the Full Court (Blow CJ, Wood and Estcourt JJ) addressed the merits of the constitutional defence and unanimously rejected it. The Full Court set aside the order of the Tribunal and remitted the complaint to the Tribunal for hearing and determination[7].

7 Blow CJ, with whom Wood J agreed, described the argument that the State Act is inconsistent with the Commonwealth Act and the Commonwealth Standards as "misconceived"[8]. Despite the use of that epithet, the Full Court did not clearly identify what it saw as the appealable error[9] on the part of the Tribunal.

8 One possible interpretation of the several reasons for judgment is that the Full Court found the Tribunal to have erred by failing itself to address and reject the merits of the constitutional defence in the exercise of the State jurisdiction to hear and determine the complaint conferred on it by the State Act. Another possible interpretation is that the Full Court held that the Tribunal erred by failing to conclude that raising the constitutional defence did not exclude State jurisdiction to hear and determine the complaint because the constitutional defence was not

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5 *David Cawthorn and Paraquad Association of Tasmania Incorporated v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd* [2019] TASADT 10 at [43]-[46].

6 See s 100 of the State Act.

7 *Cawthorn v Citta Hobart Pty Ltd* (2020) 387 ALR 356.

8 *Cawthorn v Citta Hobart Pty Ltd* (2020) 387 ALR 356 at 358 [5].

9 See *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 555-556 [30], 593 [153].

"reasonably arguable" in the sense that the constitutional defence would have amounted to an abuse of process if raised in a court.

9 The reasons for judgment of the Full Court need not be subjected to further examination. That is because the Full Court would have been wrong to discern appealable error on the part of the Tribunal on either of those bases. Nor is it necessary or appropriate for this Court, exercising appellate jurisdiction under s 73(ii) of the *Constitution* to give the judgment which ought to have been given by the Full Court[10], itself to examine and determine the merits of the argument that the State Act is in relevant part inoperative because it is inconsistent with the Commonwealth Act and the Commonwealth Standards.

10 The constitutional defence was genuinely raised in answer to the complaint in the Tribunal and was not incapable on its face of legal argument. That being so, the complaint and the defence together formed parts of a single justiciable controversy comprising a matter within the description in each of s 76(i) and s 76(ii) of the *Constitution*. The Tribunal was on that basis correct to order that the complaint be dismissed for want of jurisdiction.

11 Before turning to explain that outcome, it is appropriate to address a threshold issue, raised by the Australian Human Rights Commission ("the AHRC") with the support of the Attorney-General of Queensland intervening on the appeal to this Court, and taken up by the respondent by way of notice of contention. The issue is as to whether the jurisdiction conferred on the Tribunal by the State Act to hear and determine a complaint of discrimination referred to it in truth involves the exercise of judicial power.

The Tribunal exercises judicial power in hearing and determining a complaint

12 That the hearing and determination of a complaint referred to the Tribunal under the State Act involves the exercise of judicial power was decided in *The Commonwealth v Anti-Discrimination Tribunal (Tas)*[11]. The argument of the

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10 See s 37 of the *Judiciary Act 1903* (Cth).

11 (2008) 169 FCR 85.

AHRC challenges just one aspect of the reasoning adopted in that case to reach that conclusion.

13 Proceeding on the indisputable premise that the jurisdiction conferred on the Tribunal to hear and determine a complaint cannot involve the exercise of judicial power unless such order as the Tribunal may make if it finds the complaint to be established is binding on the parties[12], the AHRC argues that the State Act on its proper construction makes the binding effect of the Tribunal's order contingent on registration of that order in the Supreme Court. Unless and until registration occurs, so the argument goes, the Tribunal's order and the inquiry leading up to the making of that order are entirely administrative. Construing the State Act in accordance with the applicable State interpretation legislation, so the argument concludes, compliance with the constitutional limitation on State legislative capacity recognised in *Burns* is not to be achieved by construing the provisions of the State Act which confer jurisdiction on the Tribunal to hear and determine a complaint to exclude a matter of the same description as a matter referred to in s 75 or s 76 of the *Constitution*. Compliance with the constitutional limitation is instead to be achieved by construing the provision permitting registration of the Tribunal's order to exclude an order that, if registered, would result in an exercise of judicial power with respect to a matter of a description in s 75 or s 76 of the *Constitution*.

14 Precisely the same argument was put and rejected in *The Commonwealth v Anti-Discrimination Tribunal (Tas)*[13]. The principal authority of this Court from which the AHRC seeks to derive analogical support for the argument – *Brandy v Human Rights and Equal Opportunity Commission*[14] – was there distinguished by reference to a provision of the legislation in issue which specifically provided that an unregistered determination was "not binding or conclusive between any of the

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12 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645 at 658 [31].

13 (2008) 169 FCR 85 at 132-133 [205]-[207], 146-147 [249]-[254]. See also *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361 at 394-395 [102]-[103], 396 [108].

14 (1995) 183 CLR 245.

parties to the determination"[15]. The operation of that provision was later highlighted in the explanation of *Brandy* in *Attorney-General (Cth) v Breckler*[16] as a case in which the "administrative act" of registration "converted a non-binding administrative determination into ... a binding, authoritative and curially enforceable determination". The State Act, it was pointed out in *The Commonwealth v Anti-Discrimination Tribunal (Tas)*, contained and continues to contain no equivalent provision. The distinction drawn was, and remains, sound.

15 The essential flaw in the AHRC's argument is that it confuses the order of the Tribunal with the mechanism for enforcement of that order. As Dixon CJ and McTiernan J observed in *R v Davison*[17], in a passage to which attention was drawn in *Brandy*[18], "[t]he power to award execution might not belong to a tribunal, and yet its determinations might clearly amount to an exercise of the judicial power".

16 The State Act on its proper construction makes clear that an order made by the Tribunal on finding a complaint established takes immediate effect as an order with which the person to whom it is directed is bound to comply[19]. Registration of the order made by the Tribunal in the Supreme Court, so as then to become "enforceable as if it were an order of the Supreme Court"[20], is not a precondition to the order being required to be complied with. To the contrary, it is a step available to a person to enforce the order if the order "has not been complied with"[21].

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15 See s 25Z(2) of the *Racial Discrimination Act 1975* (Cth), as discussed in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257, 269.

16 (1999) 197 CLR 83 at 110 [42].

17 (1954) 90 CLR 353 at 368.

18 (1995) 183 CLR 245 at 257. See also at 269.

19 Section 89(1) of the State Act.

20 Section 90(2) of the State Act.

21 Section 90(1)(c) of the State Act.

The Tribunal has State judicial power to determine the limits of its State jurisdiction

17 No party or intervenor disputes that the Tribunal has a duty and concomitant authority to ensure that a complaint referred to it is and remains within its jurisdiction to hear and determine. The disparate arguments advanced on the appeal concerning the nature of that duty nevertheless indicate that some explication of underlying principle is warranted.

18 The starting point is the constitutional precept that "all power of government is limited by law" and that "[w]ithin the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of other branches of government through the application of judicial process and through the grant, where appropriate, of judicial remedies"[22].

19 The limits of a power conferred by statute are those expressed in or implied into the statute construed in light of the *Constitution*. That is so whether the repository of the power is a court or a non-court tribunal and whether the power conferred is judicial or non-judicial.

20 Failure to exercise, or to observe the legislated limits of, a jurisdiction conferred on a court or a non-court tribunal established by Commonwealth legislation is amenable to compulsion or restraint by mandamus or prohibition granted in the entrenched original jurisdiction of this Court under s 75(v) of the *Constitution*[23]. Failure to exercise, or to observe the legislated limits of, a jurisdiction conferred on a court or a non-court tribunal established by State legislation is correspondingly amenable to compulsion or restraint by an appropriate judicial remedy granted in the entrenched supervisory jurisdiction of the Supreme Court of that State[24].

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22 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39].

23 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482-483 [5].

24 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98].

21 Having a judicially enforceable duty to comply with the limits of its own jurisdiction, a court or a non-court tribunal must have power to take steps needed to ensure its own compliance with that duty. If not expressed in the legislation establishing the court or non-court tribunal or in the legislation conferring jurisdiction on it, that power is necessarily implied on the basis that "everything which is incidental to the main purpose of a power is contained within the power itself"[25].

22 The power which a court or a non-court tribunal necessarily has to ensure that it remains within the limits of its jurisdiction is not of a nature that is inherently judicial. The reason is that the exercise of the power is incapable of quelling a controversy between parties about existing legal rights[26]. Nor is it inherently non-judicial. Rather, the power takes its nature from the nature of the power to which it is incidental: "[t]he nature of the final act determines the nature of the previous inquiry"[27].

23 A court in which judicial power is invested therefore "has jurisdiction to determine – and to determine judicially – whether it has the jurisdiction to entertain a particular application or to make a particular order"[28]. The court, in other words, has "jurisdiction to decide its own jurisdiction"[29] in the performance of which it exercises judicial power.

24 A tribunal that is not a court and that is invested with non-judicial power correspondingly has authority – in the exercise of non-judicial power – to "make up its mind" or "'decide' in the sense of forming an opinion" about the limits of its

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25 *Burton v Honan* (1952) 86 CLR 169 at 177.

26 *Petrotimor Companhia de Petroleos SARL v The Commonwealth* (2003) 128 FCR 507 at 510 [11].

27 *R v Davison* (1954) 90 CLR 353 at 370, quoting *Prentis v Atlantic Coast Line Co* (1908) 211 US 210 at 227. See also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189-190, quoting *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666.

28 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 215.

29 *New South Wales v Kable* (2013) 252 CLR 118 at 133 [31].

own jurisdiction "for the purpose of determining its own action"[30]. The authority is not to "reach a conclusion having legal effect" but to form an opinion for the purpose of "moulding its conduct to accord with the law"[31].

25 The jurisdiction of a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the *Constitution* on which State judicial power is conferred by State legislation is to be understood in conformity with the same principles. The State tribunal must be taken to have incidental jurisdiction to determine whether the hearing and determination of a particular claim or complaint would be within the legislated limits of its State jurisdiction. The Federal Court[32] and the Court of Appeal of the Supreme Court of New South Wales[33] have correctly so held.

26 Taking its nature from the nature of the power to which it is incidental, that jurisdiction of a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the *Constitution* is itself a conferral of State judicial power. Accordingly, the State tribunal exercises judicial power when it decides that a claim or complaint in respect of which its jurisdiction is sought to be invoked is or is not a matter of a description referred to in s 75 or s 76 of the *Constitution*. The Federal Court[34] has correctly so held. To the extent that the Court of Appeal of the Supreme Court of New South Wales might be understood to have held to the contrary in *Sunol v Collier*[35], that decision should not be followed.

27 The legal effect of the judicial exercise by a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the *Constitution* of its

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30 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 618.

31 *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 at 245.

32 *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148 at 170 [91].

33 *Wilson v Chan & Naylor Parramatta Pty Ltd* (2020) 103 NSWLR 140 at 156 [72]-[74].

34 *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148 at 170 [91].

35 (2012) 81 NSWLR 619 at 624 [20]. See also *Gaynor v Attorney General for New South Wales* (2020) 102 NSWLR 123 at 156-157 [137].

jurisdiction to decide its own jurisdiction is no different from the legal effect of the judicial exercise of jurisdiction to decide its own jurisdiction by an inferior court of the State that is a court within the meaning of s 77(ii) and s 77(iii) of the *Constitution*. The limits of jurisdiction are in each case the limits that are set by the legislated conferral of jurisdiction construed in light of the *Constitution*. The judicial determination of jurisdiction is in neither case conclusive[36]. In either case, if jurisdiction is wrongly determined to exist, such order as is ultimately made in the purported exercise of jurisdiction is wholly lacking in legal force[37].

28 Here, the opinion formed by the Tribunal that the complaint referred to it was beyond its jurisdiction to hear and determine was accordingly a judicial opinion and the order made by the Tribunal dismissing the complaint for want of jurisdiction was an order made in the exercise of State judicial power. The question for the Full Court on appeal from the order of the Tribunal was, and the question for this Court on appeal from the judgment of the Full Court is, whether that order was correct.

Determining the relevant limit of the Tribunal's State jurisdiction

29 The relevant limit on the jurisdiction of the Tribunal to hear and determine the complaint made by the respondent arises, it will be recalled, because the provisions of the State Act which confer that jurisdiction are to be construed in accordance with the applicable State interpretation legislation to exclude jurisdiction with respect to any matter meeting a description in s 75 or s 76 of the *Constitution*.

30 The existence and scope of a matter meeting a description in s 75 or s 76 of the *Constitution* must be determined by "objective assessment"[38]. The assessment to be undertaken to determine the existence and scope of a matter excluded from the State jurisdiction conferred on a non-court State tribunal by a State law is no different from the assessment to be undertaken to determine the existence and scope of a matter of the same description within the jurisdiction of this Court by s 75 or under s 76, conferred on a court created by the Commonwealth Parliament

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36 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 375; *New South Wales v Kable* (2013) 252 CLR 118 at 140 [56].

37 *Cameron v Cole* (1944) 68 CLR 571 at 590-591.

38 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262 [32].

under s 77(i), or invested in a court of a State under s 77(iii) of the *Constitution*. Moreover, the objective assessment can be no different when undertaken by a non-court State tribunal for the purpose of determining whether a particular claim or complaint is within the legislated limits of its State jurisdiction from when the assessment is undertaken by the Supreme Court of the State on appeal or in the exercise of its entrenched supervisory jurisdiction.

31 A "matter" referred to in s 75 or s 76 of the *Constitution* encompasses a justiciable controversy about a legal right or legal duty having an existence that is not dependent on the commencement of a proceeding in the forum in which that controversy might come to be adjudicated[39]. Amongst the circumstances in which a justiciable controversy answers the description in s 76(ii) of a matter "arising under" a law made by the Commonwealth Parliament is where a Commonwealth law is relied on as the source of a claim or a defence that is asserted in the course of the controversy[40]. And amongst the circumstances in which a justiciable controversy answers the description in s 76(i) of a matter "arising under" the *Constitution* is where the invalidity or inoperability of a Commonwealth or State law is asserted in the course of the controversy in reliance on the *Constitution*. In each case, the assertion operates to characterise the totality of the justiciable controversy[41] and continues to characterise the totality of the justiciable controversy even where the assertion is later resolved in the exercise of judicial power or even withdrawn[42].

32 Those characteristics of a matter described in s 76(i) or s 76(ii) of the *Constitution* provide an answer to another argument of the respondent raised by notice of contention. The argument is to the effect that the judgment of the Full Court can be supported on the basis that the proper course for the Tribunal to have taken once the constitutional defence was raised before it was to have adjourned

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39 *Fencott v Muller* (1983) 152 CLR 570 at 603 (citing *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265), 608.

40 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581, citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 and *Felton v Mulligan* (1971) 124 CLR 367 at 408.

41 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7].

42 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 477.

the hearing of the complaint to allow the question of whether the State Act is in relevant part inoperative by reason of inconsistency with the Commonwealth Act or the Commonwealth Standards to be determined by the Supreme Court in the exercise of the federal jurisdiction invested in it pursuant to s 77(iii) of the *Constitution* by s 39(2) of the *Judiciary Act 1903* (Cth).

33 The answer is that the subject-matter of the complaint referred to the Tribunal was a justiciable controversy about the entitlement of the respondent to an order under the State Act on the basis that the appellants discriminated on the ground of disability in the provision of a facility by failing to provide adequate wheelchair access in the construction of Parliament Square in Hobart. The assertion by the appellants by way of defence to the complaint that the State Act is in relevant part inoperative by force of s 109 of the *Constitution* by reason of inconsistency with the Commonwealth Act and the Commonwealth Standards formed part of the one justiciable controversy for the reason that the determination of the constitutional defence was essential to the determination of the claim[43]. That was so notwithstanding the incapacity of the Tribunal judicially to determine the constitutional defence in the exercise of the limited jurisdiction conferred by the State Act[44]. The totality of that single justiciable controversy was therefore one matter meeting the descriptions in both s 76(i) and s 76(ii) of the *Constitution*. Having attracted that character by the raising of the constitutional defence, the single justiciable controversy encompassing both the statutory claim and the constitutional defence would retain that character even if the constitutional defence were later to be considered and rejected by the Supreme Court.

The irrelevance of the merits of the constitutional defence

34 There remains to consider whether, in order to have given rise to a matter of a description in s 76(i) or s 76(ii) of the *Constitution*, the constitutional defence asserted by the appellants needed to meet some threshold degree of arguability

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43 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 585-586 [138]-[140].

44 cf *Abebe v The Commonwealth* (1999) 197 CLR 510 at 529-530 [36].

and, if so, what that threshold was. The question is said in informed contemporary commentary to be not yet finally resolved[45].

35 The resolution in principle is that for a claim or defence in reliance on a Commonwealth law or in reliance on the *Constitution* to give rise to a matter of a description in s 76(i) or s 76(ii) of the *Constitution*, it is enough that the claim or defence be genuinely in controversy and that it give rise to an issue capable of judicial determination. That is to say, it is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument.

36 That is what should be taken to have been meant by repeated acknowledgements that the assertion of a claim or defence will not give rise to a matter within the description in s 76(i) or s 76(ii) of the *Constitution* if the claim or defence is "unarguable" or if the claim or defence is "colourable" in that it is made for the purpose of "fabricating" jurisdiction[46].

37 Thus, the State jurisdiction of a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the *Constitution* is not denied, just as the federal jurisdiction of this Court under s 76(i) or s 76 (ii) or of another court under s 77(i) or s 77(iii) of the *Constitution* is not engaged, by the assertion of a claim or defence that amounts to "constitutional nonsense"[47] or any other form of legal nonsense. But examination of what the prospects of success of a legally

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45 See Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 197-199, referring to Aitken, "The Meaning of 'Matter': A Matter of Meaning – Some Problems of Accrued Jurisdiction" (1988) 14(3) *Monash University Law Review* 158 and Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2012) at 40. See now the discussion in Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 42-44.

46 See the cases cited in Lane, *Lane's Commentary on the Australian Constitution* (1986) at 367-368, referred to in *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219.

47 Contrary to the opinion expressed by Owen Dixon KC in his evidence to Royal Commission on the Constitution of the Commonwealth: Australia, Royal Commission on the Constitution of the Commonwealth, *Report of Proceedings and Minutes of Evidence* (Melbourne), 13 December 1927 at 788.

coherent claim or defence might be, were that claim or defence to be judicially determined on its merits, forms no part of the requisite assessment.

38 The Full Court of the Federal Court in *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation*[48] captured that principle well in pointing out that jurisdiction with respect to a matter is jurisdiction "to entertain, and determine, all claims constituting [the matter], whatever their ultimate fate". It went on to point out that "[a]ny other approach would involve the extremely inconvenient result that the existence or absence of jurisdiction to deal with a particular claim would depend upon the substantive result of that claim"[49].

39 The longevity of the principle as expounded in *Burgundy Royale* can be illustrated by reference to *Hopper v Egg and Egg Pulp Marketing Board (Vict)*[50]. There a constitutional claim made in a proceeding in the original jurisdiction conferred on this Court under s 76(i) of the *Constitution* by s 30(a) of the *Judiciary Act* was referred to the Full Court of this Court for argument under s 18 of the *Judiciary Act*, where it was emphatically rejected. The claim was to the effect that certain provisions of a Victorian Act imposed a duty of excise contrary to s 90 of the *Constitution*. This Court in an earlier case had considered a New South Wales Act in substantially similar terms and had held that it did not impose a tax and therefore did not impose a duty of excise contrary to s 90 of the *Constitution*[51]. Determining the merits of the claim consistently with that earlier authority, the Full Court of this Court unanimously concluded that the Victorian Act also plainly did not impose a tax[52], a conclusion fatal to the constitutional claim. A majority went on to hold that, despite that outcome, the matter still attracted the Court's original jurisdiction. Drawing on language in *Troy v Wrigglesworth*[53], Latham CJ remarked that "[t]he fact that the constitutional objection has failed does not deprive the court

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48 (1987) 18 FCR 212.

49 (1987) 18 FCR 212 at 219.

50 (1939) 61 CLR 665.

51 *Crothers v Sheil* (1933) 49 CLR 399 at 408.

52 (1939) 61 CLR 665 at 671, 676-677, 687.

53 (1919) 26 CLR 305 at 311 (emphasis added).

of jurisdiction if 'the facts relied on were bona fide raised, *and* were such as to raise' the question", adding that although the constitutional claim had failed he was unable to "discern a satisfactory reason for saying that it was not a bona-fide claim so based"[54].

40 Entirely consistent with the approach taken in this Court are decisions of the Full Court of the Federal Court in cases in which a claim or defence based on a Commonwealth law has been struck out or summarily dismissed – by reason of the claim or defence having been found on analysis and after argument to be "foredoomed to fail"[55] or "so clearly untenable that it cannot possibly succeed"[56] – and in which the Federal Court has yet been held to retain jurisdiction simply by reason of the claim or defence having been genuinely asserted[57].

41 The respondent, with the support of the Attorney-General of the Commonwealth and some other intervenors, invites this Court to depart from that principled and longstanding approach. The invitation is to put in its place a requirement that, to operate to characterise a justiciable controversy as a matter described in s 76(i) or s 76(ii) of the *Constitution*, a claim or defence asserted in reliance on a Commonwealth law or in reliance on the *Constitution* must meet a threshold of arguability consistent with the raising of the claim or defence in a court not amounting to an abuse of the process of that court. The invitation is rejected.

42 To adopt the suggested approach would blur the distinction between the existence of jurisdiction and the exercise of jurisdiction. It would confuse the jurisdiction that any court or non-court tribunal must have to decide the limits of its own jurisdiction with the power that a court alone must have in the exercise of its jurisdiction to safeguard the integrity of its processes. Applied to this Court, to a court created by the Commonwealth Parliament or a court of a State on which

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54 (1939) 61 CLR 665 at 673-674.

55 *Walton v Gardiner* (1993) 177 CLR 378 at 393.

56 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130; *Spencer v The Commonwealth* (2010) 241 CLR 118 at 140 [55].

57 See *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 at 481-482; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 598-599 [88]; *Rana v Google Inc* (2017) 254 FCR 1 at 7 [21].

federal jurisdiction is conferred by a Commonwealth law, such an approach would result in a perverse fragmentation of jurisdiction by splintering off from jurisdiction those aspects of a genuine controversy most readily resolvable in the exercise of judicial power. Applied by a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii), it would inevitably involve that tribunal being drawn down the forbidden path of judicially determining the merits of a matter within a description in s 76(i) or s 76(ii) of the *Constitution*.

43 None of that is to suggest that an incomprehensible or nonsensical claim or defence that is thereby incapable of giving rise to a matter within a description in s 76(i) or s 76(ii) of the *Constitution* would not equally be a claim or defence that would be struck out or summarily dismissed by a court were it asserted in a proceeding in respect of which federal jurisdiction was otherwise attracted under s 75 or s 76 of the *Constitution*. But the questions which arise and the tests which are applied on applications of the kind mentioned are different from those which arise and are applied when determining the existence of jurisdiction.

44 Finally, in response to a submission put by the Attorney-General of the Commonwealth, it should be added that the suggested approach derives no analogical support from the approach that has been adopted to determining when a cause pending in a court "involves" a matter arising under the *Constitution* or involving its interpretation within the meaning of s 78B of the *Judiciary Act*[58]. The characterisation of a cause pending in a court required by that section is not directed to the existence of jurisdiction. The characterisation is directed rather to whether an exercise of jurisdiction is to be delayed pending the giving of notices to the Attorneys-General of the Commonwealth and of the States and Territories.

45 Here, as has already been noted, the Tribunal specifically found that the constitutional defence of the appellants was "not colourable". That finding has not been challenged. Whatever the merits of the constitutional defence, there is and could be no suggestion that the constitutional defence was not genuinely raised or is so incoherent as to be insusceptible of judicial determination on those merits.

46 Together with the claim of the respondent to a remedy under the State Act, the constitutional defence therefore formed part of and gave character to a single justiciable controversy comprising a matter within the description in each of s 76(i)

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58 See *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at 1197-1198 [14]; 198 ALR 250 at 253; *Re Culleton* (2017) 91 ALJR 302 at 307-308 [29]; 340 ALR 550 at 556.

and s 76(ii) of the *Constitution*. For that reason, the hearing and determination of the claim, no less than the hearing and determination of the defence, was beyond the jurisdiction conferred on the Tribunal by the State Act. The Tribunal was correct so to decide.

Disposition

47 The appeal is to be allowed. The substantive orders of the Full Court are to be set aside. In their place, it is to be ordered that the appeal from the Tribunal be dismissed. In accordance with a condition of the grant of special leave to appeal, there is to be no order as to costs.

EDELMAN J.

The central question and the structure of these reasons

48 The central question on this appeal concerns when a State tribunal will be denied jurisdiction to exercise judicial power in a matter before it because one party has raised in the dispute an issue that falls within a subject of federal jurisdiction. The particular issue raised concerns an allegation by the appellants that there is a "matter ... arising under [the] Constitution".

49 The circumstances of the appeal involve a complaint of discrimination by Mr Cawthorn, the respondent, which was made in the Anti-Discrimination Tribunal ("the Tribunal")[59], a body which was constituted under the *Anti-Discrimination Act 1998* (Tas) ("the State Act") and which, it is common ground, was not a court. Mr Cawthorn has paraplegia. He relies on a wheelchair for mobility. Together with the Paraquad Association of Tasmania Incorporated, he brought a complaint against the appellants, namely the developer and the owner of land for the "Parliament Square" development in Tasmania. He complained that one of the proposed entrances to the development would provide access only by stairs. Mr Cawthorn alleged that this constitutes direct and indirect disability discrimination under ss 14, 15 and 16(k) of the State Act. One of the appellants' defences was effectively that: (i) the appellants had complied with the *Disability Discrimination Act 1992* (Cth) ("the Commonwealth Act") and subordinate legislation under the Commonwealth Act, and (ii) the Commonwealth Act had covered the field in relation to disability discrimination standards so that s 109 of the *Constitution* rendered the State Act inoperative to the extent that it imposed any additional duties upon the appellants ("the s 109 issue").

50 The Tribunal dismissed Mr Cawthorn's complaint on the basis that the existence of the s 109 issue meant that the dispute arose in federal jurisdiction because there was a matter arising under the *Constitution*, and it did not have authority to decide matters in federal jurisdiction. The Full Court of the Supreme Court of Tasmania assessed the s 109 issue, concluded that it was "misconceived", and set aside the orders of the Tribunal, remitting the matter to be heard and determined by the Tribunal according to law[60].

51 The central question on this appeal is therefore whether the Tribunal was denied jurisdiction to exercise judicial power due to the allegation by the appellants

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59 The Anti-Discrimination Tribunal was abolished on 5 November 2021: *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ss 3, 148.

60 *Cawthorn v Citta Hobart Pty Ltd* (2020) 387 ALR 356.

which raised a matter under the *Constitution*. That question can be answered by reference to eight expository steps by which these reasons are structured:

(1) The Tribunal would have exercised judicial power if it had resolved the dispute.

(2) The Tribunal had no authority to exercise judicial power over a subject matter of federal jurisdiction.

(3) The scope of a subject matter of federal jurisdiction is the same in a court or in a tribunal.

(4) Tribunals, like courts, have authority to decide whether they have jurisdiction and therefore to decide whether a subject matter of federal jurisdiction arises.

(5) In a dispute concerning a "matter ... arising under this Constitution", being a subject matter of federal jurisdiction, there must be a "real question" as to that subject matter.

(6) An issue will involve no "real question" for the same reasons that it would be an abuse of process.

(7) The s 109 issue in this case involved a "real question" about a matter arising under the *Constitution* and thus it was a subject matter of federal jurisdiction.

(8) The s 109 issue in this case was not a separate matter.

52 The general propositions, discussed below, involved in each of these eight steps have been established in Australian law for many decades. In the application of those general propositions, and in the absence of any suggestion of improper purpose in the appellants raising the s 109 issue, Mr Cawthorn could only establish that the Tribunal had authority to decide the single, indivisible issue before it by establishing either that the Tribunal would not have been exercising judicial power, so that there was no matter, or that the s 109 issue raised by the appellants was manifestly hopeless. Neither submission can be accepted.

(1) The Tribunal would have exercised judicial power in resolving the dispute

53 A preliminary question, raised by the Australian Human Rights Commission in its intervention in this case and adopted in a further notice of contention by Mr Cawthorn, is whether the Tribunal would have been exercising judicial power in resolving the dispute between the appellants and Mr Cawthorn. If the Tribunal would not have been exercising judicial power, then it would not have been exercising judicial power on any of the subjects of federal jurisdiction within ss 75 and 76 of the *Constitution*.

54 Numerous statements in this Court, following the classic formulation by Kitto J[61], have established that, as a general rule, judicial power involves five elements: (i) a decision following a process of inquiry including finding of facts and application of law; (ii) that settles for the future; (iii) a dispute between defined persons or classes of persons; (iv) as to the existence of a legal relation between them; (v) creating a binding norm by reference to which that legal relation will be applied in the future.

55 The submission of the Australian Human Rights Commission was essentially in two stages. First, an exercise of power under the State Act could be administrative power if it were characterised without regard to s 90 of the State Act, which provides for a process to enforce an order of the Tribunal in the Supreme Court of Tasmania as if it were an order of that Court. Secondly, s 90 can be disapplied under s 3 of the *Acts Interpretation Act 1931* (Tas) to the extent that it would apply to the subject matter of federal jurisdiction.

56 Even if it were appropriate to approach the interpretation of the State Act in this segmented fashion, which it is not[62], the submission would fail at the first stage. The remedial provision in s 89 of the State Act is the "final act" that "determines the nature of the previous inquiry"[63]. Contrary to the submission of the Australian Human Rights Commission, the orders of the Tribunal sought by Mr Cawthorn under s 89 are not merely "recommendations". Although a power for a tribunal to enforce its own orders has sometimes been described as an essential element of judicial power[64], that is because enforcement is a powerful indicator that a binding norm has been created. But, even without enforcement, s 89 is a remedial provision that is the epitome of judicial power.

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61 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374. See also *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 655; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 12; *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 532, 685; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109-110 [41]; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 577 [94].

62 *The Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85 at 147 [254].

63 *R v Davison* (1954) 90 CLR 353 at 370.

64 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 256.

57 Section 89 of the State Act operates in the following way. After a decision that can include the finding of facts and application of law, s 89 empowers the Tribunal to impose remedies to settle a dispute about a legal relation between persons for the future, creating a binding norm. The section assumes, correctly, that binding legal norms can exist independently of their enforceability[65]. It provides for the Tribunal to make orders such as: the mandatory re-employment of the complainant[66]; the payment of money to the complainant as compensation for any loss or injury caused by discrimination or prohibited conduct[67]; the payment of a fine[68]; or the declaration that a contract or agreement is void ab initio[69]. Orders under s 89 do not merely "recommend" re-employment, the payment of compensation or fines, or that a contract or agreement is void. Such orders impose a binding norm, requiring these things to be done. This is put beyond doubt by s 90(1)(c), in its reference to the filing of an affidavit describing the extent to which any order of the Tribunal has not been complied with as part of the separate process for enforcement.

(2) The Tribunal had no authority to exercise judicial power over a subject matter of federal jurisdiction

58 Immediately prior to Federation there was no State judicial power concerning matters arising under the *Constitution*, or involving its interpretation. In *Burns v Corbett*[70], four members of this Court concluded, in effect, that the power in s 77(ii) of the *Constitution*, for the Commonwealth Parliament to make laws defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States, carried an implication with the effect that s 77(ii) would read as though it provided as follows: "all of the subjects of federal jurisdiction can only belong to or be invested in courts and not tribunals of the States even if State tribunals had previously exercised jurisdiction over those subjects".

59 Regardless of whether the large implication in *Burns* was correct, or whether (i) a "court" in s 77(ii) should be read in a general way as "some organ as

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65 Hart, *The Concept of Law*, 3rd ed (2012) at 18-25, 51-61, 100-123.

66 *Anti-Discrimination Act 1998* (Tas), s 89(1)(c).

67 *Anti-Discrimination Act 1998* (Tas), s 89(1)(d).

68 *Anti-Discrimination Act 1998* (Tas), s 89(1)(e).

69 *Anti-Discrimination Act 1998* (Tas), s 89(1)(f).

70 (2018) 265 CLR 304.

constituted by the State to exercise judicially some portion of the King's judicial power"[71], or (ii) s 77(ii) contains an implication of Commonwealth legislative power to exclude federal jurisdiction from tribunals of the States as well as courts of the States, there was no dispute on this appeal that a tribunal could not exercise federal jurisdiction in respect of a matter arising under the *Constitution*. Either the *Constitution* precludes a tribunal from exercising federal jurisdiction, or the Commonwealth Parliament has exercised legislative power to preclude a tribunal from exercising federal jurisdiction[72].

(3) The scope of a subject matter of federal jurisdiction is the same in a court or a tribunal

60 Jurisdiction has dimensions of person, locality, and subject matter[73]. The topics in ss 75 and 76 of the *Constitution* cross each of these dimensions. They include the dimension of jurisdiction concerning persons holding particular offices in the references to "consuls"[74] or "an officer of the Commonwealth"[75]. They include the dimension of jurisdiction concerning locality in the reference to "matters ... between residents of different States"[76]. And they include the dimension of jurisdiction concerning subject matter, relevantly to this appeal, in the reference to "any matter ... arising under this Constitution, or involving its interpretation"[77].

61 In every instance, the correct answer to whether that dimension of jurisdiction exists does not vary depending upon whether the question is asked by a court or by a tribunal. Federal jurisdiction, in the dimensions covered in the topics in ss 75 and 76 of the *Constitution*, cannot have one meaning when it is exercised by a court and another meaning when it is exercised by a tribunal. Put another way, the conclusion that a person is a consul, an officer of the Commonwealth, or a

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71 *Le Mesurier v Connor* (1929) 42 CLR 481 at 510.

72 See also *Judiciary Act 1903* (Cth), ss 38, 39.

73 *Rizeq v Western Australia* (2017) 262 CLR 1 at 48 [129]; Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824) at 21-22.

74 *Constitution*, s 75(ii).

75 *Constitution*, s 75(v).

76 *Constitution*, s 75(iv).

77 *Constitution*, s 76(i).

resident of a different State does not change simply because the forum in which the conclusion is reached is a tribunal rather than a court. Likewise, a matter does not cease to arise under the *Constitution* because it is raised before a tribunal rather than a court.

(4) Both courts and tribunals have authority to decide whether they have jurisdiction

62 If doubt arises, the "first duty of any Court, in approaching a cause before it, is to consider its jurisdiction"[78]. That consideration of whether jurisdiction exists is not, by definition, an exercise of jurisdiction. It is "part of the court being 'clothed with full authority essential for the complete adjudication of the matter'"[79]. In deciding whether federal jurisdiction exists, the court is not exercising federal jurisdiction. It is merely taking the necessary step anterior to the exercise of any judicial power by reaching an opinion as to its own jurisdiction. As Leeming JA said in *Gaynor v Attorney General for New South Wales*[80], "[t]here is a difference between an authoritative, binding determination of a dispute between the parties by the exercise of judicial power, and the expression of an opinion".

63 The same is true for a tribunal. A tribunal has a duty not to exceed its authority which necessarily requires the ability "to consider the legal limits of that authority"[81]. Like a court, if there is doubt a tribunal must "satisfy itself whether a claim made to it is within its limited authority"[82]. In short, a tribunal must "make up its mind" about its authority to decide[83]. Also like a court, in determining whether it has jurisdiction to exercise judicial power, a tribunal is not resolving

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78 *Hazeldell Ltd v The Commonwealth* (1924) 34 CLR 442 at 446. See also *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; *Old UGC Inc v Industrial Relations Commission (NSW)* (2006) 225 CLR 274 at 290 [51]; *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434 at 477 [132].

79 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 44, quoting *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 465.

80 (2020) 102 NSWLR 123 at 156 [137].

81 *Re Adams and the Tax Agents' Board* (1976) 12 ALR 239 at 242.

82 *Gaynor v Attorney General for New South Wales* (2020) 102 NSWLR 123 at 155-156 [130]-[132]; *Wilson v Chan & Naylor Parramatta Pty Ltd* (2020) 103 NSWLR 140 at 144 [14].

83 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 618.

any matter between the parties[84]. Its determination is anterior to, but is not an exercise of, judicial power.

64 The determination by a tribunal of whether it has jurisdiction to exercise judicial power can lead to a consequential decision that will affect the parties. If the court decides that it has jurisdiction, then it will exercise judicial power. If it decides that it does not have jurisdiction, then it will refuse to exercise judicial power. In either case, the consequential act of exercising, or not exercising, judicial power is judicially reviewable. But neither courts nor tribunals can be prohibited from performing their anterior duty to decide whether they have jurisdiction[85].

65 In summary, both courts and tribunals have the duty and the authority to decide, "in the sense of forming an opinion" about[86], the existence of their jurisdiction. Hence, for the purposes of ascertaining whether federal jurisdiction exists, courts and tribunals can decide whether a person is a consul or an officer of the Commonwealth. They can decide whether a person is a resident of a different State. And they can decide whether the dispute before them is a "matter ... arising under this Constitution, or involving its interpretation".

(5) A dispute concerning a "matter ... arising under this Constitution" requires a "real question" as to that subject matter

66 More than a century ago, Griffith CJ said that "[t]he word 'matters' was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice"[87]. A "matter" in s 76 of the *Constitution* means "the subject matter for determination in a legal proceeding"[88], which is "capable of judicial determination"[89]. A matter requires "some immediate right, duty or

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84 See *Sunol v Collier* (2012) 81 NSWLR 619 at 624 [20].

85 See *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 203, 215-216, 225; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 216.

86 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 618.

87 *South Australia v Victoria* (1911) 12 CLR 667 at 675.

88 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

89 *South Australia v Victoria* (1911) 12 CLR 667 at 708. See also *Palmer v Ayres* (2017) 259 CLR 478 at 490 [26].

liability to be established by the determination of the Court"[90], where the reference to a "right" encompasses all species of legal relations.

67 Contrary to the submissions of the State of Western Australia, intervening, it is not necessary in order to identify the existence of a matter "arising under this Constitution" for a court or tribunal to *resolve* the issue arising under the *Constitution*. It is sufficient that the court or tribunal considers that the dispute *arises*. Nevertheless, a matter will not arise simply because one party asserts that it does. For example, just as there will be a "want of [federal] jurisdiction" in the United States where "the alleged claim under the Constitution" is "made solely for the purpose of obtaining jurisdiction or ... is ... frivolous"[91], a matter in Australian law will not arise where one party raises the issue merely for jurisdictional reasons without any genuine dispute or where the issue is preposterous or manifestly hopeless. This is what is meant when it is sometimes said that a question calling for the exercise of federal jurisdiction must be "properly raised"[92] or that there must be a "real question"[93] rather than one that is "essentially fictitious"[94]. As will be explained below, an issue in a court that is not properly raised – or, in other words, does not involve a "real question" – has been described for a century as an abuse of process. The next section addresses the circumstances in which an issue would be described in a court as an abuse of process or, without the label of abuse of process, described in a tribunal as not raising a "real question".

(6) An issue will involve no "real question" for the same reasons that it would be an abuse of process

68 As explained in (3) above, the scope of the subject matter of federal jurisdiction must be the same whether it arises in a court or in a tribunal. So, whether a putative matter is brought in a court or in a tribunal, the same answer

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90 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265. See also *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 368 [85].

91 *Bell v Hood* (1946) 327 US 678 at 682-683. See also *Shapiro v McManus* (2015) 136 S Ct 450 at 455-456.

92 *Troy v Wrigglesworth* (1919) 26 CLR 305 at 311.

93 *Hopper v Egg and Egg Pulp Marketing Board (Vict)* (1939) 61 CLR 665 at 677; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130. See also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 303 [159]; *Re Green* (2011) 85 ALJR 423 at 432 [36]; 275 ALR 437 at 448.

94 *Bailey v Patterson* (1962) 369 US 31 at 33.

must be given in both fora as to whether there is a "real question" sufficient to give rise to jurisdiction.

69 Where a putative matter arises in a court, the court's conclusion that there is no "real question" raised by a party may be reached in the exercise of its inherent jurisdiction by considering whether it would be an abuse of the court's processes to address the question. There are at least three established categories of abuse of process: (i) the use of the court's processes for an illegitimate purpose; (ii) the use of the court's processes in a manner that is unjustifiably oppressive to one of the parties; and (iii) the use of the court's processes in a manner that impairs the integrity of the court[95]. In each category, issues that are abuses of process are sometimes also described as involving no "real question"[96].

70 The first category of abuse of process, where the court's processes are used for an illegitimate purpose, is sometimes described as involving an issue that is "'colourable' in the sense that [it was] made for the improper purpose of 'fabricating' jurisdiction"[97]. The second category, sometimes unfortunately also described as involving a "colourable" issue[98], concerns oppression in the sense that a ground of the dispute is oppressive or "vexing" to one of the parties or, in more antique language, it is "frivolous and vexatious" or "frivolous, vexatious or oppressive[99].

71 In relation to the second category of abuse of process, it is important to distinguish between, on the one hand, a frivolous or vexatious issue and, on the

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95 *Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq)* (2022) 96 ALJR 166 at 192 [130]; 399 ALR 1 at 33.

96 *Hopper v Egg and Egg Pulp Marketing Board (Vict)* (1939) 61 CLR 665 at 677; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130. See also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 303 [159]; *Re Green* (2011) 85 ALJR 423 at 432 [36]; 275 ALR 437 at 448.

97 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 at 219.

98 See *Hopper v Egg and Egg Pulp Marketing Board (Vict)* (1939) 61 CLR 665 at 677; *Arbaugh v Y & H Corporation* (2006) 546 US 500 at 513.

99 *Tampion v Anderson* (1973) 48 ALJR 11 at 12; 3 ALR 414 at 416-417; *Mickelberg v The Queen* (1989) 167 CLR 259 at 312; *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266-267 [14]-[15].

other hand, one that discloses "no reasonable cause of action"[100]. The former is a higher threshold. As Barwick CJ observed in *General Steel Industries Inc v Commissioner for Railways (NSW)*[101], many different expressions have been used to attempt to describe the high threshold for a frivolous or vexatious issue:

> "'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the Court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them' (the pleadings) 'to stand would involve useless expense'.
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> At times the test has been put as high as ... so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or 'so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument'; 'so to speak apparent at a glance'."

72 Some of these verbal formulae do not capture the height of the threshold. For instance, the penultimate expression that reads in part, "does not admit of reasonable argument", distracts from the higher threshold required for an issue to be "manifestly groundless"[102] or "unarguable"[103] by the introduction of notions of reasonableness. On the other hand, a test of "unarguable" is either a contradiction in terms (ie, the very reason that the issue arises is because it will be argued), or it is the expression of the very conclusion sought to be justified (ie, the reason why a party will not be permitted to argue the issue).

73 The Solicitor-General of the Commonwealth suggested the adoption of the expression "so clearly untenable that it cannot possibly succeed". That is an expression which Barwick CJ[104] borrowed from an early decision of this Court where it was used to describe a claim that was "so utterly hopeless that it ought to be got rid of under the inherent jurisdiction of the Court" and so should be

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100 *In the matter of an appeal by Luck* (2003) 78 ALJR 177 at 178 [6]; 203 ALR 1 at 3, quoting *Hunt v Allied Bakeries Ltd* [1956] 1 WLR 1326 at 1328; [1956] 3 All ER 513 at 514.

101 (1964) 112 CLR 125 at 129.

102 See also *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91.

103 Compare *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 26.

104 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130.

permanently stayed as an abuse of process and not heard in the exercise of the Court's jurisdiction[105]. But without knowledge of the history of this expression, references to "untenable" or even "obviously untenable" might be associated with notions of reasonableness involved in summary dismissal. For want of any better expression, the best description might be "manifestly hopeless".

74 The important distinction in the second category of abuse of process is between the higher threshold of issues that are manifestly hopeless and the lower thresholds, including claims or defences that do not enjoy reasonable prospects of success. As four members of this Court said in *Spencer v The Commonwealth*[106], many cases of unreasonable prospects of success might also meet the higher threshold[107], but the higher threshold to establish that there is no "real question" requires a "certain demonstration of the outcome of the litigation, not an assessment of the prospect of its success"[108]. Hence, decisions of the Full Court of the Federal Court of Australia that have upheld "[t]he striking out of the relevant portions of [a] pleading"[109] properly did not suggest that the struck out pleading was necessarily an abuse of process unless the claim was manifestly hopeless such as "the proposition that the Commonwealth Constitution is invalid"[110].

75 In order to show that the s 109 issue raised by the appellants was not a "real question", and in the absence of any improper purpose, it was necessary for Mr Cawthorn to show that the issue was manifestly hopeless. That is a higher threshold than summary dismissal on the grounds that the claim has no reasonable prospects of success. A similar lower threshold to no reasonable prospects is also arguably embodied in the summary dismissal test for whether a claim is "misconceived" under s 99(2)(a) of the State Act.

76 The same reasoning, denying the existence of a "real question", can also, unsurprisingly, be seen in the application of s 78B of the *Judiciary Act 1903* (Cth),

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105 *Burton v Shire of Bairnsdale* (1908) 7 CLR 76 at 88, 92.

106 (2010) 241 CLR 118.

107 (2010) 241 CLR 118 at 141 [59]

108 (2010) 241 CLR 118 at 140 [54].

109 *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 at 481. See also *Rana v Google Inc* (2017) 254 FCR 1 at 7 [21].

110 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 598-599 [88].

which copies the language of s 76(i) of the *Constitution*[111], such that a notice that a cause "involves a matter arising under the Constitution or involving its interpretation" is not required to be issued merely because one party asserts that there is a matter arising under the *Constitution*[112]. Although the question raised by the similar language of s 78B operates to suspend rather than to extinguish jurisdiction, the principles are the same. Again, there must be a "real question"[113]. As French J said in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*[114], "[i]f the asserted constitutional point is frivolous or vexatious or [otherwise] raised as an abuse of process, it will not attach to the matter in which it is raised the character of a matter arising under the Constitution".

(7) The s 109 issue involved a "real question" about a matter arising under the *Constitution* and thus it was a subject matter of federal jurisdiction

77 The only basis upon which Mr Cawthorn submitted that the s 109 issue did not involve a "real question" was that, in his submission, it was so clearly untenable that it could not succeed. In other words, Mr Cawthorn relied upon the formulation of the appropriate test for a lack of a "real question" due to an issue being oppressive or, in more antique language, "frivolous, vexatious or oppressive". For the reasons explained above, I prefer to express that test as requiring the issue raised to be manifestly hopeless.

78 In such cases, it is both unnecessary and inappropriate to delve into any detail of the question raised by the appellants. Nevertheless, and contrary to the submissions of a number of the counsel on this appeal, an assessment of whether a question is manifestly hopeless can never be entirely independent of an assessment of the "merits" of that issue. But the extreme conclusion that there is no "real question", such that if raised as a question of the inherent jurisdiction of a court it would be dismissed as an abuse of the court's processes, requires the lack of merit to be so obvious, and so apparent, that it can be easily seen to be manifestly hopeless. Some cases might require substantial thought and reasoning for an

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111 *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 4 NSWLR 549 at 563.

112 *Glennan v Commissioner of Taxation* (2003) 77 ALJR 1195 at 1197 [14]; 198 ALR 250 at 253, quoting *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74.

113 *Re Culleton* (2017) 91 ALJR 302 at 308 [29]; 340 ALR 550 at 556. The addition of "substantial" merely describes the outcome and adds nothing: Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 115-117.

114 (1999) 95 FCR 292 at 297 [14]. See also *Daniels v Deputy Commissioner of Taxation* [2007] SASC 431 at [17].

adjudicator to satisfy themselves that an apparently absurd claim or defence is hopeless[115] or that it is not hopeless and may indeed be correct[116]. But it should only be in a rare case that a court or tribunal should accede to the tentatively expressed suggestion of Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)*[117] that argument "of an extensive kind" may be necessary to demonstrate the extreme lack of merit required to establish that there is no "real question", so that the claim or defence is manifestly hopeless.

79 The s 109 issue raised by the appellants is not manifestly hopeless. It suffices to say that, whatever may be the strength of the argument concerning what is sometimes, awkwardly, described as "direct inconsistency"[118], it was not manifestly hopeless to allege that the State Act was "indirectly" inconsistent with the Commonwealth Act on the argued basis that the Commonwealth Act was intended to be "exhaustive"[119] in its coverage of the relevant subject matter of disability standards. The argument is not manifestly hopeless in circumstances in which the Commonwealth Act contemplates a comprehensive regime of disability standards to be formulated by the Minister[120].

80 Mr Cawthorn submitted that the Commonwealth Act provides for a "model of election" between bringing a discrimination claim under a State regime or under the Commonwealth regime[121]. At first glance, this might appear to make any claim that the Commonwealth Act is exhaustive manifestly hopeless. But, as the

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115 eg *Joosse v Australian Securities and Investment Commission* (1998) 73 ALJR 232; 159 ALR 260.

116 eg *Re Manitoba Language Rights* [1985] 1 SCR 721.

117 (1964) 112 CLR 125 at 130.

118 See the discussion in *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 472-473 [105].

119 See, eg, *Ex parte McLean* (1930) 43 CLR 472 at 483; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120; *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563; *Viskauskas v Niland* (1983) 153 CLR 280 at 291-292; *Dickson v The Queen* (2010) 241 CLR 491 at 507-508 [33]-[35]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525 [44]; *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428 at 447-448 [33]-[35], 472-473 [105]-[106].

120 *Disability Discrimination Act 1992* (Cth), s 31. But cf s 31(2)(b).

121 *Disability Discrimination Act 1992* (Cth), ss 13(4), 13(5).

appellants submitted, it is arguable that (i) the election regime is concerned only with areas of concurrency of the Commonwealth Act and any State Act, and (ii) those areas of concurrency do not extend to disability standards. This argument derives some support from ss 13(3) and 13(3A) of the Commonwealth Act which, respectively, recognise that the Commonwealth Act "is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with [the Commonwealth Act]" but that lack of intention "does not apply in relation to Division 2A of Part 2 (Disability standards)".

81 Whatever may be the strength of the appellants' argument[122], the brief discussion above suffices to demonstrate that the s 109 issue raised is not manifestly hopeless.

(8) The s 109 issue was not a separate matter

82 The second ground of Mr Cawthorn's notice of contention was essentially that, if the s 109 issue was not manifestly hopeless, then the Tribunal could, and should, have excised the s 109 issue as a separate matter to be dealt with by a court possessing federal jurisdiction.

83 A matter encompasses all claims made within the scope of a controversy[123] and it will only be where an issue is a "completely disparate claim constituting in substance a separate proceeding" that it will constitute a separate matter[124]. It was not, and could not have been, suggested that the subject matter of the s 109 issue was, in substance, a separate proceeding.

84 Mr Cawthorn instead submitted that the s 109 issue was a separate matter for reasons concerning the forum in which it could be adjudicated. In other words, if the Tribunal had jurisdiction over all of the dispute other than the s 109 issue, then the s 109 issue must form part of a separate matter. That submission cannot be accepted.

85 The s 109 issue could have been separately raised in a court possessing federal jurisdiction and, if that had occurred, the Tribunal would have had a

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122 See *Disability Discrimination Act 1992* (Cth), ss 13(4)(a), 13(5)(a), "including a matter dealt with by a disability standard" and Australia, House of Representatives, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, Explanatory Memorandum at 12 [63].

123 *Fencott v Muller* (1983) 152 CLR 570 at 603.

124 *Fencott v Muller* (1983) 152 CLR 570 at 607, quoting *Felton v Mulligan* (1971) 124 CLR 367 at 373.

separate matter before it[125]. The Tribunal could then have resolved the dispute before it since no subject matter of federal jurisdiction would have been involved in that separate matter. But, since the s 109 issue was raised as part of the same proceeding before the Tribunal, there was only one matter. The content of that matter fell to be characterised independently of the forum in which it was to be adjudicated[126] and, hence, independently of any restrictions upon the jurisdiction of that forum.

Conclusion

86 The appeal must be allowed on the first ground and the notices of contention dismissed. This conclusion means that it is unnecessary, in order to resolve the appeal to this Court, to decide the appellants' second ground of appeal concerning the merits of the s 109 issue. Orders should be made allowing the appeal, setting aside orders 1 to 3 of the Full Court made on 23 December 2020 and, in their place, ordering that the appeal to that Court be dismissed.

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125 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 529-530 [36].

126 *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361 at 406 [139].