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 27A - Appellant's submissions
Filing party:	Appellants
Date filed:	01 Oct 2021

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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' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES PRESENTED

2. The issues presented by this appeal are:

   a. whether the Full Court of the Supreme Court of Tasmania (the **Full Court**) erred in concluding that, because (in the Full Court's opinion) the claim of inconsistency within the meaning of s 109 of the Constitution made in the defence to the complaint in the Anti-Discrimination Tribunal (the **Tribunal**) would not succeed, the Tribunal was not called upon to exercise federal jurisdiction and therefore had a duty to hear and determine the complaint rather than dismissing it; and

   b. whether the Full Court erred in deciding that the *Anti-Discrimination Act* 1998 (Tas) (the **State Act**) was not inconsistent, within the meaning of s 109 of the Constitution, with the federal law comprised of the *Disability Discrimination Act* 1992 (Cth) (the **Federal Act**) and the Disability (Access to Premises – Buildings) Standards 2010 made under the Federal Act (the **2010 Disability Standards**).

3. By his notice of contention, the respondent seeks to raise four further issues. The appellants will address those issues in their reply submissions, once the bases for them have been articulated by the respondent.

PART III: SECTION 78B NOTICES

4. The appellants have served notices pursuant to s 78B of the *Judiciary Act* 1903 (Cth) on the Commonwealth, State and Territory Attorneys-General.

PART IV: DECISIONS BELOW

5. The decisions below are *Cawthorn & Anor v Citta Hobart Pty Ltd & Anor* [2019] TASADT 10 (**T**) and *Cawthorn v Citta Hobart Pty Ltd* (2020) 387 ALR 356 (**FC**).

PART V: FACTS

6. The first appellant is undertaking a building development in Hobart, on land owned by the second appellant: FC [2]; Appeal Book (**AB**) p 28. When the development is completed, there will be three entrances, one of which will provide access only by way of stairs: FC [2]; AB p 28.

7. The respondent made a complaint to the Tribunal that this entrance constituted disability discrimination under s 16(k) of the State Act. He alleged direct discrimination under s 14 of the State Act in connection with the provision of facilities, goods and services, and indirect discrimination under s 15 of the State Act on the basis that the entrance was "a condition, requirement or practice" that was unreasonable in the circumstances and had the effect of disadvantaging him and other members of the class of people who shared his disability: T [3], [4], [17], [18]; AB pp 8-10.

8. In their defence, the appellants contended that they had complied with the 2010 Disability Standards made under the federal legislative scheme governing disability access: T [20]; AB pp 10-11. That scheme is relevantly as follows:

    a. Part 2 of the Federal Act contains provisions prohibiting discrimination on the basis of disability at work and in other areas, one of which is "Access to premises" (s 23);

    b. the Minister can formulate "disability standards" in relation to any area in which it is unlawful under Pt 2 "for a person to discriminate against another person on the ground of a disability of the other person" (s 31(1));

c. once a disability standard is made, it is unlawful for a person to contravene the standard (s 32); and

d. conversely, if a person acts in accordance with the standard, the disability discrimination prohibitions in Pt 2 do not apply to the person's act (s 34).

9. The appellants relevantly contended that the State disability discrimination provisions under which the complaint was made were directly or indirectly inconsistent with this federal scheme, and thus invalid pursuant to s 109 of the Constitution: T [20(d)], [26]; AB pp 10, 12.

10. The Tribunal decided, in accordance with *Burns v Corbett*,[1] that, as the Tribunal was not a court of a State, and as the defence raised a matter arising under the Constitution, the resolution of which would involve the exercise of federal jurisdiction, the Tribunal had no jurisdiction to hear the complaint: T [35]-[41]; AB pp 14-15. The Tribunal considered that the only circumstance in which it would have had jurisdiction was if the federal claim was "colourable", that is, made for the sole purpose of fabricating jurisdiction: T [42]; AB p 15. However, the Tribunal said that the constitutional issue could not "on any view" be said to have been invoked to fabricate jurisdiction, and that any attempt to assess the merits of the federal claim would involve an exercise of federal jurisdiction: T [43]; AB p 15. The Tribunal accordingly dismissed the complaint: T [46]; AB p 16.

11. On appeal, the Full Court held that the Tribunal had erred in dismissing the complaint.

12. Blow CJ (with whom Wood J relevantly agreed) held that, although the s 109 defence "was made in good faith, and was therefore not 'colourable', the suggested defence was misconceived": FC [5]; AB p 29. His Honour said that it was "significant" that s 34 of the Federal Act did not declare conduct to be lawful, but rather "render[ed] inapplicable provisions that would make it unlawful": FC [16]; AB p 32. He went on to hold that when s 34 of the Federal Act operated, "with the result that the [Federal] Act does not render particular conduct unlawful", no direct inconsistency would arise if State provisions rendered the same conduct unlawful: FC [17]; AB pp 32-33. His Honour further held that there was no indirect inconsistency because the 2010

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[1] (2018) 265 CLR 304.

Disability Standards were only intended to set minimum standards for the purposes of the federal scheme, and compliance with those standards did not preclude a breach of the State Act: FC [22]-[23]; AB p 33. His Honour concluded that, because there was no inconsistency between the Federal and State Acts, the Tribunal was not required to make a finding as to whether the 2010 Disability Standards had been complied with, was therefore not required to exercise federal jurisdiction, and had erred in dismissing the complaint: FC [26]-[27]; AB p 34.

13. Estcourt J wrote separately but agreed in the result. His Honour accepted a submission of the respondent that the 2010 Disability Standards did not apply as "a law of the Commonwealth" in Tasmania: FC [93]; AB p 52; see also [59], [102]; AB pp 42, 53-54. While it is unclear precisely what his Honour meant to convey by this phrase, the substance of his Honour's reasons is to the effect that there was no direct or indirect inconsistency between the Federal and State Acts, on the basis that the federal legislature intended the federal, State and Territory discrimination laws to operate harmoniously, leaving the choice of scheme to the election of the complainant: FC [93]-[103]; AB pp 52-54. His Honour held that the Tribunal erred in determining that it had no jurisdiction and in dismissing the complaint: FC [103]; AB p 54.

14. The Full Court allowed the appeal, set aside the orders of the Tribunal, and remitted the matter to the Tribunal for determination according to law: FC [28]; AB p 34.

15. By special leave, the appellants appeal to this Court.

PART VI: ARGUMENT

(a) Ground 1: The Full Court erred in deciding that the Tribunal should have determined the complaint

16. The first issue is whether the Full Court erred in concluding that, because (in its view) the constitutional claim would not succeed, the Tribunal was not called upon to exercise federal jurisdiction and therefore had a duty to hear and determine the complaint rather than dismissing it.

17. Although that issue arises because of the recent decision in *Burns v Corbett*,[2] which held that a State tribunal that is not a court of a State cannot exercise federal jurisdiction, it is readily resolved, in the appellants' favour, by the application of established principles concerning the exercise of federal jurisdiction.

(i) Principles established by this Court in relation to the exercise of federal jurisdiction

18. It is appropriate to commence by identifying a number of foundational propositions in relation to the exercise of federal jurisdiction.

19. "Jurisdiction" is a "generic term", which signifies an "authority to adjudicate".[3] "Authority to adjudicate" is the authority to exercise judicial power, which power is defined by its essential function of quelling controversies about legal rights and legal obligations through the ascertainment of facts, the application of law and the exercise, where appropriate, of judicial discretion.[4]

20. Federal jurisdiction is the authority to adjudicate on a matter within any of the five enumerated categories in respect of which the High Court is given original jurisdiction in s 75 of the Constitution, or within any of the four enumerated categories in respect of which the Parliament is empowered to confer original jurisdiction on the High Court under s 76.[5] Federal jurisdiction may be compared to, and contrasted with, "State jurisdiction", which is the authority of State courts to adjudicate that is derived from State Constitutions. State jurisdiction is "not limited to authority to adjudicate a matter, let alone a matter identified in ss 75 or 76".[6]

21. Federal jurisdiction can be vested in federal and State courts under s 77 of the Constitution. By s 39(2) of the *Judiciary Act*, the Commonwealth Parliament legislated to vest State courts with federal jurisdiction in all matters identified in ss 75 and 76 of the Constitution. A State court invested with federal jurisdiction, while acting in that capacity, becomes part of the federal judicature.[7] The Federal, Family

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2 (2018) 265 CLR 304 at [4], [40], [43], [49] (Kiefel CJ, Bell and Keane JJ).
3 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 (Isaacs J); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [2] (Gleeson CJ, Gaudron and Gummow JJ).
4 *Rizeq v Western Australia* (2017) 262 CLR 1 at [52] (Bell, Gageler, Keane, Nettle and Gordon JJ).
5 *Ah Yick v Lambert* (1905) 2 CLR 593 at 605-607 (Griffiths CJ); *Baxter* (1907) 4 CLR 1087 at 1113 (Griffiths CJ, Barton, O'Connor JJ); *Rizeq* (2017) 262 CLR 1 at [51] (Bell, Gageler, Keane, Nettle and Gordon JJ).
6 *Rizeq* (2017) 262 CLR 1 at [71] (Bell, Gageler, Keane, Nettle and Gordon JJ).
7 *Rizeq* (2017) 262 CLR 1 at [5] (Kiefel CJ).

and Federal Circuit Courts of Australia have such jurisdiction as is vested in them by laws made by the Federal Parliament.[8]

22. Given the defined content of federal jurisdiction, the High Court has, from the earliest days of the federation, been called upon to determine whether and when a matter arises in that jurisdiction. The resultant cases have involved the careful and considered establishment of a number of principles about the exercise of federal jurisdiction. Three such principles are of particular relevance for the present case.

23. First, whether or not federal jurisdiction is being exercised will turn upon the questions that arise in a case, the identity of the parties or the nature of the relief sought,[9] rather than the court in which the matter proceeds or any express invocation of federal jurisdiction.[10] That principle has its origins in pre-federation authorities of the Supreme Court of the United States. In *Tennessee v Davis*,[11] Strong J, delivering the judgment of the Supreme Court, said "[a] case arising under the Constitution and the laws of the United States may as well arise in a criminal prosecution as in a civil suit … A case may truly be said to arise under the Constitution or a law or a treaty of the United State whenever its correct decision depends upon the construction of either". In *Starin v New York*,[12] Waite CJ, delivering the opinion of the same Court, said "[t]he character of the case is determined by the questions involved. If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States". In its early days, the High Court, when called upon to determine whether an appeal to it was within federal jurisdiction, said that "[a] question of federal jurisdiction may be raised upon the face of a plaintiff's claim or it may be raised for the first time in the defence",[13] and relied upon the above cited passages from *Tennessee* and *Starin* for the proposition. That

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8 *Federal Court of Australia Act* 1976 (Cth), ss 19, 24; *Federal Circuit and Family Court Act of Australia Act* 2021 (Cth) Part 2.

9 *ASIC v Edensor* (2001) 204 CLR 559 at [3] (Gleeson CJ, Gaudron and Gummow JJ).

10 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 476 (Gibbs J). Indeed, courts have throughout the history of the federation exercised federal jurisdiction "notwithstanding [they] assum[e] to be determining the case purely under the authority of State law": *Troy v Wrigglesworth* (1919) 26 CLR 305 at 309. See also *Momcilovic v The Queen* (2011) 245 CLR 1.

11 100 US 257 (1879) at 264.

12 115 US 248 (1885) at 257.

13 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1136.

proposition, and those passages, were repeated by a unanimous Court later that year in *Miller v Haweis*,[14] and since then it has been consistently recognised by the High Court as providing "a correct guide to the manner in which it may be determined whether or not a question of federal jurisdiction has arisen".[15]

24. Secondly, while it is the existence of a federal claim or defence which causes a matter to arise in federal jurisdiction, a court exercising federal jurisdiction will be "clothed with full authority essential for the complete adjudication of the matter", rather than merely decision of the question which attracted jurisdiction.[16] Put another way, the exercise of federal jurisdiction in a proceeding is not limited to the "determination of the federal claim or cause of action in the proceeding, but extend[s] beyond that to the litigious or justiciable controversy between parties of which the federal claim or cause of action forms part".[17] The principle that the whole of the matter arises in federal jurisdiction was originally recognised in cases where the High Court, exercising jurisdiction in matters arising under the Constitution and s 30 of the *Judiciary Act*, decided non-federal claims that also formed part of the controversy between the parties.[18] That recognition was subsequently extended to cases dealing with the exercise of federal jurisdiction by State Courts,[19] at which time it was also decided that the conferral of federal jurisdiction on State Courts under s 39(2) of the *Judiciary Act* operated to exclude State jurisdiction in respect of the same topics.[20] Shortly

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14 (1907) 5 CLR 89 at 93.

15 *Felton v Mulligan* (1971) 124 CLR 367 at 403 (Walsh J, with whom Barwick CJ agreed at 373) (see also 388 (Windeyer J)). See also *Moorgate Tobacco Co Ltd* (1980) 145 CLR 457 at 468-469 (Gibbs J), 476 (Stephen, Mason, Aickin and Wilson JJ); *LNC Industries Pty Ltd v BMW (Australia) Ltd* (1982) 151 CLR 575 at 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); *ASIC v Edensor* (2001) 204 CLR 559 at [3] (Gleeson CJ, Gaudron and Gummow JJ).

16 *Ex Parte Walsh v Johnson; In re Yates* (1925) 37 CLR 36 at 130 (Starke J); *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 465-466 (Starke J); *Fencott v Muller* (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ).

17 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 290 (Mason, Brennan and Deane JJ); see also 281-282 (Gibbs CJ).

18 *Hopper v Egg Pulp Marketing Board (Vict)* (1939) 61 CLR 665 at 673 (Latham CJ), 680-681 (Evatt J); *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR at 465-466 (Stark J); *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 257-258 (Dixon J); *Stack* (1983) 154 CLR 261 at 290-291 (Mason, Brennan and Deane JJ).

19 *Felton* (1971) 124 CLR 367 at 373 (Barwick CJ), 410 (Walsh J); *Moorgate Tobacco Co Ltd* (1980) 145 CLR 457 at 472 (Gibbs CJ); *Stack* (1983) 154 CLR 261 at 291-292 (Mason, Brennan, Deane JJ).

20 *Moorgate Tobacco Co Ltd* (1980) 145 CLR 457 at 467-468 (Barwick CJ), 471 (Gibbs J), 476 (Stephen, Mason, Aickin and Wilson JJ). Whether the investiture of State courts with federal jurisdiction excluded State jurisdiction had previously been "the subject of much controversy": *Minister for Army v Parbury Henty & Co* (1945) 70 CLR 459 at 482 (Latham CJ). See also *Felton* (1971) 124 CLR 367 at 373 (Barwick CJ), 391-394 (Windeyer J), 411-13 (Walsh J).

thereafter, the principle that the whole of the matter arises in federal jurisdiction was applied in Federal Court cases involving non-federal claims.[21] The scope of federal jurisdiction is therefore anchored in and defined by the concept of a "matter".

25. Thirdly, once a matter arises in federal jurisdiction, it does not "cease to be federal because the matter that attracted federal jurisdiction is either not dealt with, or is decided adversely to the [party who raised it]".[22] This was originally recognised in authorities of the High Court dealing with its own jurisdiction. In *R v Carter; Ex parte Kisch*,[23] Evatt J said "[t]he jurisdiction of this Court, once vested, is not lost by reason of the rejection of the constitutional point". In *Hopper v Egg and Egg Pulp Marketing Board (Vict)*,[24] Latham CJ said that "the fact that the constitutional objection has failed does not deprive the court of jurisdiction if 'the facts relied on were bona fide raised, and were such as to raise' the question". Evatt J likewise said "[t]he legal validity or strength of the plaintiff's constitutional point is quite immaterial so long as it is genuinely raised".[25] This principle was subsequently recognised in relation to the exercise of federal jurisdiction in State Supreme Courts.[26] In *Moorgate Tobacco Co Ltd v Philip Morris Pty Ltd*,[27] Stephen, Mason and Aickin JJ said, "once federal jurisdiction is attracted, it is exercised 'throughout the case'; it is not lost by subsequent disclaimer. The disclaimer may inhibit what the court does in the exercise of jurisdiction but it does not affect the existence of its jurisdiction". The application of the same principle in the Federal Court is the starting point for the discussion in the next section.

(ii) Application of High Court jurisprudence in the Federal Court

26. The three principles identified in the preceding section underlie the development of the "colourability" test in the Federal Court of Australia.

27. In *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation Ltd*,[28] the applicants brought proceedings in the Federal Court alleging contraventions of

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21 *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott* (1983) 152 CLR 570; *Stack* (1983) 154 CLR 261; *ASIC v Edensor* (2001) 204 CLR 559.
22 *Moorgate Tobacco Co Ltd* (1980) 145 CLR 457 at 472 (Gibbs J).
23 *R v Carter; Ex Parte Kisch* (1934) 52 CLR 221 at 223-224.
24 (1939) 61 CLR 665 at 673.
25 *Hopper v Egg and Egg Pulp Marketing Board (Vict)* (1939) 61 CLR 665 at 681.
26 *Moorgate Tobacco Co Ltd* (1980) 145 CLR 457 at 477 (Stephen, Mason, Aickin and Wilson JJ).
27 (1980) 145 CLR 457 at 477.
28 (1987) 18 FCR 212.

provisions of the *Trade Practices Act* 1974 (Cth) respecting misleading and deceptive conduct or involvement in such conduct. The applicants also claimed in the same proceedings that the respondents were liable to pay common law damages for breaches of collateral warranties and negligence.

28. The Full Court held, on a case stated, that no cause of action under the *Trade Practices Act* was available against two government respondents, as that Act did not bind them.[29] Those respondents submitted that, as a consequence, the Federal Court no longer had jurisdiction to entertain the non-federal claims against them. The Full Court rejected that proposition. It said that the Federal Court's "jurisdiction is to determine each of the claims which together constitute a federal 'matter'. That jurisdiction cannot be limited… to the determination of only those claims … which are successfully maintained. On the contrary, the jurisdiction is to entertain, and determine, all claims constituting a "matter", whatever their ultimate fate". [30] The Full Court further said, "nor does it follow that the Court now loses its jurisdiction to deal with the attached common law claims. In principle, the position is no different than it would have been if the claims under the Act had proceeded to trial and been dismissed on the merits".[31]

29. That reasoning was wholly consonant with the principles identified in the preceding section of these submissions. So too was the Full Court's dictum that:[32]

> The position may have been different if the claims under the Act had been "colourable" in the sense that they were made for the improper purpose of "fabricating" jurisdiction. There is no room for such a suggestion here. The applicant's case that the second and third respondents were bound by the Act cannot be said to be unarguable; and we think it was pursued bona fide.

30. In support of that passage, the Full Court referred to authorities cited in *Lane's Commentary on the Australian Constitution*,[33] which make reference to claims being made "not merely to fabricate a federal element in the case",[34] "for decision and not merely colourably in an attempt to attract the appellate jurisdiction of this Court",[35]

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29 (1987) 18 FCR 212 at 217.
30 (1987) 18 FCR 212 at 219.
31 (1987) 18 FCR 212 at 219.
32 *Burgundy Royale* (1987) 18 FCR 212 at 219.
33 (1986), pp 367-368.
34 *Rogers v Jordan* (1965) 112 CLR 580 at 591.
35 *Stock Health Pty Ltd v Brebner* (1964) 112 CLR 113 at 117 (Taylor J).

"not merely colourably, but in good faith",[36] "bona fide"[37] and "merely colourable: they do not raise any real question involving the interpretation of the Constitution and are in truth fictitious".[38]

31. *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*[39] was an appeal from a decision of a Judge of the Federal Court who struck out a *Trade Practices Act* claim but allowed the negligence claim to proceed in the Court's accrued jurisdiction. Justice French (as his Honour then was, and with whom Beaumont and Finkelstein JJ agreed) said that a federal claim may be colourable where it is "a sham reflecting no genuine controversy and therefore establishing no matter in respect of which the Court may exercise jurisdiction".[40] That proposition reflects the foundational fact that the exercise of federal jurisdiction involves federal authority to exercise judicial power, which, as set out above, is defined by its essential function of quelling controversies about legal rights and legal obligations.[41] In the absence of such a controversy, there can be no occasion for the exercise of judicial power, let alone federal jurisdiction.

32. Consistently with this, French J said that the fact that a claim is struck out as untenable does not mean it is colourable in the relevant sense.[42] With respect, that must be correct – the fact that a claim is struck out does not indicate the absence of a controversy between the parties which is capable of founding jurisdiction. Justice French concluded that the federal claim in *Johnson Tiles* was not colourable because it advanced:[43]

> the legitimate forensic purpose of endeavoring to establish a cause of action which would not require proof of a duty of care. Notwithstanding its precipitate initiation and chequered history, I am not satisfied that it was colourable in the sense that would deprive this Court of jurisdiction to deal with the matter including any non-federal claims that may form part of it.

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36 *R v Cook; ex parte Twigg* (1980) 147 CLR 15 at 26 (Gibbs J) (where it is also stated that a case will not be colourable when it "cannot be said to … [be] unarguable"). See also *Re Superintendent of Goulburn Training Centre; ex parte Pelle* (1983) 57 ALJR 679 at 680 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ).

37 *R v Bowen; Ex parte Federated Clerks' Union of Australia* (1984) 154 CLR 207 at 209 (Mason, Murphy, Wilson, Brennan and Dawson JJ).

38 *Hopper* (1939) 61 CLR 665 at 677 (Starke J).

39 (2000) 104 FCR 564 at [88].

40 *Johnson Tiles* (2000) 104 FCR 564 at [88] ([1] (Beaumont J), [99] (Finkelstein J)).

41 *Rizeq* (2017) 262 CLR 1 at [52] (Bell, Gageler, Keane, Nettle and Gordon JJ).

42 *Johnson Tiles* (2000) 104 FCR 564 at [88].

43 *Johnson Tiles* (2000) 104 FCR 564 at [88].

33. In so reasoning and concluding, French J added structure to the colourability test and demonstrated how it operates within the confines of established principles about judicial power and federal jurisdiction.

34. In *Rana v Google Inc*,[44] the Full Federal Court allowed an appeal from the primary judge's decision refusing leave to commence defamation proceedings under State law on the basis that the Court had no jurisdiction where claims made under the *Australian Consumer Law* had been struck out.

35. The Full Court recognised that, once a matter is within federal jurisdiction, it remains so, regardless of how the claim giving rise to federal jurisdiction resolves, even where the claim is struck out, dismissed or abandoned.[45] The Court said that the "exception to this principle is where the federal claim is 'colourable' in the sense that it was 'made for the improper purpose of fabricating jurisdiction' such that it was not made *bona fide*".[46] The Full Court said that although the allegations in that case were "less than coherently pleaded … an embarrassing pleading does not make a claim colourable".[47] The entirety of the matter was held to be properly within federal jurisdiction.[48] Those conclusions were consistent with High Court authority, and with *Burgundy Royale* and *Johnson Tiles*.

36. These decisions demonstrate that the test of "colourability" is necessarily narrow. It is limited to an inquiry into whether the claim is advanced solely for the purpose of fabricating jurisdiction, because such claims cannot provide a foundation for the exercise of judicial power or federal jurisdiction.[49] The substantive or procedural merits of a federal claim are irrelevant to the jurisdictional inquiry, save to the extent they establish that proscribed purpose.

37. The colourability test does not disturb or erode the well-established principles that federal jurisdiction will be attracted by the questions raised in the proceeding; that, once a matter involves federal jurisdiction, the whole matter arises in federal

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44 (2017) 254 FCR 1.
45 *Rana* (2017) 254 FCR 1 at [20]-[21].
46 *Rana* (2017) 254 FCR 1 at [22].
47 *Rana* (2017) 254 FCR 1 at [38].
48 *Rana* (2017) 254 FCR 1 at [38].
49 The colourability test, as described, has been relied upon to dismiss proceedings in the Federal Court for want of jurisdiction: see, for example, *Quach v Marks (No 2)* [2021] FCA 922; *Humphrys (Tobin) v Chief Executive Officer of Department of Communities WA* [2021] FCA 586 at [7]; *Tucker v McKee* [2021] FCA 828.

jurisdiction; and that jurisdiction is not lost because of the manner in which the federal claim is resolved. Rather, it operates consistently with, and within the confines of, those principles.

38. Conversely, and contrary to the decision presently under appeal, it is inherently incompatible with those settled principles to determine whether a proceeding is in federal jurisdiction by evaluating the perceived merits or soundness of the federal claim or defence made in the proceeding.

(iii) Application of colourability test in the Tribunal

39. The Tribunal's reasoning accorded entirely with the above principles. It was unexceptional and impeccable.

40. The Tribunal recognised its duty to consider the extent of its own jurisdiction and that it could not be conferred with, or exercise, federal adjudicative authority (T [34]-[36], [41]; AB pp 14, 15). It recognised the nature of judicial power, and that its function in entertaining the complaint would involve the exercise of judicial power (T [39]; AB p 15).

41. The Tribunal acknowledged that, once a federal defence was invoked, the determination of the whole of the matter involved an exercise of federal adjudicative authority, and that this remained so regardless of whether the federal claim was disclaimed, rejected or unnecessary to determine (T [37]-[38]; AB pp 14-15).

42. The Tribunal correctly identified that both the defendant's reliance on s 109 of the Constitution, and the defendant's reliance on a positive defence under s 34 of the Federal Act, caused the matter to arise in federal jurisdiction (T [40]; AB p 15).

43. This led the Tribunal to consider whether the federal claims were colourable. It concluded that they were not, and that it was therefore required to dismiss the complaint (T [41]-[42], [46]; AB pp 15, 16).

(iv) Error of the Full Court

44. In contrast, the Full Court erroneously held that there was no exercise of federal jurisdiction because the federal claim was "misconceived". This error was

compounded by the Full Court's failure to recognise that the resolution of a s 109 claim was itself an exercise of federal jurisdiction.[50]

45. The error is prominently exposed from the opening paragraphs of Blow CJ's reasons. At FC [5]; AB p 29, Blow CJ, with whom Wood J relevantly agreed (FC [29]; AB p 35), said that, although the federal claim was "made in good faith, and was therefore not colourable", the defence was "misconceived", and therefore the Tribunal was not called upon to exercise federal judicial power to determine the complaint. After [5], the great majority of Blow CJ's judgment was consumed by an evaluation of the s 109 claim on its merits. His Honour then summarised his conclusions at [26] (AB p 34) in a manner that again makes starkly apparent the erroneous nature of his approach, saying "[b]ecause there is no inconsistency between the provisions of the [State] Act … and any Commonwealth law, a finding as to whether the design of Parliament Square complies with the Disability Standards is unnecessary" and that as "the Tribunal is not bound to make findings as to whether the Disability Standards have been complied with, … [it] is thus not required to exercise federal adjudicative authority".

46. With respect, that approach was patently wrong. By entering into an analysis of the substantive merits of the constitutional question, Blow CJ exercised federal jurisdiction. If the Tribunal had done so, as Blow CJ held it ought have, it would have purported to exercise federal jurisdiction. The conclusion that the s 109 defence was misconceived did not take the matter outside federal jurisdiction. His Honour ought to have held that, as the complaint in the Tribunal involved a federal claim that was not colourable, it was, and would always remain, in federal jurisdiction, and therefore outside the Tribunal's jurisdiction.

47. Justice Estcourt similarly engaged in a substantive analysis of the s 109 question, with no acknowledgment of the fact that this was itself an exercise of federal jurisdiction (FC [93]-[103]; AB pp 52-54). His Honour likewise erred in deciding that the determination of the complaint involved no exercise of federal jurisdiction.

48. On the Full Court's approach, the Tribunal would be required to form an opinion about whether it had jurisdiction by deciding the very claims that it lacked

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[50] *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [26] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

jurisdiction to deal with. That is plainly wrong. Applying established principles as to federal jurisdiction, the presence of a non-colourable federal claim precluded the Tribunal from hearing the complaint. That the claim would or might ultimately fail was not on any view relevant to whether the matter arose in federal jurisdiction. When the issue is shorn of surrounding detail, the conclusion of fundamental error is simple and incontestable.

(b) Ground 2: The Full Court erred in deciding that the State Act was not inconsistent with the Federal Act and 2010 Disability Standards

49. The second ground only arises for consideration if the appellants do not succeed on the first ground. The issue under the second ground is whether State legislative provisions that generally prohibit direct or indirect discrimination on the basis of disability are inconsistent, within the meaning of s 109 of the Constitution, with the Federal Act and 2010 Disability Standards. If they are, the Full Court erred in its decision even if the first ground is rejected.

50. The appellants contend that it is plain that the State Act impermissibly alters, impairs or detracts from the operation of the federal law, thereby rendering this a case of direct inconsistency which engages s 109 of the Constitution.[51] The Full Court erred in how it undertook its analysis of direct inconsistency.

51. Direct inconsistency involves an inquiry into whether the State law would alter, impair or detract from the operation of the Commonwealth law.[52] The inquiry looks to whether the State law would undermine the operation and effect of the State law.[53] In relation to direct inconsistency, "there is no need to seek to define the intended

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51 There may also be a good argument of indirect inconsistency, but the appellants are content to rely on direct inconsistency. It is noted that, in *WHA v Outback Ballooning* (2019) 266 CLR 428 at [68], Gageler J criticised the drawing of a strict dichotomy between "direct" and "indirect" inconsistency, as failing to capture the true complexity of Commonwealth legislation. With respect, it does appear that Dixon J, when articulating both approaches, conceptualised the second form of inconsistency as a species of impairment or detraction, rather than as a distinct test: *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136 (Dixon J) (in dissent); *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J) (in the majority). *Telstra v Worthing* (1999) 197 CLR 61 at [28], as followed in *Dickson v The Queen* (2010) 241 CLR 491 at 504 [22], *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 524 [39] and *WHA v Outback Ballooning* at [32]-[33], appears to be the source of the treatment of the two tests as distinct, although it is not evident that *Telstra* involved a deliberate departure from Dixon J's reasoning notwithstanding that this is how it has been treated. However, resolution of the present appeal does not require that these matters be addressed.

52 *WHA* (2019) 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

53 *WHA* (2019) 266 CLR 428 at [32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

field of the federal legislation in order to resolve the question of inconsistency".[54] Rather, it is "enough to confine attention to an examination of the particular operation of the two laws said to collide with one another".[55]

52. While the expression "direct inconsistency" is commonly used as a form of shorthand, it is not a substitute for the underlying principles. To reduce the constitutional test to that expression would fail to capture the complexity of those principles, and constitute error.

53. However, with respect, that is precisely what was done by Blow CJ (with whom Wood J relevantly agreed) in determining that there was no "direct inconsistency" between the State Act and the federal law. At FC [16]-[17]; AB pp 32-33, Blow CJ reasoned that the federal law was self-contained and that "compliance with a disability standard results in individuals not being able to complaint to the AHRC that a person has done something that was made unlawful by the [Federal] Act": FC [16]; AB p 32. His Honour said "[i]t is significant that, when a person complies with a disability standard, the [Federal] Act does not declare that person's conduct to be lawful, but renders inapplicable provisions that would make it unlawful": FC [16]; AB p 32. His Honour then concluded, "when s 34 of the [Federal] Act operates with the result that that Act does not render particular conduct unlawful, no direct inconsistency arises if that conduct is made unlawful by a State law unless the Minister has expressly declared that the disability standard was intended to affect the operation of State and Territory laws generally, or a particular State or Territory law": FC [17]; AB pp 32-33.

54. That analysis only looked to whether there was a direct conflict between the Federal laws and the State Act. It is reminiscent of earlier notions of "direct inconsistency", which assessed whether it was impossible to obey both a federal and a State law or whether one law permitted that which the other law prohibited.[56] Such direct inconsistency is only one sub-species of inconsistency falling within the concept of

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54 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-259 (Barwick CJ).
55 *ABC v Industrial Court (SA)* (1977) 138 CLR 399 at 406 (Stephen J).
56 *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23 at 29 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ); *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation Australia* (1977) 137 CLR 545 at 563 (Mason J).

"alter, impair or detract". Blow CJ failed to consider whether the State law otherwise altered, impaired or detracted from the federal law.

55. *Australian Mutual Provident Society v Goulden*[57] provides an example of the more nuanced analysis required by a consideration of whether a State anti-discrimination law alters, impairs or detracts from a federal law. The case involved an inconsistency between the *Anti-Discrimination Act* 1977 (NSW) and the *Life Insurance Act* 1945 (Cth). The High Court recognised that the federal law was intended to operate in the context of State and Territory laws but said that it "should be understood as giving expression to a legislative policy that the protection of the interests of policy holders is to be achieved by allowing a registered life insurance company to classify risks and fix rates or premium in its life insurance business in accordance with its own judgement founded upon the advice of actuaries and the practice of prudent insurers".[58] The High Court held that the application of the prohibition in the *Anti-Discrimination Act* of "discrimination against a physically handicapped person on the ground of his physical impairment in the terms or conditions appertaining to a superannuation or provident fund or scheme" would be inconsistent with the *Life Insurance Act* because it would "effectively preclude such companies from taking account of physical impairment in classifying risks and rates of premium and other terms and conditions of insurance in the course of their life insurance business in New South Wales" and would thereby "qualify, impair and, in a significant respect, negate the essential legislative scheme of the Commonwealth Life Insurance Act for ensuring the financial stability of registered life insurance companies and their statutory funds and the financial viability of the rates of premium and other terms and conditions of the policies of insurance which they write in the course of their life insurance business".[59] The High Court thus identified the central object sought to be achieved by the *Life Insurance Act* and, given how the State law would impair the achievement of that object, held that the State law was invalid under s 109 of the Constitution.

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57 (1986) 160 CLR 330.
58 *Australian Mutual Provident Society* (1986) 160 CLR 330 at 337 (the Court).
59 *Australian Mutual Provident Society* (1986) 160 CLR 330 at 339 (the Court).

56. *Dickson v The Queen*[60] is a further instance of an "alter, impair or detract" analysis that is pertinent for the present appeal. The federal law there in issue was the *Criminal Code* (Cth). It contained various provisions that expressed an intention not to exclude the laws of the States and Territories, but no such provision applied to Ch 2 of the Code. Section 11.5, which was in Ch 2, created a conspiracy offence. It differed from the conspiracy offence in s 321(1) of the *Crimes Act 1958* (Vic) – where the Commonwealth offence required at least one party to the agreement to have committed an overt act pursuant to the agreement, the Victorian offence did not require proof of overt acts. The High Court held that, "[i]n the absence of the operation of s 109 of the *Constitution*, the [State Act] will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. … [T]he case is one of "direct collision" because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law".[61] *Dickson* provides an example of a Commonwealth law that, by its confined scope, precluded State legislation that would impose liability on a broader basis than the federal law.

57. In the present case, s 13(3)(3) of the Federal Act provides for general concurrency with State and Territory laws. However, s 13(3A) provides that s 13(3) does not apply to Div 2A of the Federal Act.

58. Within Div 2A, s 31 provides for the creation of disability standards, and specifies that a disability standard can state whether or not it is intended to affect the operation of a State and Territory law. Section 34 provides, "[i]f a person acts in accordance with a disability standard this Part (other than this Division) does not apply to the person's act". "This Part" is a reference to Part 2, which includes general prohibitions against discrimination, including discrimination in relation to access to premises (s 23).

59. The 2010 Disability Standards create an "Access Code for Buildings" which prescribes the precise manner in which access to buildings is required. Relevantly, this includes a requirement that access must be provided from the main points of a

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60 (2010) 241 CLR 491.
61 *Dickson* (2010) 241 CLR 491 at [22] (the Court).

pedestrian entry, but not from every point of entry (D3.2(1)(b), see also T [20]; AB p 10).

60. The 2010 Disability Standards do not state that they are, and do not state that they are not, intended to affect the operation of the State Act, or the equivalent enactments of other States and Territories.

61. They do, however, provide that the objects of the 2010 Disability Standards are to:

    a. "ensure dignified, equitable, cost-effective and reasonably achievable access to buildings, and facilities and services within buildings, is provided for people with a disability"; and

    b. "give certainty to building certifiers, building developers and building managers that, if access to buildings is provided in accordance with these Standards, the provision of that access, to the extent covered by these Standards, will not be unlawful under the [Federal] Act".

62. Using the language of *Australian Mutual Provident Society*, these objects identify the essential "policy" of the 2010 Disability Standards. The Standards' specific prescription of the manner in which access is to be provided is self-evidently integral not only to the provision of dignified, equitable access but also to ensuring that the provision of such access is cost-effective and reasonably achievable. For the State Act to reimpose a general prohibition against disability discrimination would unquestionably "qualify, impair and, in a significant respect, negate" this policy. The federal law could no longer "ensure" that provision of disability access was both dignified and equitable but also cost-effective and reasonably achievable in the manner expressly provided for under the Disability Standards. It is of no significance that the second object contains a reference to lawfulness under the Federal Act – the first stated object does not contain any such reference.

63. Likewise, using the language in *Dickson*, the 2010 Disability Standards, by prescribing the nature of the access that must be provided (and limiting the accessways required to the main points of a pedestrian entry), relieve building certifiers, building developers and building managers from the broader obligation of complying with a general disability discrimination prohibition, and relevantly from providing an accessway at all points of pedestrian entries. If the State Act operated, it

would impose a greater obligation than that imposed by the federal law, in direct collision with the federal law.

64. On either analysis, the State law impermissibly alters, impairs or detracts from the operation of the federal law, such as to attract the operation of s 109 of the Constitution.

PART VII: ORDERS SOUGHT

65. The orders sought are: (a) the appeal be allowed; (b) orders 1 to 3 of the Full Court be set aside, and in their place it be ordered that the appeal be dismissed; and (c) there be no order as to costs.

10 ## PART VIII: TIME REQUIRED FOR ORAL ARGUMENT

66. The appellants estimate that they will require 2 hours for oral argument, including reply.

Dated: 1 October 2021

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Annexure A

Commonwealth Constitution, ss 75, 76, 77, 109

Disability Discrimination Act 1992 (Cth), ss 13, 23, 31-34 (Compilation No. 31)

Anti-Discrimination Act 1998 (Tas) ss 14, 15 and 16 (Version current from 24 June 2015 to 8 April 2018)

Disability (Access to Premises – Buildings) Standards 2010, s 1.3, Sch 1, A1.1, D3.2 (Compilation prepared on 1 May 2011)