HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: **CITTA HOBART PTY LTD**
First Appellant

AND: **PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD**
Second Appellant

DAVID CAWTHORN
Respondent

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

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

The Anti-Discrimination Tribunal was exercising judicial power

2. The Tribunal's essential task was to determine whether there had been a contravention of the law by reference to past facts and, if so, to make appropriate orders. The nature of
20 that task, the fact that its jurisdiction was compulsory, the range of court-like orders it could make (s 89) and the manner by which those orders could be enforced (s 90) together meant that the Tribunal was exercising judicial power.

- *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85 at [201], [204]-[207] (Kenny J) (**JBA 13, Tab 99**)
- *Meringnage* (2020) 60 VR 361 at [102]-[104], [108] (**JBA 14, Tab 108**)
- *Burns v Corbett* (2017) 96 NSWLR 247 at [30]-[31] (**JBA 13, Tab 96**)

3. The AHRC's argument that the Tribunal was not exercising judicial power depends entirely on the proposition that s 90 of the *Anti-Discrimination Act 1998* (Tas) can be read down in cases where, if s 90 applied, it would have the consequence that the Tribunal
30 would purport to exercise judicial power contrary to *Burns v Corbett* (**AHRC [67], [70]-[71]**). However, the argument that s 90 (and equivalent registration provisions) should be read down in such cases has not previously been overlooked: it has been rejected.

- *Commonwealth v Anti-Discrimination Tribunal* (2008) 169 FCR 85 at [203], [251]-[254] (Kenny J) (**JBA 13, Tab 99**)
- *Burns v Corbett* (2018) 265 CLR 304 at [64] (Kiefel CJ, Bell and Keane JJ), [120] (Gageler J) (**JBA 5, Tab 32**); Commonwealth Submissions at [67] (**attached**)

4. In addition to being contrary to authority, the AHRC's proposed reading down of s 90 is also contrary to settled principles concerning the limits of provisions such as s 3 of the *Acts Interpretation Act 1931* (Tas).

- *Clubb v Edwards* (2019) 267 CLR 171 at [431]-[432] (Edelman J) (**JBA 6, Tab 34**)
- *Re East; ex p Nguyen* (1998) 196 CLR 354 at [25]-[26], [31]-[32] (**JBA 10, Tab 71**)

10 **When a matter arises in federal jurisdiction**

5. It is well established that a federal claim that is "colourable", in the sense that it was made for the improper purpose of fabricating jurisdiction, will not be effective to engage federal jurisdiction. It is less well established – but nevertheless has some support in authority – that a federal claim that is "so clearly untenable that it cannot possibly succeed" likewise is not effective to engage federal jurisdiction (**Cth [14]-[17]**).

- *Hopper v Egg and Egg Pulp Marketing Board* (1939) 61 CLR 665 at 673 (Latham CJ), 677 (Starke J) (**JBA 7, Tab 45**)
- *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 26 (**JBA 9, Tab 63**)
- *Re Culleton* (2017) 91 ALJR 302 at [29] (Gageler J) (**JBA 14, Tab 115**)
- 20 *Green v Jones* [1979] 2 NSWLR 812 at 817-818 (Hunt J) (**JBA 14, Tab 104**)

6. The question whether a claim engages federal jurisdiction is a question of substance that must be determined objectively (**Cth [13], [18]**). Federal claims that are "so clearly untenable that they cannot possibly succeed" do not, as a matter of principle, affect the objective character of a matter, so as to bring it within the jurisdiction of federal courts, or to prevent it from being determined by State tribunals exercising State judicial power (**Cth [18]-[19]**).

- *Spencer* (2010) 241 CLR 118 at [55] (Hayne, Crennan, Kiefel and Bell JJ) (**JBA 11, Tab 77**)
- Cf *Johnson Tiles v Esso* (2000) 104 FCR 564 at [85]-[86] (**JBA 14, Tab 105**)
- 30 *Esso Australia v Johnson Tiles* [2001] HCATrans 32 (16 February 2001) (**Supp JBA Tab 1**) at lines 130-135, 188-202, 719-732, 778-782, 791-792.
- *Johnson Tiles v Esso (No 4)* (2001) 113 FCR 42 at [14] (**Supp JBA Tab 2**)

Not part of the Tribunal's task to decide matter on the merits

7. The Tribunal was entitled — in order to decide whether it had jurisdiction — to form an opinion about whether the defence raised by the appellants was colourable, or was so clearly untenable that it could not possibly succeed (**Cth [23]-[24]**; **NSW [20]-[25], [32]-[38]**). But it could not otherwise form an opinion about the merits of the federal defence, because the jurisdiction of the Tribunal did not depend on the merits of that defence: **cf WA [41]-[42], [46]**; *Palmer v Ayers* (2017) 259 CLR 478 at [27] (**JBA 9, Tab 55**).

Inconsistency between Commonwealth and State laws

8. The terms and subject-matter of the *Disability (Access to Premises – Buildings) Standards 2010* (**JBA 1, Tab 5**) demonstrate that the Standards were intended to operate to the exclusion of State laws by providing different rules to determine whether access to buildings covered by the Standards discriminated against persons with a disability. *First*, the Standards contain detailed and comprehensive rules as to what must be done to provide for non-discriminatory access to particular categories of buildings for people with a disability: DP1, D3.2 (**JBA 1, Tab 5, pp 209, 215**); *Outback Ballooning* (2019) 266 CLR 428 at [35] (**JBA 12, Tab 89**); *Noarlunga Meat* (1954) 92 CLR 565 at 591 (**Supp JBA Tab 3**). *Secondly*, the Standards were intended to bring about national uniformity by aligning them with the rules applicable in the context of a scheme of uniform national building regulation: Explanatory Statement, [4], [11], [29], [30] (**JBA 17, Tab 125**). *Thirdly*, the purpose of making standards under the Commonwealth Act is to replace general prohibitions with specific rules to guide people's conduct (**Cth [40]-[44]**).

9. The general intention that the *Disability Discrimination Act 1992* (Cth) (**JBA 1, Tab 4**) operates concurrently with State law (s 13(2)-(3)) expressly does not apply to disability standards made under Pt 2, Div 2A: s 13(3A) (**Cth [35]-[36]**). No inference can be drawn from the absence of an express statement in the Standards pursuant to s 31(2)(b), as the content of such a statement had one been made is unknowable (**Cth [36]-[37]**). The framing of para 1.3(b) of the Standards is likewise neutral in terms of the s 109 analysis.

10. The *Anti-Discrimination Act 1998* (Tas) is therefore invalid to the extent that it purports to impose a prohibition on discrimination on the basis of disability in respect of the provision of access to buildings covered by the Standards (**Cth [47]**).

Dated: 8 February 2022

Stephen Donaghue Frances Gordon Rachel Amamoo

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S183 OF 2017

BETWEEN:

GARRY BURNS
Appellant

AND:

TESS CORBETT
First Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Second Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S185 OF 2017

BETWEEN:

GARRY BURNS
Appellant

AND:

BERNARD GAYNOR
First Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Second Respondent

STATE OF NEW SOUTH WALES
Third Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Fourth Respondent

ATTORNEY-GENERAL FOR COMMONWEALTH
Fifth Respondent

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S186 OF 2017

BETWEEN: ATTORNEY GENERAL FOR NEW SOUTH WALES
Appellant

AND: GARRY BURNS
First Respondent

TESS CORBETT
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S187 OF 2017

BETWEEN: ATTORNEY GENERAL FOR NEW SOUTH WALES
Appellant

AND: GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

NSW CIVIL & ADMINISTRATIVE TRIBUNAL
Fourth Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE NSW COURT OF APPEAL

NO S188 OF 2017

BETWEEN: STATE OF NEW SOUTH WALES
Appellant

AND: GARRY BURNS
First Respondent

BERNARD GAYNOR
Second Respondent

ATTORNEY-GENERAL FOR THE COMMONWEALTH
Third Respondent

CIVIL AND ADMINISTRATIVE TRIBUNAL OF NEW SOUTH WALES
Fourth Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

65.2. The State Parliament could not confer State jurisdiction upon the Tribunal with respect to a s 75(iv) matter, either by reason of an implied limitation derived from Ch III, or by reason of s 109 of the Constitution and s 39(2) of the Judiciary Act.

66. A question arises as to the consequence of those conclusions for the validity of provisions of the AD Act and the CAT Act that purport to confer jurisdiction contrary to the above limitations. The Commonwealth submits that similar consequences flow from acceptance of either the Commonwealth's primary or alternative argument, notwithstanding that, as Leeming JA pointed out the route to those consequences differs as between the two arguments [**CA [35]**].

10 67. On the Commonwealth's primary argument, to the extent that the AD Act and CAT Act purport to authorise the Tribunal to exercise judicial power to determine matters falling within s 75(iv) of the Constitution they would be invalid. However, those Acts can be (and therefore must be) read down or severed so as to remain within constitutional limits.[85] It might be thought sufficient to avoid invalidity to read down the registration provisions, which would produce the result that the Tribunal would not exercise judicial power in such a matter.[86] However, for reasons explained by Kenny J in the *Tasmanian ADT Case*, reading down or severance of that kind would produce a result that was "fundamentally different" to the operation of those Acts in other cases, and would result
20 in a "set of provisions that the Parliament did not intend", meaning that such a reading down is not possible.[87] It is, however, possible to read down the AD Act and CAT Act such that they do not confer jurisdiction at all in cases where the complainant and respondent to a complaint made under s 87A of the AD Act are "residents of different states" within the meaning of s 75(iv) of the Constitution.[88] The same reading down would be possible in other cases falling within ss 75 or 76 of the Constitution.

68. If, on the other hand, the Court accepts the Commonwealth's alternative argument based on s 109 of the Constitution, the AD Act and CAT Act would not be contrary to Ch III in a way that would require reading down or severance.[89] The AD Act and CAT
30 Act would, however, be inoperative "to the extent of the inconsistency". The end result would be equivalent to that of the reading down identified in the previous paragraph, for the AD Act and CAT Act would be invalid to the extent that they purport to confer jurisdiction on the Tribunal to determine complaints under s 87A of the AD Act

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85 *Interpretation Act 1987* (NSW) s 31.

86 The provisions providing for the registration of a certificate that the Tribunal has made an order, which then "operates as a judgment of the Court" (AD Act s 114), are critical to the (agreed)
40 conclusion that the Tribunal exercises judicial power: see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261 (Mason CJ, Brennan and Toohey JJ), 269–70 (Deane, Dawson, Gaudron and McHugh JJ); *Attorney-General (Commonwealth) v Breckler* (1999) 197 CLR 83 at 110 [42] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); see also **CA [30]**.

87 *Tasmanian ADT Case* (2008) 169 FCR 85 at 147 [254].

88 That is the approach Kenny J adopted in the *Tasmanian ADT Case* (2008) 169 FCR 85 at 147 [255]. It is consistent with the analysis of Gageler J in *Tajjour v New South Wales* (2014) 254 CLR 508, 585–6 [168]–[171], noting that provisions expressed in general terms can be read down to conform to constitutional limitations.

50 89 Indeed, s 31 of the *Interpretation Act 1987* (NSW) would have no application in such a case, as it is not addressed to cases of inconsistency between otherwise valid laws: see *Sportsbet Pty Limited v New South Wales* (2012) 249 CLR 298 at 317 [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).