HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY H7 of 2021

BETWEEN

CITTA HOBART PTY LTD
First Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

AND

DAVID CAWTHORN
Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of submissions

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

Part II Basis of intervention

2. The Attorney General for the State of New South Wales ("**NSW Attorney**") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth), in respect of Ground 1 only, in support of the First and Second Appellants.

Part III Argument

Constitutional requirements for exercise of federal jurisdiction

3. It is necessary to commence the analysis of the issues arising in this appeal by reference to the constitutional implication recognised by a majority of this Court in Burns v Corbett (2018) 265 CLR 304 ("**Burns**").

4. While there is "no doubt" that State legislatures may confer judicial power on a body that is not a "court of a State" with respect to subject matters outside the heads of federal jurisdiction in ss 75 and 76 of the Constitution (K-Generation Pty Ltd v Liquor

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Licensing Court (2009) 237 CLR 501 at [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ)), that is not so with respect to the matters in ss 75 and 76.

5. In Burns, at [3], Kiefel CJ, Bell and Keane JJ, with whom Gageler J substantially agreed (see at [69]), held that Ch III of the Constitution "exhaustively identif[ies] the possibilities for the authoritative adjudication of matters listed in ss 75 and 76" of the Constitution, namely adjudication in federal courts and State courts co-opted for that purpose as components of the federal Judicature (see also at [106] (Gageler J)). A State statutory provision which purports to confer judicial power on a body other than a "court of a State" is invalid to the extent that it purports to confer jurisdiction with respect to a matter listed in ss 75 and 76 of the Constitution (Burns at [64] (Kiefel CJ, Bell and Keane JJ) and [119] (Gageler J)) and must be read down accordingly.

6. Whether a body that is not a "court of a State" would transgress the constitutional limitation identified in Burns is accordingly determined by asking whether hearing and determining the proceeding would involve: (a) the exercise of judicial power; and (b) with respect to a matter identified in ss 75 and 76 of the Constitution (see eg The Republic of Turkey v Mackie Pty Ltd (ACN 097 603 846) [2021] VSCA 77 at [30]-[32] (Tate JA, Beach JA agreeing); Meringnage v Interstate Enterprises Pty Ltd (2020) 60 VR 361 ("**Meringnage**") at [144] (Tate, Niall and Emerton JJA)).

Judicial power

7. There is no contravention of the constitutional implication identified in Burns if the decision maker is exercising a non-judicial function or an administrative function or power (Gaynor v Attorney General for New South Wales (2020) 102 NSWLR 123 ("**Gaynor**") at [138] (Leeming JA, Basten JA agreeing); see also at [55] (Bell P)). This has been recognised as an "uncontroversial proposition" (Meringnage at [131] (Tate, Niall and Emerton JJA)).

8. While it may not be "possible to frame an exhaustive definition of judicial power" (R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 at 373 (Kitto J)), it may be identified by reference to its "essential character", which as explained in Rizeq v Western Australia (2017) 262 CLR 1 ("**Rizeq**") at [52] (Bell, Gageler, Keane, Nettle and Gordon JJ) (quoted in Burns at [21]):

> … stems from the unique and essential function that judicial power performs by quelling controversies about legal rights and legal obligations through ascertainment of facts, application of law and exercise, where appropriate, of judicial discretion.

Sections 75 and 76 matters generally

9. In Palmer v Ayres (2017) 259 CLR 478 ("**Palmer**") at [26], Kiefel CJ, Keane, Nettle and Gordon JJ explained of a "'matter' in the constitutional sense" that (citations omitted):

> A "matter", as a justiciable controversy, is not co-extensive with a legal proceeding, but rather means the subject matter for determination in a legal proceeding – "controversies which *might* come before a Court of Justice" (emphasis added). It is identifiable independently of proceedings brought for its determination and encompasses all claims made within the scope of the controversy. What comprises a "single justiciable controversy" must be capable of identification, but it is not capable of exhaustive definition. ...

In Re Wakim; Ex parte McNally (1999) 198 CLR 511 ("**Re Wakim**") at [140] Gummow and Hayne JJ explained that "[t]here is but a single matter if different claims arise out of 'common transactions and facts' or 'a common substratum of facts', notwithstanding that the facts upon which the claims depend 'do not wholly coincide'" (citations omitted).

10. There can be no matter within the meaning of ss 75 and 76 of the Constitution "unless there is some immediate right, duty or liability to be established" (In re Judiciary and Navigation Acts (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ)). In Palmer, at [27], Kiefel CJ, Keane, Nettle and Gordon JJ explained that this requirement reinforces that "only a *claim* is necessary. A matter can exist even though a right, duty or liability has not been, and may never be, established" (citations omitted).

11. Whether a proceeding involves a "matter" within ss 75 or 76 of the Constitution is "a question of objective assessment" (Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251 ("**Agtrack**") at [32] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ)). The "central task is to identify the justiciable controversy", which in civil proceedings "will ordinarily require close attention to the pleadings (if any) and to the factual basis of each claim" (Re Wakim at [139] (Gummow and Hayne JJ)). It "will not always be possible" to ascertain from pleadings whether federal jurisdiction is attracted and

"evidence of the factual basis of the controversy" may be required (Agtrack at [32]). "[F]ederal jurisdiction may be attracted at any stage of a legal proceeding" including by way of a defence (Agtrack at [29]).

Section 76(i) and (ii) matters

12. The relevant heads of federal jurisdiction in this appeal are ss 76(i) and (ii) of the Constitution, being matters "arising under th[e] Constitution, or involving its interpretation" and matters "arising under any laws made by Parliament".

13. Turning first to s 76(ii), a matter arises under a law of the Commonwealth Parliament if the right, duty or liability in question "owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law" (R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett (1945) 70 CLR 141 at 154 (Latham CJ)). See also Moorgate Tobacco Company Limited v Philip Morris Limited (1980) 145 CLR 457 ("**Moorgate Tobacco**") at 476 (Stephen, Mason, Aickin and Wilson JJ, Barwick CJ agreeing); LNC Industries Ltd v BMW (Australia) Ltd (1983) 151 CLR 575 ("**LNC Industries**") at 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ)). Federal jurisdiction is attracted where the relevant right, duty or liability "is directly asserted by the plaintiff or defendant, but not if the federal question arises only in some incidental fashion" (Moorgate Tobacco at 476). Whether a matter arises does not "depend[] on the form of the relief sought and on whether that relief depends on federal law" (LNC Industries at 581). A matter does not arise under a law made by the Commonwealth Parliament "merely because the interpretation of the law is involved" (LNC Industries at 581). See also Felton v Mulligan (1971) 124 CLR 367 at 374 (Barwick CJ).

14. The various ways a matter will arise under a law of the Commonwealth, which include "where a Commonwealth statute is the source of a defence that is asserted", are catalogued in Rana v Google Inc (2017) 254 FCR 1 ("**Rana**") at [18] (Allsop CJ, Besanko and White JJ).

15. There is a s 76(i) matter if either the right, duty or liability owes its existence to the Constitution or depends upon the Constitution for its enforcement or the interpretation of the Constitution is involved.

16. In Hooper v Kirella Pty Ltd (1999) 96 FCR 1 at [55], which was cited by this Court in Palmer (see [10] above), the Full Federal Court (Wilcox, Sackville and Katz JJ) explained that (citation omitted):

> … it is only a *claim* (with the necessary federal elements) that is necessary. A matter can exist even though a right, duty or liability has not been established and, indeed, may never be established.

17. Similarly, in Boensch v Pascoe (2016) 311 FLR 101 at [20] Leeming JA observed that "[i]t is basal that, where jurisdiction turns on the subject matter of a dispute, what matters is the nature of the litigant's claim, as opposed to its strength or otherwise".

18. The point is reflected in the "fundamental tenet of federal jurisdiction that once a federal claim is made, even a bad one, and even one that is abandoned, or struck out, the whole matter in which that claim is made is, and remains, federal jurisdiction" (Macteldir Pty Ltd v Dimovski (2005) 226 ALR 773 at [36] (Allsop J, citations omitted); see also Rana at [21] (Allsop CJ, Besanko and White JJ); Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (2000) 104 FCR 564 ("**Johnson Tiles**") at [85]-[88] (French J, Beaumont and Finkelstein JJ agreeing)).

19. The exception is where the relevant claim is not made *bona fide* (see Troy v Wrigglesworth (1919) 26 CLR 305 at 311 (Barton, Isaacs and Rich JJ); Hopper v Egg and Egg Pulp Marketing Board (Vic) (1939) 61 CLR 665 at 673-674 (Latham CJ); Australian Solar Mesh Sales Pty Ltd v Anderson (2000) 101 FCR 1 ("**Australian Solar Mesh**") at [15] (Burchett J, Wilcox and Tamberlin JJ agreeing)). Claims will not be made *bona fide* if they are "'colourable' in the sense that they were made for the improper purpose of 'fabricating' jurisdiction" (Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation (1987) 18 FCR 212 at 219 (Bowen CJ, Morling and Beaumont JJ); Rana at [22]). In Johnson Tiles, at [88], French J explained that "[t]he mere fact that a claim is struck out as untenable does not mean it is colourable in that sense". A claim may, however, be colourable where it "is so obviously untenable, and would have been so to those who propounded it" (see Qantas Airways Ltd v Lustig (2015) 228 FCR 148 ("**Lustig**") at [88] (Perry J) and the cases cited therein). To adopt the language of National Union of Workers v Davids Distribution Pty Ltd (1991) 91 FCR 513 at [22] (Wilcox, Burchett and Cooper JJ), such characteristics may evidence that the claim is "a mere subterfuge to fabricate jurisdiction".

The effect of the constitutional implication on State tribunals

20. The constitutional implication in Burns has the consequence that, where the hearing and determination of a proceeding in a State tribunal would involve the exercise of judicial power with respect to a matter identified in ss 75 and 76 of the Constitution, "the proceedings cannot be heard and determined on their merits" by the State tribunal (Wilson v Chan & Naylor Parramatta Pty Ltd (2020) 103 NSWLR 140 ("**Wilson**") at [3] (Leeming JA, Macfarlan JA agreeing); special leave to appeal Wilson was refused: Wilson v Chan & Naylor Parramatta Trust [2020] HCASL 253).

21. This consequence is self-evident in a proceeding between "residents of different States", such as that before the Court in Burns (see Burns at [38]). If there is diversity of parties to the proceeding, a body other than a "court of a State" has no jurisdiction to hear and determine any part of the proceeding (see eg Attorney General for New South Wales v Gatsby (2018) 99 NSWLR 1 ("**Gatsby**") at [196](1)(e) and [196](2)(e) (Bathurst CJ, Beazley P, McColl and Leeming JJA agreeing)).

22. This is also the case in respect of those matters which attract federal jurisdiction because of their subject matter. Because the "matter" includes all the claims within the scope of the justiciable controversy (see [9] above), and notwithstanding that federal jurisdiction may be engaged by only one of the various claims in the justiciable controversy, the constitutional implication recognised in Burns has been held to prohibit a State tribunal from exercising "judicial power to determine any part of the justiciable controversy" (Wilson at [11] (Leeming JA, Macfarlan JA agreeing); see also Wilson at [84] (White JA)). As identified by Mason, Brennan and Deane JJ in Stack v Coast Securities (No 9) Pty Ltd (1983) 154 CLR 261 at 291, the content of the matter "extends to non-federal aspects of the justiciable controversy between the parties when both aspects, federal and non-federal, rest upon a common substratum of facts".

23. The constitutional implication does not, however, prevent a State tribunal from itself considering whether it has jurisdiction to hear and determine the proceeding. Indeed, similar to the duty of courts of limited jurisdiction to attend to those limits (see Gaynor at [130]-[132] (Leeming JA, Basten JA agreeing)), a State tribunal is "obliged to consider the extent of its own jurisdiction" (Gatsby at [281] (Leeming JA, Bathurst CJ and Beazley P agreeing)). A tribunal is "authorised, by necessary implication, to

determine whether claims made to it are within its limited jurisdiction" (Wilson at [13] (Leeming JA, Macfarlan JA agreeing); see also Wilson at [72]-[74] (White JA)).

24. Given the limit on State legislative power identified in Burns, and the limited nature of any general conferral of State jurisdiction, a State tribunal's duty to consider its own jurisdiction includes "a duty to consider whether the dispute is within federal jurisdiction and therefore cannot be determined by itself" (Gaynor at [134] (Leeming JA, Basten JA agreeing)). In doing so, the State tribunal is necessarily able to consider whether: it is a "court of a State"; it would be exercising judicial power in hearing and determining the proceeding; and whether there is a s 75 or 76 matter (see [6] above; see eg Gatsby at [281] (Leeming JA, Bathurst CJ and Beazley P agreeing)). Such consideration may, of course, be obviated in part or in full where the relevant issues have been the subject of authoritative determination by a "court of a State".

25. This does not contravene the constitutional implication recognised in Burns; to the contrary, it "vindicates" it (Wilson at [13] (Leeming JA, Macfarlan JA agreeing); see also Gaynor at [136] (Leeming JA, Basten JA agreeing)).

a. *First*, as Leeming JA identified in Wilson at [17], there is an "important distinction between the anterior exercise of authority to determine the limits of the Tribunal's own authority, and the subsequent adjudication of an application on its merits" (see also Wilson at [73] (White JA); Gaynor at [129] (Leeming JA, Basten JA agreeing); Lustig at [91] (Perry J)). In this respect, the NSW Attorney emphasises that the State tribunal's consideration of whether it has jurisdiction to hear and determine a proceeding does not, in any sense, determine the underlying justiciable controversy and thus the "matter" for the purpose of ss 75 or 76 of the Constitution.

b. *Secondly*, the State tribunal is only forming an opinion whether the matter is one within ss 75 or 76 of the Constitution and acting upon that opinion, by for example dismissing the proceedings for want of jurisdiction (see Wilson at [14]-[15] (Leeming JA, Macfarlan JA agreeing) and [73] (White JA); Gaynor at [22] (Bell P), [100] (Basten JA) and [137] (Leeming JA)). The tribunal is not called upon to, and cannot, consider the merits of the claim (Lustig at [91] (Perry J)); it is confined to determining whether there is a matter requiring the exercise of federal jurisdiction by considering questions such as whether the parties to the

dispute are residents of different States (see eg Gaynor at [137] (Leeming JA, Basten JA agreeing)).

c. *Thirdly*, the State tribunal would not be exercising federal jurisdiction; the State tribunal's authority to decide whether it has jurisdiction to hear and determine a proceeding is derived, by necessary implication, from State law (see [23] above). The Tribunal's jurisdiction, at this anterior stage, in no way "derive[s] from the Commonwealth Constitution and laws" (Baxter v Commissioners of Taxation (NSW) (1907) 4 CLR 1087 at 1142 (Isaacs J)). See also [41]-[42] below.

10 **The Full Court erred in concluding that the Tasmanian Anti-Discrimination Tribunal had a duty to hear and determine the complaint**

26. The Full Court's reasoning, and conclusion, that the Tasmanian Anti-Discrimination Tribunal ("**Tribunal**") had a duty to hear and determine the complaint (see Cawthorn v Citta Hobart Pty Ltd [2020] TASFC 15; 387 ALR 356 ("**J**") at [27] (Blow CJ, Wood J agreeing) and [103] (Estcourt J)) is contrary to the principles set out above and must be rejected.

27. It does not appear to have been in doubt, either before the Tribunal or the Full Court, that the Tribunal was not a "court of a State" and would be exercising judicial power in hearing and determining the complaint (see eg Cawthorn and Paraquad Association
20 of Tasmania Incorporated v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd [2019] TASADT 10 ("**T**") at [23]-[24]). In Commonwealth v Anti-Discrimination Tribunal (Tasmania) (2008) 169 FCR 85 Kenny J relevantly accepted "as clear that, under the *Anti-Discrimination Act*, the Tribunal exercises judicial power" (see at [205]-[207]) and that the Tribunal was not a "court of State" (see at [226], [236] and [239]).

28. The relevant question was accordingly whether judicial power would be exercised in respect of a matter in ss 75 or 76 of the Constitution in hearing and determining Mr Cawthorn's complaint.

29. As the Tribunal recognised (see T [40] and [45]), there was plainly a matter within
30 federal jurisdiction. There are two bases for this conclusion.

a. *First*, there was a matter within s 76(ii) of the Constitution because the defence of the respondents to the complaint ("**Defence**") relied on rights owing their

existence to a law of the Commonwealth Parliament, being the Disability Discrimination Act 1992 (Cth) (using the numbering adopted by the Tribunal at T [20], see [21A](a), (b), (c) and (e) of the Defence); T [20], [21], [25], [26] and [40]; J [4]).

b. *Secondly*, there was a matter within s 76(i) of the Constitution because the Defence contended that, if there was an inconsistency between the Anti-Discrimination Act 1998 (Tas) and the Disability Discrimination Act, the Anti-Discrimination Act was invalid pursuant to s 109 of the Constitution (using the numbering adopted by the Tribunal at T [20], see [21A](d) of the Defence; T[20], [26] and [40]). That matter both arises under the Constitution and involves its interpretation.

30. The reasoning of the Full Court, which appears to have been that there was no federal matter because the Defence was relevantly not a good one (see at J [5], [23], [25], [26]-[27] (Blow CJ, Wood J agreeing) and [102]-[103] (Estcourt J)), is fundamentally inconsistent with the established authorities as to when there is a matter which is required to be heard and determined in the exercise of federal jurisdiction (see [16]-[19] above). Why those authorities were disregarded by the Full Court are not explained in its reasons.

31. Whether the Defence was "misconceived" (J [5] (Blow CJ)) was irrelevant because, subject to the exception for claims which are not made bona fide, only a *claim* is necessary for there to be a matter within ss 76(i) or (ii) of the Constitution. Both the Tribunal and the Full Court accepted that the relevant claims were made bona fide and were not a colourable attempt to engage federal jurisdiction and avoid the jurisdiction of the Tribunal (see T [43]; J [5] (Blow CJ, Wood J agreeing)). As the Tribunal correctly recognised, "[f]ederal jurisdiction is enlivened regardless of the merits of the arguments raised" (T[43]). No analogy can be drawn with a State tribunal investigating whether there is, in fact, a diversity of residents, which determines whether or not the matter is required to be heard in the exercise of federal jurisdiction (see [25.b] above).

The contravention of the constitutional implication would not be avoided by the Tribunal forming an opinion about the constitutional question

32. The vice of the Tribunal hearing and determining the complaint would not be avoided by the Tribunal forming an opinion about the merits of the s 109 defence and acting accordingly (cf Ground 1 of the Respondent's Notice of Contention).

33. The Respondent's contention, which does not address the independent engagement of s 76(ii) of the Constitution, derives some support from the decision in Sunol v Collier (2012) 81 NSWLR 619 ("**Sunol**") at [20] where the NSW Court of Appeal (Bathurst CJ, Allsop P and Basten JA) suggested that a State tribunal's decision "in respect of a particular matter may depend upon a view about the constitutional validity of State legislation" (see also Lustig at [62] (Perry J)). The Court of Appeal said:

> … If the opinion led the Tribunal to decline to make an order, the unsuccessful party might challenge that result by seeking in the Supreme Court an order in the nature of mandamus, or a declaration as to the constitutional validity of the law sought to be enforced. If the Tribunal makes an order, on the basis that the law was indeed valid, the other party, being unsuccessful, could challenge the order by seeking to have it set aside on the ground that the law which supported it was constitutionally invalid. In each case, the Tribunal acted on the basis of an opinion as to the validity of the law in question, but its decision was not in any legal sense determined by that opinion. …

The tribunal's decision was said to be "like the decision of an administrative official, effective only to the extent that it has understood the law correctly" (Sunol at [9]).

34. Although this passage is not entirely clear, it would be erroneous if it was read as permitting a State tribunal to consider constitutional questions to the extent that the tribunal exercises judicial power in hearing and determining the proceeding on the merits. The capability of State tribunals to exercise judicial power with respect to matters outside of ss 75 and 76 of the Constitution (see [4] above) makes them fundamentally different to the Commonwealth administrative decision makers considered by Brennan J in Re Adams and the Tax Agents' Board (1976) 1 ALD 251 ("**Re Adams**") at 253 and 257 (see eg Meringnage at [133] and [135]). Although it does not need to be determined for the purpose of the present appeal, the approach identified in Re Adams can explained by reference to the "uncontroversial proposition" identified at [7] above.

35. Even if one accepted the characterisation of the State tribunal forming an opinion only as to the constitutional question, given that the matter is the entire justiciable controversy (and not just the constitutional claim), if the tribunal proceeded to hear and determine the complaint after forming the opinion, the State tribunal would still be purporting to be exercise judicial power with respect to a matter in federal jurisdiction.

36. It is not, however, apparent how the approach advocated by the Respondent differs in substance from consideration of a constitutional question on the merits by a "court of a State". The State tribunal would presumably hear submissions about the question, give reasons for the opinion it reaches and act according to the opinion reached. From the perspective of the parties, the exercise would look almost identical to consideration of a constitutional argument by a court, other than the fact that the "constitutional guarantee of an appeal contained in s 73" of the Constitution (Burns at [53] (Kiefel CJ, Bell and Keane JJ)) would be unavailable.

37. Once the State tribunal hears argument on the question, the tribunal is effectively assuming that it may have to exercise the apparent judicial function of treating the legislation in question as if it had never been enacted. While it is true that a State tribunal would be incapable of giving declaratory relief on the constitutional question, the distinction between a declaration of validity or invalidity and the tribunal acting, or refusing to act, in accordance with its view of validity or invalidity is "hard to sustain" (Cooper v Canadian Human Rights Commission [1996] 3 SCR 854 at 875 (Lamer CJ)).

38. Covering cl 5 of the Constitution does not compel a different result (cf Sunol at [8]). Whatever enduring operation covering cl 5 may have (see Attorney General v 2UE Sydney Pty Ltd (2006) 226 FLR 62 at [52]-[53] (Spigelman CJ, Ipp JA agreeing)), Ch III and the implied limitation identified in Burns are necessarily included in what is declared binding on a State tribunal.

The existence of a claim which engages federal jurisdiction by reason of s 76(i) or (ii) of the Constitution does not immunise the balance of the matter from determination by a State tribunal

39. In the submission of the NSW Attorney, the constitutional implication recognised in Burns would not prevent the claims attracting federal jurisdiction by reason of s 76(i)

or (ii) from being heard and determined by a "court of a State" and the balance of the matter being determined by the State tribunal. This is so for four reasons.

40. *First*, this Court has rejected the "theory of an indivisible and irreducible matter", such that the Constitution compels the whole of a "matter" to be determined by the same body at the same time (Abebe v The Commonwealth (1999) 197 CLR 510 ("**Abebe**") at [226] (Kirby J); see Abebe at [26], [28], [38] and [47] (Gleeson CJ and McHugh J), [228] (Kirby J) and [278]-[281] (Callinan J)). The Commonwealth Parliament's power to exclude claims, including non-federal claims, from the jurisdiction of a federal court (see Abebe at [47]-[48] (Gleeson CJ and McHugh JJ)) necessarily carries with it the potential that those claims may be determined separately in the exercise of State jurisdiction.

41. *Secondly*, in a State tribunal that is incapable of being invested with federal jurisdiction, the existence of a claim engaging ss 75 and 76 of the Constitution does not alter the nature of the Tribunal's authority to decide the matter. The metamorphosis that occurs when a federal matter arises in a court capable of exercising federal jurisdiction (see Australian Solar Mesh at [12]) occurs by reason of the shift in the court's authority to decide (see Anderson v Eric Anderson Radio & TV Pty Ltd (1965) 114 CLR 20 at 30 (Kitto J)). Admonitions that "[t]here is but one matter and that matter is entirely within federal jurisdiction" (Rizeq at [55]) must be understood in that context.

42. No such change occurs in a State tribunal. As Perry J identified in Lustig at [84], "the issues in State jurisdiction would retain their character as such, notwithstanding that federal issues are raised".

43. *Thirdly,* even in a "court of a State" capable of exercising federal jurisdiction, the mere existence of a federal claim would not necessarily change the nature of the court's authority to decide. In Fencott v Muller (1983) 152 CLR 570 at 609-610 Mason, Murphy, Brennan and Deane JJ said:

> … federal judicial power is attracted to the whole of a controversy only if the federal claim is a substantial aspect of that controversy. A federal claim which is a trivial or insubstantial aspect of the controversy must, of course, itself be resolved in federal jurisdiction, but it would be neither appropriate nor convenient in such a case to translate to federal jurisdiction the determination of the substantial aspects of the controversy from the jurisdiction to which they are subject in order to determine the trivial or

> insubstantial federal aspect. Again, impression and practical judgment must determine whether it is appropriate and convenient that the whole controversy be determined by the exercise of federal judicial power.

Substantiality is not a description of the federal claim's "strength or weakness but rather a description of its relationship to the controversy" (Johnson Tiles at [84] (French J, Beaumont and Finkelstein JJ agreeing)).

44. Finally, as in Abebe, a contrary approach would be productive of "immense practical problems" (Abebe at [41] (Gleeson CJ and McHugh); see also at [203] and [228] (Kirby J)). It is not apparent why the raising of, for example, a constitutional claim in a State tribunal, should preclude the tribunal determining the balance of the matter once the constitutional question has been heard and determined. This is particularly so when it is recognised that the court in which the federal claim is determined may not have jurisdiction with respect to the balance of the matter, with the result that no body may have jurisdiction to hear and determine it (see Gaynor at [92] (Basten JA)). In NSW, this has been addressed through Pt 3A of the Civil and Administrative Tribunal Act 2013 (NSW), which permits substituted proceedings to be brought in a court of a State where the proceeding "would involve an exercise of federal jurisdiction" and confers on that court the jurisdictions and functions that the Civil and Administrative Tribunal would have if it could exercise federal jurisdiction.

45. Determination of the federal claims in federal jurisdiction and the State claims in State jurisdiction could be achieved by the federal claim being determined in separate proceedings in a "court of a State", such as in proceedings seeking declaratory relief, or by the referral by the State tribunal of the relevant claim to a "court of a State". With respect to the question of referral, the ability of referral powers to refer such questions to courts capable of exercising federal jurisdiction has been limited by their terms (see Sunol at [19] (Bathurst CJ, Allsop P and Basten JA); Lustig at [108] (Perry J); Gatsby at [282] (Leeming JA, Bathurst CJ and Beazley P agreeing)). In Lustig, at [109], Perry J expressly left open the possibility that a State could legislate to confer power on a tribunal "to transfer part or all of proceedings instituted in the Tribunal, but over which it lacks jurisdiction, to another court or decision-making body".

Part IV Estimate of time for oral argument

46. It is estimated that 10 minutes will be required for oral argument.

Dated: 28 October 2021

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HOBART REGISTRY H7 of 2021

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10 **DAVID CAWTHORN**
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ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Pursuant to Practice Direction No 1 of 2019, the NSW Attorney sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in the submissions

	Description	Version	Provision
	Constitutional provisions		
1.	Constitution (Cth)	Current	Covering cl 5, Ch III, ss 73, 75, 76, 109
	Statutes		
2.	Anti-Discrimination Act 1998 (Tas)	Current from 24 June 2015 to 8 April 2018	
3.	Civil and Administrative Tribunal Act 2013 (NSW)	Current from 26 March 2021 to date	Pt 3A (ss 34A-34D)
4.	Disability Discrimination Act 1992 (Cth)	Compilation No 31 (1 July 2016 to 11 October 2017)	
5.	Judiciary Act 1903 (Cth)	Compilation No 47 (25 August 2018 to date)	s 78A

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