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 27C - Intervener's submissions-SA
Filing party:	Interveners
Date filed:	26 Nov 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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Part I: CERTIFICATION

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

Part II: BASIS OF INTERVENTION

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes in this matter pursuant to s 78A(1) of the *Judiciary Act 1903* (Cth).

Part III: LEAVE TO INTERVENE

3. Not applicable.

Part IV: ARUGUMENT

4. The submissions of South Australia address both grounds of the appeal to this Court.

5. In summary, in relation to Ground 1, South Australia submits:

   5.1. On an objective assessment, there was a matter arising under the *Constitution* or involving its interpretation before the Tasmanian Anti-Discrimination Tribunal (**Tribunal**).

5.2. The respondent's complaint under the *Anti-Discrimination Act 1998* (Tas) (**Tasmanian Act**) forms part of a single justiciable controversy and so forms part of the matter.

5.3. Although the constitutional implication recognised in *Burns v Corbett*[1] appears to preclude the Tribunal exercising adjudicative authority with respect to the respondent's complaint under the Tasmanian Act (being the State aspect of the matter), there are Ch III courts with authority to determine that complaint in the exercise of federal jurisdiction.

6. In summary, in relation to Ground 2, South Australia submits:

10 6.1. As there are Ch III courts with authority to determine the respondent's complaint under the Tasmanian Act, it is open for this Court to determine Ground 2 even if the appellants are successful in relation to Ground 1.

6.2. The Full Court did not err in deciding that the Tasmanian Act was not inconsistent, within the meaning of s 109 of the *Constitution*, with the *Disability Discrimination Act 1992* (Cth) (**DDA**) and the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (**Standards**) (together, the **Commonwealth law**).

GROUND 1

There was a "matter" before the Tribunal

20 7. It is well established that a "matter" listed in ss 75 and 76 of the *Constitution* does not mean a legal proceeding "but rather the subject matter for determination in a legal proceeding".[2] In seeking to identify a "matter", the "central task is to identify the justiciable controversy"[3] which is "identifiable independently of the proceedings which are brought for its determination".[4]

8. In *Agtrack (NT) Pty Ltd v Hatfield*,[5] the High Court recognised that whether federal jurisdiction with respect to one or more of the matters listed in ss 75 and 76 of the

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1 (2018) 265 CLR 304.

2 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265-266 (Knox CJ, Gavan Duffy, Powers, Rich & Starke JJ); *Fencott v Muller* (1983) 152 CLR 570, 591 (Gibbs CJ), 603 (Mason, Murphy, Brennan & Deane JJ).

3 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [139] (Gummow & Hayne JJ).

4 *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan & Deane JJ), referring to the decision of the majority of the Court in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457. See also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (***ASIC v Edensor***) (2001) 204 CLR 559, 586 [54] (Gleeson CJ, Gaudron & Gummow JJ); *Palmer v Ayres* (2017) 259 CLR 478, 490-491 [26] (Kiefel, Keane, Nettle & Gordon JJ).

5 (2005) 223 CLR 251, 262 [32] (Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ).

Constitution has been engaged "is a question of objective assessment". The objective nature of the assessment shapes the circumstances in which a matter arises for determination in the exercise of federal jurisdiction in at least three ways.

9. First, a matter may arise, and federal jurisdiction may be engaged, even though that was not the intention of the parties and even if there is no awareness of this having occurred.[6] In *Hume v Palmer*,[7] Isaacs J observed that on account of the appellant objecting that the State law in question was invalid by operation of s 109 of the *Constitution* "the Police Magistrate, consequently, whether he intended or not, or whether he knew it or not, was exercising Federal jurisdiction within the meaning of s 73 of the *Constitution*".

10. Second, and conversely, a matter will not arise, and federal jurisdiction will not be engaged, merely because that was the intention of the parties. A claim that is made for the improper purpose of engaging federal jurisdiction, a so-called "colourable"[8] claim, will not give rise to a matter. While subjectively there may be an intention to invoke federal jurisdiction, objectively there is no genuine controversy between the parties and therefore no "matter" for the purposes of ss 75 and 76 of the *Constitution*.

11. Third, in South Australia's submission, a matter will not arise, and federal jurisdiction will not be engaged, where a claim is so clearly untenable that it cannot possibly succeed. While subjectively the parties may believe there to be a real controversy between them, objectively that controversy is nothing other than imagined or supposed. Put another way, as the Attorney-General for the Commonwealth has done,[9] while as a matter of form there is a controversy between the parties, there is no such controversy as a matter of substance. There is, therefore, no "matter" for the purposes of ss 75 and 76 of the *Constitution*.

12. This third proposition is supported by the fact that a claim will be "colourable" where it is so obviously untenable and would have been so to those who propounded it.[10] As

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6 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 263 [32] (Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ).

7 (1926) 38 CLR 441, 451.

8 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, 219 (Bowen CJ, Morling & Beaumont JJ); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 599 [88] (French J, Beaumont & Finkelstein JJ agreeing); *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148, 169 [88] (Perry J).

9 Submissions of the Attorney-General for the Commonwealth (Intervening) (**Cth**), [13]-[14], [18].

10 *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148, 169 [88] (Perry J), citing *Cook v Pasminco Ltd* (2000) 99 FCR 548, 550 [14], [16] (Lindgren J); *Ahmed v Harbour Radio Pty Ltd* (2009) 180 FCR 313, 327-329 [58]-[64] (Foster J); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 598 [88] (French J, Beaumont & Finkelstein JJ agreeing).

a matter of principle, there is no reason why the existence of a "matter" and the invocation of federal jurisdiction, with the constitutional limitations on State legislative power this gives rise to,[11] should depend upon whether the party making the claim is subjectively aware that their claim is so obviously untenable. In South Australia's submission, the making of a claim that is so clearly untenable that it cannot possibly succeed is merely an attempt[12] to invoke federal jurisdiction: as such a claim does not objectively give rise to a "matter" for the purposes of ss 75 and 76 of the *Constitution*, it does not invoke that jurisdiction in fact.

13. In the present case, there is no dispute between the parties that the defence claimed by the appellants is not colourable. While for the reasons discussed at [39]-[59**Error! Reference source not found.**] below, South Australia considers the defence may not ultimately succeed, South Australia accepts that it is not so clearly untenable that it could not possibly succeed. It follows that, on an objective assessment, there was before the Tribunal a "matter" arising under the *Constitution* or involving its interpretation for the purposes of s 76(i) of the *Constitution*.[13]

Discrimination complaint formed part of the "matter"

14. The consequence of there being a "matter" before the Tribunal was that the constitutional implication recognised by a majority of this Court in *Burns v Corbett*[14] precluded the Tribunal from exercising adjudicative authority with respect to that matter. The implications of this for the Tribunal's jurisdiction to determine the respondent's discrimination complaint under the Tasmanian Act *appears* to depend upon whether that complaint forms part of the "matter" before the Tribunal.[15] In

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[11] *Rizeq v Western Australia* (***Rizeq***) **(**2017) 262 CLR 1, 14 [15] (Kiefel CJ), 25-26 [59]-[61] (Bell, Gageler, Keane, Nettle & Gordon JJ); *Burns v Corbett* (2018) 256 CLR 304, 325-326 [2]-[3] (Kiefel CJ, Bell & Keane JJ), 345-346 [67]-[68], 360 [106] (Gageler J).

[12] See e.g., *Re Young* (2020) 94 ALJR 448, 451 [13] (Gageler J) regarding the concept of abuse of process.

[13] *Croome v Tasmania* (1997) 191 CLR 119, 125 (Brennan CJ, Dawson & Toohey JJ), citing *James v South Australia* (1927) 40 CLR 1, 40 (Gavan Duffy, Rich & Starke JJ)), 136 (Gaudron, McHugh & Gummow JJ).

[14] *Burns v Corbett* (2018) 256 CLR 304, 325-326 [2]-[3] (Kiefel CJ, Bell & Keane JJ), 345-346 [67]-[68], 360 [106] (Gageler J). The same consequence follows from the finding of the minority that a law of the State that purported to confer authority to adjudicate with respect to a "matter" on a body other than a State court is invalid or inoperative: at 374 [145]-[146] (Nettle J), 375-376 [149]-[151] (Gordon J), 413 [259] (Edelman J). Regardless of the source of the limitation on State tribunals exercising adjudicative authority with respect to a matter, that limitation does not preclude a State tribunal from exercising non-adjudicative authority with respect to a matter, and in the course of exercising that non-adjudicative authority they may from an opinion about what the law requires in order to "appropriately mould its conduct" to be lawful: *Re Adams and Tax Agents' Board* (1976) 12 ALR 239, 242 (Brennan J).

[15] South Australia acknowledges that the submissions of the Attorney-General for NSW (at [39]-[45]) invite this Court to find that the constitutional implication recognised in *Burns v Corbett* (2018) 256 CLR 304 would not prevent claims attracting federal jurisdiction by reason of s 76(i) or (ii) of the *Constitution* from being heard and determined by a "court of a State" and the balance of the matter being determined by a

forming an opinion as to its jurisdiction, the Tribunal accordingly needed to consider not only whether there was a matter before it, but also the "metes and bounds"[16] of that matter.

15. A matter encompasses all claims made within the scope of the justiciable controversy.[17] Summarising the circumstances in which different claims will give rise to a single controversy, Gummow and Hayne JJ observed in *Re Wakim; Ex parte McNally*:[18]

> There 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". So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other …. Conversely, claims which are "completely disparate", "completely separate and distinct" or "distinct and unrelated" are not part of the same matter.

16. To this, it is necessary to add that a matter will not include all the claims within the scope of the controversy if the "federal claim is a trivial or insubstantial aspect of the controversy".[19]

17. In the present case, the determination of the appellants' federal claim was essential for the determination of the respondent's complaint under the Tasmanian Act, and it could not be said that the federal claim was a trivial or non-substantial aspect of that controversy.

18. Despite this, the respondent has submitted that there were two matters before the Tribunal as the claims are properly to be regarded as "disparate", "distinct" or "completely severable".[20] The submission is made on the basis that the claims fall to be determined in different forums. This is said to be clear from the circumstance that a Ch III court could not determine the whole of the controversy constituted by the complaint: only the Tribunal has authority to make the orders sought by the respondent

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State tribunal. South Australia also acknowledges that the submissions of the Australian Human Rights Commission (at [80]) invite the Court to find that the Tribunal can hear and determine the discrimination complaint, including to make orders under s 89(1) of the Tasmanian Act, but that any such orders will not attract to themselves the attribute of enforceability under s 90 of the Act.

16 *ASIC v Edensor* (2001) 204 CLR 559, 584-585 [50] (Gleeson CJ, Gaudron & Gummow JJ), citing *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations* (1995) 184 CLR 620, 653 (Toohey, McHugh & Gummow JJ).

17 *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan & Deane JJ), referring to the decision of the majority of the Court in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

18 (1999) 198 CLR 511, 585-586 [140] (citations omitted).

19 *Fencott v Muller* (1983) 152 CLR 570, 609-610 (Mason, Murphy, Brennan & Deane JJ).

20 Respondent's Submissions (**RS**), [54].

and only a Ch III court could determine the s 109 defence. In South Australia's submission, this assertion is misconceived and there is but one matter.

A matter may span more than one proceeding and forum

19. The respondent's submission is inconsistent with the concept of a matter which, as discussed at [7] above, is a justiciable controversy "identifiable independently of the proceedings which are brought for its determination".[21] As Gageler J recently explained in *Burns v Corbett*,[22] a matter encompasses a controversy about legal rights "existing independently of the forum in which that controversy might come to be adjudicated".

10 20. The notion that a matter exists independent of proceedings, and the forum in which those proceedings may be brought, has allowed for the recognition that a single matter can proceed in more than one court and, as a corollary, that a particular proceeding may relate to part only of a matter.[23] This recognition tells against there being two matters merely because the claims may fall for determination by different adjudicative bodies.

Claim may form part of a matter even though State law provides for adjudication by tribunal

21. Even if that were not determinative, the respondent's submission should not be accepted as it would have the tendency to undermine the constitutional implication discerned in *Burns v Corbett*. At its core, the respondent's submission is that because

20 the Tasmanian Act has provided for the discrimination complaint to be adjudicated in a tribunal and not a Ch III court, that complaint cannot form part of a "matter". If that proposition were correct, State legislation could avoid the creation of a "matter", thereby "side-stepping"[24] the limitation on State legislative power that has been held necessary to ensure that adjudicative authority with respect to matters listed in ss 75 and 76 is exercised by Ch III courts and not otherwise.

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[21] *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan & Deane JJ), referring to the decision of the majority of the Court in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457. See also *ASIC v Edensor* (2001) 204 CLR 559, 586 [54] (Gleeson CJ, Gaudron & Gummow JJ); *Palmer v Ayres* (2017) 259 CLR 478, 490-491 [26] (Kiefel, Keane, Nettle & Gordon JJ).

[22] *Burns v Corbett* (2018) 256 CLR 304, 346 [70].

[23] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [138] (Gummow & Hayne JJ), citing *R v Murphy* (1985) 158 CLR 596, 614, 617-618 (Gibbs CJ, Mason, Wilson, Brennan, Deane & Dawson JJ). See also *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan & Deane JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 525-26 [26]-[28], 530 [38], 533-544 [47] (Gleeson CJ & McHugh J), 588 [226] (Kirby J), 605 [278] (Callinan J).

[24] *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361, 407 [141] (Tate, Niall & Emerton JJA). See also *Burns v Corbett* (2018) 256 CLR 304, 325-326 [2]-[3], 339 [51] (Kiefel CJ, Bell & Keane JJ).

22. While South Australia acknowledges that there is limited support for this proposition,[25] it was found to be implausible by the Victorian Court of Appeal in a *Meringnage v Interstate Enterprises Pty Ltd*.[26] In that case, the Court of Appeal considered that if a controversy is not a "matter" because it can only be resolved by the grant of a remedy by a State tribunal, it would follow that the complaints at issue in *Burns v Corbett* were not "matters" and that case was probably wrongly decided.[27]

23. A further reason why the respondent's submissions should not be accepted is that, as advanced at [24]-[36] below, there are Ch III courts with authority to determine that complaint in the exercise of federal jurisdiction, including to make orders of the kind sought by the respondent.

A Ch III court can make orders sought by the respondent in adjudicating complaint

24. In South Australia's submission, this is not a case where there are no Ch III courts with authority to determine the whole of the controversy, including to make the orders sought by the respondent in his complaint. South Australia acknowledges that for a Ch III court to do so, it must have both *jurisdiction* with respect to the complaint under the Tasmanian Act and *power* to make the relevant orders.

25. As to *jurisdiction*, so long as the discrimination complaint under the Tasmanian Act forms part of the whole controversy between the parties, it forms part of the relevant matter. As part of the matter, federal jurisdiction has been conferred on various Ch III courts by the *Judiciary Act 1903* (Cth): jurisdiction has been conferred on the High Court by s 30(a) of the *Judiciary Act*, on the Federal Court by s 39B(1A) of that Act and on State courts within the limits of their several jurisdictions[28] by s 39(2) of that Act. The conferral of *jurisdiction* signifies that those Ch III courts have authority to adjudicate the matter.[29]

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[25] *Attorney-General (NSW) v Gatsby* (2018) 99 NSWLR 1, 52 [246], 53 [250] (Basten JA). Justice Basten was in dissent on this issue, and further the issue was not the subject of submissions from the parties.

[26] *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361, 402 [125] (Tate, Niall & Emerton JJA).

[27] *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361, 402 [125] (Tate, Niall & Emerton JJA).

[28] To the extent that those limits exist, it is within the competence of the State legislatures to vary any such limitations to facilitate the exercise of federal jurisdiction by inferior State courts (see e.g., *Gaynor v Attorney General for New South Wales* (2020) 102 NSWLR 123, 138 [43], 138-139 (Bell P), 145 [86], 150 [110] (Basten JA), 154 [124], 158 [143] (Leeming JA)). Legislation of this kind has been enacted in a number of jurisdictions following the decision in *Burns v Corbett* (2018) 256 CLR 304 including s 131 of the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) which commenced on 5 November 2021. See also s 38B of the *South Australian Civil and Administrative Tribunal Act 2013* (SA).

[29] *ASIC v Edensor* (2001) 204 CLR 559, 570 [2] (Gleeson CJ, Gaudron & Gummow JJ).

26. As to *power*, South Australia acknowledges that, on its terms, s 89 of the Tasmanian Act only confers power to make the orders described therein on the Tribunal. However, to suggest that this is the end of the inquiry is to ignore the general powers available to Ch III courts in the exercise of federal jurisdiction, as well as the more specific powers that are made available to them by s 79 of the *Judiciary Act*.

27. Taking the Federal Court as an example,[30] in the exercise of its jurisdiction it "has powers expressly or impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or powers so conferred'".[31] As such, the power conferred on the Federal Court by s 21 of the *Federal Court of Australia Act 1976* (Cth) to make declarations enables the Federal Court to declare a contravention of State legislation in the exercise of federal jurisdiction.[32] More generally, s 22 of that Act provides that the Federal Court shall grant "all remedies to which any of the parties appears entitled in respect of a legal or equitable claim" and s 23 enables the Court to "make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate".

28. To the extent that general powers are not sufficient to allow a Ch III court to make the orders sought,[33] South Australia submits that s 89 of the Tasmanian Act is capable of being "picked up" by s 79 of the *Judiciary Act* and applied in the exercise of the court's jurisdiction.

29. In *Rizeq*,[34] the plurality observed that:

> Within the limits of State legislative capacity, State laws apply in federal jurisdiction as valid State laws unless and to the extent that they are rendered invalid by reason of inconsistency with Commonwealth laws. What State laws relevantly cannot do within the limits of State legislative capacity is govern the exercise by a court of federal jurisdiction. A State law can determine neither the powers that a court has in the exercise

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[30] In relation to the High Court see e.g., s 32 of the *Judiciary Act 1903* (Cth). State courts also have general powers at their disposal however given the limitations on State legislative power they are ordinarily picked up by s 79 of the *Judiciary Act*: *Rizeq* (2017) 262 CLR 1, 34-35 [86] (Bell, Gageler, Keane, Nettle & Gordon JJ), referring to the holding in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 253 CLR 1, 10 [2] (French CJ, Kiefel, Bell, Gageler & Gordon JJ, Keane & Nettle JJ agreeing) that s 79 of the *Judiciary Act* picked up rules made under the *Supreme Court Act 1935* (WA) which regulated the exercise the Supreme Court of Western Australia's inherent power to make a freezing order.

[31] *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J) (cited with approval in *ASIC v Edensor* (2001) 204 CLR 559, 590 [64] (Gleeson CJ, Gaudron & Gummow JJ)), citing *Parson v Martin* (1984) 5 FCR 235, 241, see also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 630-631.

[32] *Rizeq* (2017) 262 CLR 1, 39 [98] (Bell, Gageler, Keane, Nettle & Gordon JJ).

[33] See e.g., the discussion in *ASIC v Edensor* (2001) 204 CLR 559 about the extent to which the ordinary powers of the Federal Court might allow for the making of orders absent the "picking up" of specific remedial powers: 615 [148] (McHugh J), cf. 636 [207] (Kirby J).

[34] *Rizeq* (2017) 262 CLR 1, 41 [103] (Bell, Gageler, Keane, Nettle & Gordon JJ).

> of federal jurisdiction nor how or in what circumstances those powers are to be exercised. A State law cannot in that sense "bind" a court in the exercise of federal jurisdiction, and that is the sense in which that word is used in s 79 of the *Judiciary Act*. The operation of s 79 is limited to making the text of the State laws of that nature apply as Commonwealth law to bind a court in the exercise of federal jurisdiction.

30. Section 79 of the *Judiciary Act* thus "serves to ensure that the exercise of federal jurisdiction is effective" by "fill[ing] a gap in the law governing the actual exercise of federal jurisdiction which exists by reason of the absence of State legislative power".[35] It provides courts exercising federal jurisdiction "with powers necessary for the hearing or determination of those matters".[36]

31. In *Rizeq*, Kiefel CJ described State laws providing a court with powers to make particular orders, grant injunctive relief or impose a particular penalty as necessary for the determination of a matter.[37] However, as those laws are not laws "which can operate of their own force upon courts exercising federal jurisdiction" her Honour observed that it is "necessary that s 79 operate upon them so that they may be picked up" and applied. Her Honour cited a number of authorities where State laws of this kind had been picked up by s 79.[38] The plurality did likewise.[39]

32. Just like the laws referred to in *Rizeq*, s 89 of the Tasmanian Act confers power to make certain remedial orders where a complaint is substantiated. Those powers are necessary for the determination of the matter. They are conferred by a State law which could not operate of its own force upon courts exercising federal jurisdiction. Accordingly, in South Australia's submission s 89 of the Tasmanian Act is a law of the kind that is capable of being picked up by s 79 of the *Judiciary Act*.

33. In *Rizeq*, the Court acknowledged the established limitations, explicit in the text of s 79, which preclude certain State laws of this kind from being picked up.[40] There are

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35 *Rizeq* (2017) 262 CLR 1, 26 [63] (Bell, Gageler, Keane, Nettle & Gordon JJ).

36 *Rizeq* (2017) 262 CLR 1, 15 [20] (Kiefel CJ).

37 *Rizeq* (2017) 262 CLR 1, 15 [21] (Kiefel CJ).

38 *Rizeq* (2017) 262 CLR 1, 15 [21] (Kiefel CJ), citing: *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323; *ASIC v Edensor* (2001) 204 CLR 559, 586-587 [56]; *Forge* v *Australian Securities and Investments Commission* (2006) 228 CLR 45, 90-91 [112].

39 *Rizeq* (2017) 262 CLR 1, 34 [86], 35 [88], 38 [97] (Bell, Gageler, Keane, Nettle & Gordon JJ), citing: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 10 [2], 18 [39]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 90-91 [112], see also at 56 [4], 136 [237], 150 [278]; *ASIC v Edensor* (2001) 204 CLR 559.

40 *Rizeq* (2017) 262 CLR 1, 33 [82] (Bell, Gageler, Keane, Nettle & Gordon JJ), citing *Solomons v District Court (NSW)* (***Solomons***) (2002) 211 CLR 119, 134 [23] (Gleeson CJ, Gaudron, Hayne & Callinan JJ). One limitation recognised in *Solomons* is that since s 79 is addressed to courts exercising federal jurisdiction and the State laws shall be binding upon those courts, "the section is not directed to rights and liabilities of those engaged in non-curial procedures under State law". Since State bodies, though not recognised as courts, can be "empowered to resolve disputes by using curial powers" (*Burns v Corbett* (2018) 265 CLR

some statements in *Rizeq* that may, if not understood in context, tend to suggest the existence of a further limitation, being that s 79 only picks up State laws that are binding on State courts and not those that are binding on State tribunals.[41] In *Rizeq*, the Court was considering the application of two provisions of a State law: one a provision addressed to the conduct of individuals which rendered them liable to prosecution for an offence, and the other a provision addressed to what is taken to be the verdict of a jury in a prosecution before a State court for an offence. The former was held to apply of its own force and the latter was held to be picked up by s 79 of the *Judiciary Act*.[42] The Court was not there considering a provision like s 89 of the Tasmanian Act which confers a curial power on a State tribunal. Moreover, the Court had not yet handed down its decision in *Burns v Corbett* which, for the reasons explained at [14] above, appears to preclude the Tribunal itself exercising the powers conferred by s 89 of the Tasmanian Act.

34. The primary concern of the Court in *Rizeq* was to construe s 79 in a manner that was consistent with its purpose. In South Australia's submission, s 79 of the *Judiciary Act* operating to pick up s 89 of the Tasmanian Act is entirely consistent with the purpose therein discerned. It would fill the gap that otherwise exists in the law governing the exercise of the Ch III court's federal jurisdiction and provide the court, whether that be this Court, the Federal Court or a State court, with powers necessary for the hearing and determination of those matters.[43]

35. In circumstances where the general powers of a Ch III court are not otherwise adequate, a construction of s 79 that precludes s 89 of the Tasmanian Act being picked up would not "ensure that the exercise of federal jurisdiction is effective" as s 79

304, 388 [186] (Gordon J)), the limitation identified in *Solomons* is no impediment to the picking up of s 89 of the Tasmanian Act, being a power conferred on a State tribunal exercising judicial power.

41 *Rizeq* (2017) 262 CLR 1, 26 [63] (read with 22 [50]), 33 [81], 35 [87] (Bell, Gageler, Keane, Nettle & Gordon JJ). A limitation may also be suggested by the plurality's description (at 33 [82]) of the holding in *Solomons* (2002) 211 CLR 119 that s 79 has "no application to State laws which are not "binding" on State courts, and for that reason (amongst others) to be inapplicable in that case to apply as Commonwealth law provisions of State legislation which imposed obligations on the State and on State executive officers". However, in *Solomons* the Court held that s 79 would not pick up a provision of the State law that required the Under Secretary and Treasurer to consider making a payment following the grant of a certificate by a court: s 79 could not bind those State officers. It then followed that if s 79 picked up the separate provision that allowed the court to grant a certificate, the Under Secretary and Treasurer would have no obligation to consider making payment in respect of a certificate granted in the exercise federal jurisdiction, when they would have such an obligation in respect of a certificate granted in the exercise of State jurisdiction. What was decisive, therefore, was that the picking up of the power to grant a certificate would have given it a different meaning.

42 *Rizeq* (2017) 262 CLR 1, 18 [32] (Kiefel CJ), 20 [40]-[42], 41 [104]-[105] (Bell, Gageler, Keane, Nettle & Gordon JJ), 73 [201], 74 [204] (Edelman J).

43 *Rizeq* (2017) 262 CLR 1, 15 [20] (Kiefel CJ), 26 [63] (Bell, Gageler, Keane, Nettle & Gordon JJ).

intends.[44] Chapter III courts would be seized of federal jurisdiction yet denied the competency to make orders of the kind sought to resolve an element of the controversy between the parties. The consequence would be that "no court, State or federal, would be competent in the exercise of federal jurisdiction to administer remedies such as those sought" for contravention of the Tasmanian Act.[45]

36. Indeed, such a consequence would be inconsistent with the very reason the discrimination complaint under the Tasmanian Act is properly considered part of the matter in the first place. The concerns of the plurality in *Fencott v Muller*,[46] in rejecting a limitation on the concept of "matter" that would restrict a federal court to resolving only the federal claim, would ring true: "[t]he judicial award of effective remedies in resolution of a controversy would be impaired. The judicial power of the Commonwealth would … prove insufficient to accomplish its purpose".

GROUND 2

It is open for the Court to determine Ground 2

37. The appellants submit that, if they are successful in relation to the first ground of appeal, Ground 2 does not arise for consideration.[47] This Court's practice of declining to investigate and decide constitutional questions does not represent a "rigid rule imposed by law which cannot yield to special circumstances".[48] Rather, it is a practice "based upon prudential considerations" which include avoiding "the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation", "the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be applied",[49] and "the appearance of an 'eagerness' that may detract from the Court's standing".[50]

38. Consistently with those considerations, it is open for this Court to consider that, if the appellants are successful in relation to Ground 1, it is nevertheless expedient[51] to determine Ground 2. Notwithstanding the existence of intermediate appellate court authority on the substance of Ground 2, there remains a controversy between the

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44 *Rizeq* (2017) 262 CLR 1, 26 [63] (Bell, Gageler, Keane, Nettle & Gordon JJ).
45 *ASIC v Edensor* (2001) 204 CLR 559, 572, [11] (Gleeson CJ, Gaudron & Gummow JJ).
46 (1983) 152 CLR 570, 609 (Mason, Murphy, Brennan & Deane JJ).
47 Appellants' submissions (**AS)** [49].
48 *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432, 438 [22] (the Court).
49 *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432, 438 [22] (the Court).
50 *Clubb v Edwards* (2019) 267 CLR 171, 192 [35] (Kiefel, Bell & Keane JJ).
51 *Clubb v Edwards* (2019) 267 CLR 171, 193 [38] (Kiefel, Bell & Keane JJ), 249 [232], 252 [238], 253 [241] (Nettle J).

parties with respect to that issue. Moreover, as advanced above, an avenue remains open for the determination of the respondent's complaint under the Tasmanian Act.[52] The cost and inconvenience to the parties and this Court of pursuing the substance of Ground 2 through further litigation may relevantly bear upon the consideration by this Court of the appropriateness of determining that ground.

The Full Court did not err in deciding that the Tasmanian Act was not inconsistent with the Commonwealth law

39. Turning to the substance of the question presented by Ground 2, South Australia submits that the Full Court did not err in deciding that the Tasmanian Act was not inconsistent, within the meaning of s 109 of the *Constitution*, with the Commonwealth law.

40. Whether an inconsistency arises for the purpose of s 109 of the *Constitution* may be approached by considering whether a State law alters, impairs or detracts from a Commonwealth law (direct inconsistency), or whether the Commonwealth law covers the field with respect to its subject matter (indirect inconsistency). These "different aspects of inconsistency are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct".[53] They are interrelated.[54] Common to each is the search for a "real conflict"[55] between the laws. That task, ultimately, involves a search for the intention of the Commonwealth law in question.

41. The role of intention within the framework of indirect inconsistency is well-recognised. A conclusion that a Commonwealth law covers the field with respect to its subject matter falls if there is "an implicit negative proposition that nothing other than what it provides with respect to a particular subject matter is to be the subject of legislation".[56]

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[52] The avenue remains open given Ch III courts have authority to determine the complaint in the exercise of federal jurisdiction, and on current authority, that jurisdiction exists even after the federal aspect of the matter is resolved: *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 472 (Gibbs J), 467-477 (Stephen, Mason, Aikin & Wilson JJ). See also *Philip Morris Inc v Adam P Brown Pty Ltd* (1981) 148 CLR 457, 474 (Barwick CJ), 498-499 (Gibbs J), 533 (Aikin J); *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557, 586-587 (Starke J).

[53] *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 280 (Aickin J).

[54] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (***Jemena***) (2011) 244 CLR 508, 525 [42] (the Court).

[55] *Jemena* (2011) 244 CLR 508, 525 [42] (the Court).

[56] *Work Health Authority v Outback Ballooning Pty Ltd* (***Outback Ballooning***) (2019) 266 CLR 428, 448 [35] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ).

42. Issues of direct inconsistency will involve an examination of the interaction between the Commonwealth and State laws in questions. However, it is insufficient to merely "confine attention to an examination of the particular operation of the two laws said to collide with one another".[57] A State law will alter, impair or detract from a Commonwealth law if it "undermines"[58] the Commonwealth law. To do so a degree of substantiality, as opposed to triviality, is required.[59] Whether that degree of substantiality exists is informed by the intention of the Commonwealth law in question. The intention of the Commonwealth law, that is intention as a matter of interpretation having regard to the law's subject, scope and evident purpose,[60] speaks to whether it provides for "significant areas of liberty designedly left".[61]

No indirect inconsistency arises

43. The task of ascertaining whether the Commonwealth law intends to make exhaustive or exclusive provision on the subject matter with which it deals requires consideration of all provisions which speak for or against such an intention.[62] In examining the Commonwealth law for any such intention, the precise subject matter for which it is said to make exclusive provision must be borne in mind.[63] In this case, the area of exclusivity said to exist is "discrimination on the basis of disability in respect of the provision of access to buildings covered by the [Standards]."[64]

44. South Australia submits that the Commonwealth law does not disclose an implicit negative proposition that nothing other than what it provides with respect to that subject matter is to be the subject of legislation.[65]

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57 Cf. AS [51].

58 *Jemena* (2011) 244 CLR 508, 525 [41] (the Court); *Outback Ballooning* (2019) 266 CLR 428, 447 [32] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ).

59 *Jemena* (2011) 244 CLR 508, 525 [41] (the Court); *Bell Group NV (in liq) v Western Australia* (2016) 260 CLR 500, 524 [61], 526 [66] (French CJ, Kiefel, Bell, Keane, Nettle & Gordon JJ).

60 *Dickson v The Queen* (***Dickson***) (2010) 241 CLR 491, 508 [34] (the Court).

61 *Dickson* (2010) 241 CLR 491, 505 [25] (the Court). See also *Jemena* (2011) 244 CLR 508, 525 [44] (the Court); *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 336-337 (the Court); *Momcilovic v The Queen* (***Momcilovic***) (2011) 245 CLR 1, 115-116 [258]-[261] (Gummow J, Bell J relevantly agreeing at 241 [660]); G Lindell, "Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation" (2005) 8 *Constitutional Law and Policy Review* 25, 30-34; G Rumble, "Manufacturing and Avoiding Constitution Section 109 Inconsistency: Law and Practice" (2010) 38 *Federal Law Review* 445, 457-459.

62 *Outback Ballooning* (2019) 266 CLR 428, 447-448 [35] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ).

63 *Jemena* (2011) 244 CLR 508, 529 [58] (the Court).

64 Cth [47].

65 Cf. Cth [47]-[48].

45. Other than in one respect, the text of the DDA does not illuminate whether the Commonwealth law intends to make exclusive provision for its subject matter.

45.1. Subsection 13(3) provides that the DDA "is not intended to exclude or limit a law of a State or Territory[66] that is capable of operating concurrently with this Act". Subsection 13(3A) provides that "Subsection (3) does not apply in relation to Division 2A of Part 2 (Disability standards)". But for s 13(3A), the effect of s 13(3) would be a strong indication against the requisite implicit negative proposition. The effect of s 13(3A) is, in South Australia's submission, to negate that indication. However, the absence of a statement of "general concurrency"[67] tends neither for nor against a finding that the Commonwealth law intends to make exhaustive provision for the discrimination on the basis of disability in respect of the provision of access to buildings covered by the Standards.[68]

45.2. Nor does s 31(2)(b) advance the matter one way or the other, given that standards may contain a statement of intention, and that any such statement may be expressed as a positive intention (to affect the operation of a State law) or a negative intention (not to affect the operation of a State law). Similarly, nothing can be drawn from s 31(3), given that it requires the Commonwealth Minister to consider any comments made by her State or Territory counterparts irrespective of whether any s 31(2)(b) statement of intention is to be expressed in the positive or the negative.[69] South Australia adopts RS [49] as to the relevance of the Commonwealth's reliance on a recommendation of the Productivity Commission, in circumstances where the very terms of s 31(2)(b) make it clear that the recommendation was not adopted.

45.3. If s 13(4) of the DDA is engaged, it removes the ability of a complainant to litigate in both a State and federal forum with respect to the same matter, where he or she has already initiated a proceeding or made a complaint under the State law in question. Subsection 13(4) operates on the premise, as expressly contemplated in s 13(4)(a), that a State law relating to discrimination may deal with a matter dealt with by a disability standard. That premise precludes drawing

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66 As defined in s 13(2) of the DDA.

67 AS [57].

68 Cf. Cth [37].

69 Cth [36], [39].

from s 34 of the DDA any assumption in the Commonwealth law as to any "primacy" of the Standards.[70]

46. However, the premise of s 13(4) itself tends against an implication that the Commonwealth law intends to make exclusive provision for its subject matter. Subsection 13(4) is premised on a legislative apprehension that an operational inconsistency might arise with respect to matters dealt with in a disability standard. The corollary of that apprehension is that, save for where it is impossible to simultaneously obey both laws, the Commonwealth legislature assumes that the State laws which deal with matters also dealt with in a disability standard will operate concurrently to each lay down norms of conduct regarding disability discrimination. A provision such as s 13(4) speaks, of course, to situations in which the State law is not inoperative under s 109,[71] however the provision should nevertheless be considered at the anterior stage of identifying the intention of the Commonwealth law.[72]

47. *Momcilovic* provides an analogy. Section 4C(2) of the *Crimes Act 1914* (Cth), a "roll-back" mechanism performing a similar function to s 13(4) of the DDA, informed the conclusions of three members of the Court that there was no s 109 inconsistency between Victorian and Commonwealth criminal offences for drug trafficking. That subsection provided that where an act or omission constituted an offence under both Commonwealth and State laws and an offender had been punished for that offence under the law of the State, he or she was not liable to be punished for the offence under the law of the Commonwealth. Chief Justice French described that provision as being "of some importance … [i]t qualifies, conditionally, the application of all Commonwealth laws creating offences".[73] His Honour acknowledged that the provision would not be determinative of the question of inconsistency in every case,[74] however noted that it "accommodates federal diversity falling short of invalidating inconsistency" such as different maximum penalties for similar State and

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[70] Cf. Cth [48].

[71] *Dickson* (2010) 241 CLR 491, 504 [21] (the Court); *Momcilovic* (2011) 245 CLR 1, 74 [110] (French CJ).

[72] *Momcilovic* (2011) 245 CLR 1, 72 [104], 74 [110] (French CJ), 119-120 [268] (Gummow J, Bell J relevantly agreeing at 241 [660]); G Lindell, "Grappling with Inconsistency between Commonwealth and State Legislation and the Link with Statutory Interpretation" (2005) 8 *Constitutional Law and Policy Review* 25, 32-33. See also *Outback Ballooning* (2019) 266 CLR 428, 449 [40] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ).

[73] *Momcilovic* (2011) 245 CLR 1, 72 [104].

[74] *Momcilovic* (2011) 245 CLR 1, 72 [104]. And indeed, the existence of the provision did not avoid the conclusion of inconsistency reached in *Dickson* (2010) 241 CLR 491, 504 [21] (the Court).

Commonwealth criminal offences.[75] Justice Gummow (with whom Bell J relevantly agreed) also relied upon s 4C(2),[76] to conclude that the Commonwealth law did not intend to deal exclusively with the prosecution and punishment of acts dealt with in the Commonwealth offence provision.[77]

48. The Standards themselves also fall for consideration as to whether the Commonwealth law intends to be exclusive. They do not deploy the s 31(2)(b) device and make no express statement of intention. And, for the following reasons, they do not evince an intention to be exclusive.

49. The Standards address the concept of "unlawfulness" as employed in the DDA. "Unlawful" conduct underpins the availability of redress action under Part IIB of the *Australian Human Rights Commission Act 1986* (Cth) but does not represent a rule of conduct beyond the structure of the DDA. It does not form the basis for criminal[78] or other civil[79] proceedings.

50. If a person performs certain acts in accordance with the Standards, s 34 of the DDA provides that Part 2 of the DDA (other than Division 2A) "does not apply" to his or her act.

51. Pursuant to cl 2.4 of the Standards, the Standards are to be construed so far as is possible within the power conferred by s 31(1) of the DDA. The s 31(1) discretion to make a disability standard is not a power at large; rather, it must be understood against the subject-matter, scope and purpose of the statute.[80] Consistently with the scope of the s 31(1) power, the Standards need not be interpreted as permitting acts which, but for the provisions of the Standards, would not suffice to meet the obligations in Part 2 of the DDA.[81] Rather, the function of Standards promulgated pursuant to s 31, as understood in the context of s 34, is to codify how the obligations of non-discrimination in Part 2 of the DDA can be satisfied by specified persons in respect of a specific class of acts (cll 2.1 and 2.2).

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75 *Momcilovic* (2011) 245 CLR 1, 74 [110].

76 Together with another provision, s 300.4 of the Criminal Code (sch 1 to the *Criminal Code Act 1995* (Cth)), which provided that the relevant Part was "not intended to exclude or limit the concurrent operation of any law of a State or Territory".

77 *Momcilovic* (2011) 245 CLR 1, 119-120 [267]-[268] (Bell J relevantly agreeing at 241 [660]).

78 DDA s 41.

79 DDA s 125.

80 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40 (Mason J).

81 Cf. Cth [47], AS [62].

52. Understanding the Standards as a codification of how Part 2 of the DDA operates in a particular factual scenario is consistent with the object of certainty stated in cl 1.3(b) of the Standards. Nothing in the word "certainty" connotes a lower standard of conduct with respect to discrimination.

53. Even if it is accepted that the Standards contain "highly prescriptive" or "precise" rules,[82] the existence of detail in a Commonwealth law is not of itself conclusive of an inconsistency; the "central question" remains one of intention.[83] Given that the Standards codify how the obligations of non-discrimination in Part 2 of the DDA can be satisfied by specified persons in respect of a specific class of acts, detail is to be expected.

54. The references to "cost-effective" and "reasonably achievable" in cl 1.3(a) of the Standards do not tend towards an intention of exclusivity.

54.1. It is immaterial that the stated object in cl 1.3(a) of the Standards does not explicitly draw a connection to the concept of unlawfulness under the DDA.[84] Such a connection is explicit in the text of the Standards,[85] and implicit from the operation of s 34 of the DDA.

54.2. The type of access referred to in sub-clause (a), namely access which is "dignified, equitable, cost-effective and reasonably achievable", may be understood as an articulation of the type of access dealt with by the Standards which, by cl 3.1 and s 32 of the DDA, must be provided.

54.3. Nothing in cl 1.3(a) demands that "cost-effective" and "reasonably achievable" be understood without reference to the interests of the persons whom the Commonwealth law is designed to benefit. The adjectives "cost-effective" and "reasonably achievable" must be viewed in context. Two textual features of cl 1.3 indicate that they ought to include consideration of what is cost-effective and reasonably achievable for a person with a disability. First, the other adjectives used in cl 1.3(a), namely "dignified" and "equitable", plainly speak to the interests of a person with a disability. It would be surprising if the adjectives which followed did not share that common feature. Second, the focus of cl 1.3(a)

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82 Cth [47].

83 *Momcilovic* (2011) 245 CLR 1, 116 [261] (Gummow J), referred to with approval in *Outback Ballooning* (2019) 266 CLR 428, 447 [35] (Kiefel CJ, Bell, Keane, Nettle & Gordon JJ).

84 Cf. Cth [47]; AS [62].

85 RS [45].

is the class of persons to whom the provision of access is directed: "people with a disability". This may be contrasted with cl 1.3(b), which is directed to the interests of the people whose acts are regulated by the DDA.

54.4. That does not necessarily preclude understanding the references to "cost-effective" and "reasonably achievable" as extending to the interests of building certifiers, developers and managers. Indeed, such considerations are pursued by cl 4.1 of the Standards in making a concession for "unjustifiable hardship", the existence of which is informed by a context-specific examination of matters such as financial impacts, and the benefits and detriments, for all affected, of compliance or non-compliance (cl 4.1(3)). Such concessions mirror the DDA itself (s 11(1)(c) and (d)). Given such concessions in the DDA do not result in the exclusion of State laws, it should not be expected that the references to "cost-effective" and "reasonably achievable" in the Standards would found an intention to exclude State laws.

55. The DDA, in seeking to eliminate disability discrimination across certain areas as far as possible and ensure equality for persons with disabilities as far as practicable (see s 3), is beneficial legislation. The Standards, in codifying how the obligations of non-discrimination in Part 2 of the DDA can be satisfied by specified persons in respect of a specific class of acts, serve those beneficial objects. The beneficial nature of the Commonwealth law tends against an intention to exclude a compatible State law.[86]

No direct inconsistency arises

56. South Australia submits that no direct inconsistency arises.[87] An inconsistency does not arise merely because a State law imposes obligations additional to those in the Commonwealth law.[88] There must be some feature of the Commonwealth law which indicates that what the Commonwealth law provides for is regarded by it as essential and incapable of being undermined by a State law.[89] Each of the cases on which the appellants rely, *Dickson* and *Goulden*, provide examples of Commonwealth laws that were intended to operate by reference to an underlying assumption that a person will have a liberty to act in a particular manner. It is that underlying assumption of a liberty

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86 *Jemena* (2011) 244 CLR 508, 528 [57] (the Court).
87 Cf. AS [50].
88 Cf. AS [63].
89 *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 76 [27] (the Court).

which "sustains the conclusion that the positive authority was to take effect to the exclusion of any other law".[90]

57. In *Dickson*, the Court unanimously held that the Victorian criminal offence of conspiracy was inconsistent with the Commonwealth criminal offence of conspiracy. Critical to the Court's decision was their Honours' observation as to "the exclusion by the federal law of significant aspects of conduct to which the State offence attaches".[91] In doing so, their Honours referred to the "deliberate legislative choice" to "narrow" the scope of the Commonwealth criminal offence, as discussed in *R v LK*.[92] That narrowing was the product of a substantial law reform project to codify the Commonwealth criminal offence, to clarify and in some instances modify the common law position.[93] The Court considered that scheme contained an implicit "liberty" with respect to the matters which it deliberately excluded from the rule of conduct which it laid down, which denied the concurrent operation of the State law.[94]

58. The decision in *Goulden* did not involve the Court merely identifying the "central object" of the Commonwealth law and reaching a conclusion of inconsistency because the State law "would impair the achievement of that object".[95] There were two related steps which led to their Honours' conclusion that an inconsistency existed in that case. First, the Commonwealth scheme was premised on the *establishment* of an entitlement of a registered life insurance company to exercise its business judgment with respect to classifying risks and setting premiums.[96] Second, the State law would have "effectively precluded" the exercise of the business judgment on which the Commonwealth scheme was premised, by making it generally unlawful for a company to take account of a physical impairment in determining whether it would grant insurance and if so on what terms.[97]

59. The Commonwealth law in this case does not convey that the legal norms that it lays down, and no other legal norms, are to govern given cases. Unlike in *Dickson* and *Goulden*, the Commonwealth law is not premised on an underlying assumption that a

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90 *Dao v Australian Postal Commission* (1987) 162 CLR 317, 335 (the Court), quoting *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 260 (Mason J). Cf. AS [53]-[54].

91 *Dickson* (2010) 241 CLR 491, 505 [25] (the Court).

92 *Dickson* (2010) 241 CLR 491, 505 [24] (the Court).

93 *R v LK* (2010) 241 CLR 177, 220-224 [99]-[107] (Gummow, Hayne, Crennan, Kiefel & Bell JJ).

94 *Dickson* (2010) 241 CLR 491, 506 [29] (the Court); *Momcilovic* (2011) 245 CLR 1, 122 [276] (Gummow J).

95 Cf. AS [55].

96 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 336-337 (the Court).

97 *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 337 (the Court).

person will have a liberty to act in a manner beyond that dealt with in the Standards.[98] Subsection 13(4) of the DDA tends against any such assumption. The Standards do not, as the appellants contend, "relieve" persons to whom it applies from the norms set by the DDA.[99] Rather, the Standards codify the manner by which the obligations of non-discrimination in Part 2 of the DDA can be satisfied by specified persons in respect of a specific class of acts. It is not possible to read the Commonwealth law as conferring a person with a liberty or entitlement to act in a discriminatory manner, where that person complies with the Standards.[100] The Tasmanian law, if it attaches a consequence to the conduct in question, would not "deny or vary a right, power or privilege conferred by"[101] the Commonwealth law.

Part V: ESTIMATED TIME FOR ORAL ARGUMENT

60. It is estimated that up to 20 minutes will be required for the presentation of South Australia's oral argument.

Dated 26 November 2021

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[98] Cf. AS [63].
[99] Cf. AS [63].
[100] Cf. *Dickson* (2010) 241 CLR 491, 506 [29] (the Court), discussing *McWaters v Day* (1989) 168 CLR 289.
[101] *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61, 78 [32] (the Court).

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

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

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

10 and

DAVID CAWTHORN
Respondent

ANNEXURE TO SOUTH AUSTRALIA'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, South Australia sets out below a list of the particular constitutional provisions and statutes referred to in submissions.

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	Description	**Provisions**	**Version**
1.	*Commonwealth Constitution*	ss 75, 76, 109	Current
2.	*Anti-Discrimination Act 1998* (Tas)	ss 89	Version from 8 May 2019 to 4 November 2021
3.	*Australian Human Rights Commission Act 1986* (Cth)	Pt IIB	Current
4.	*Crimes Act 1914* (Cth)	s 4C(2)	Compilation prepared on 19 April 2011
5.	*Criminal Code Act 1995* (Cth)	Sch 1, s 300.4	Compilation prepared on 29 July 2011

	Description	Provisions	Version
6.	*Disability (Access to Premises – Buildings) Standards 2010* (Cth)	cll 1.3, 2.1, 2.2, 2.4, 3.1, 4.1	Compilation prepared on 1 May 2011
7.	*Disability Discrimination Act 1992* (Cth)	Part 2, and ss 3, 11, 13, 125	Current
8.	*Federal Court of Australia Act 1976* (Cth)	ss 21, 22, 23	Current
9.	*Judiciary Act 1903* (Cth)	ss 30, 32, 39, 39B, 79	Current
10.	*South Australian Civil and Administrative Tribunal Act 2013* (SA)	s 38B	Current
11.	*Tasmanian Civil and Administrative Tribunal Act 2020* (Tas)	s 131	Current