HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	H7/2021
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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

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

and

DAVID CAWTHORN
Respondent

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

Part I: CERTIFICATION

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

Part II: OUTLINE OF ORAL SUBMISSIONS

Ground 1: There was a "matter" before the Tribunal and the discrimination complaint formed part of the "matter"

2. The "objective assessment" recognised by this Court in *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 shapes the circumstances in which a "matter" arises. (SA [8]) The making of claim or a defence that is either colourable or so clearly untenable that it could not possibly succeed does not give rise to a real dispute and, accordingly, does not constitute a "matter" for the purposes of ss 75 and 76 of the *Constitution*. (SA [10]-[11])

3. On an objective assessment, the appellants' s 109 defence is neither colourable nor so clearly untenable that it could not possibly succeed. Accordingly, there was a "matter" before the Tribunal. (SA [13])

4. The "matter" before the Tribunal included the respondent's discrimination complaint. The respondent's submission to the contrary should not be accepted for the following three reasons. (RS [54], [55]; SA [18])

   4.1. The respondent's submission is inconsistent with the orthodox concept of a matter as encompassing all claims made within the scope of a justiciable controversy. (SA [19]; *Fencott v Muller* (1983) 152 CLR 570, 603 **JBA Vol 7, Tab 41, p 2237**)

   4.2. The respondent's submission would tend to undermine the constitutional implication discerned in *Burns v Corbett* (2018) 256 CLR 304 and is implausible. (SA [21]-[22]; *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361, 402 [121] **JBA Vol 14, Tab 108, p 5383**)

   4.3. Contrary to the respondent's submission, there were, and remain, Ch III courts with *jurisdiction* to determine the discrimination complaint and *power* to make orders of the kind provided for in s 89 of the *Anti-Discrimination Act 1998* (Tas) (Tasmanian Act). To the extent that the ordinary powers of Ch III courts are not sufficient to allow for the making of orders of that kind, s 79 of the *Judiciary Act 1903* (Cth) operates to pick up s 89 of the Tasmanian Act, making those powers available to determine the complaint in the exercise of federal jurisdiction. (SA [23]-[36]; *Rizeq v Western Australia* (2017) 262 CLR 1, 26 [63] **JBA Vol 10, Tab 74, p 3967**)

Ground 2: The Tasmanian Act was not inconsistent with the Commonwealth law

5. As a preliminary point, South Australia submits that irrespective of how this Court disposes of Ground 1, it is open to the Court to proceed to determine the Ground 2. In circumstances where further litigation between the parties on the substance of Ground 2 before a Ch III court remains a real prospect, considerations of judicial economy weigh in favour of dealing with the substance of Ground 2. (SA [37]-[38])

6. Turning to the substance of Ground 2, South Australia submits that while it remains useful to speak of notions of direct and indirect inconsistency, in the end, the question of inconsistency involves a search for the intention of the Commonwealth law to be exclusive. (SA [39]-[42])

7. Neither of the *Disability Discrimination Act 1992* (Cth) (Commonwealth Act) nor the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (Standards) evince an intention to be exclusive.

8. Beginning with the Commonwealth Act, s 13(4) is a provision which "accommodates federal diversity falling short of invalidating inconsistency", and speaks against exclusivity (SA [46]-[47]; *Momcilovic v The Queen* (2011) 245 CLR 1, 74 [110] **JBA Vol 8**, **Tab 52, p 2838**). So too does the beneficial purpose of the Commonwealth Act. (SA [55]; *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, 528 [57] **JBA Vol 7, Tab 47, p 2590**)

9. Turning to Standards, the textual features on which the appellants and the Commonwealth each rely (the objects clauses in cl 1.3) disclose no intention of exclusivity. Sub-cl 1.3(b) is expressed as promoting certainty in relation to compliance with the Commonwealth Act only. (SA [52]) The references in sub-cl 1.3(a) to "cost-effective" and "reasonably achievable" access are, at the very least, inclusive of the interests of the people with disability for whom the access is to be provided. (SA 54.3)

10. Further, to the extent that the concepts of "cost-effective" and "reasonably achievable" access may also be understood by reference to the interests of building certifiers, developers and managers, this purpose should not be seen as manifesting an intention to exclude the operation of concurrent state laws in circumstances where the protection of interests of these kinds contained in the Commonwealth Act itself – by way, for example, of unjustifiable hardship exceptions – do not give rise to this result by virtue of s 13(3). (SA [54.4])

11. The Standards codify how the obligations of non-discrimination in Part 2 of the Commonwealth Act can be satisfied by specified persons in respect of a specific class of acts. The analogies that the appellants seek to draw with *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 **JBA Vol 4, Tab 27** and *Dickson v The Queen* (2010) 241 CLR 491 **JBA Vol 6, Tab 37** fail. In those cases, the rule prescribed by the Commonwealth laws in question were held to contain an underlying assumption of a liberty to act. However, it is not possible to evince from the Commonwealth law in the present case an intention that compliance with the Standards confers a liberty or entitlement to act in a discriminatory manner. Accordingly, s 109 is not engaged. (SA [56]-[59])

Dated: 8 February 2022

MJ Wait SC