HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

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 THE STATE OF TASMANIA (INTERVENING)

Part I: Certification

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

Part II and III: Intervention

2. The Attorney-General for the State of Tasmania intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth). She does not intervene in support of the appellants or the respondents. Her submissions are limited to the first ground of the Notice of Appeal.

Part IV: Argument

A Summary

3. The Attorney-General does not intervene to engage with the merits of the s 109 argument determined by the Full Court of the Supreme Court of Tasmania (**Full Court**) or with respect to any question as to the validity of State law. She intervenes only for the purposes of establishing the correct approach to be taken by a State tribunal in considering its jurisdiction when faced with a federal claim.

4. It is submitted that the Anti-Discrimination Tribunal (**Tribunal**) was correct to hold that it did not have the jurisdiction to determine the respondent's complaint by reason of the federal matters raised before it.[1] The Full Court was wrong to hold that it did.[2]

5. It is not controversial that the Tribunal is not a 'court of a State' within Chapter III of the Constitution.[3] Nor is it controversial that its determinations about contraventions of, and the remedies it may grant under, the *Anti-Discrimination Act 1998* (Tas) (**AD Act**) involve the exercise of judicial power.[4] The Tribunal can plainly be invested with and exercise State judicial power,[5] but, as it is not a court of a State, it cannot be invested with and exercise federal judicial power.[6]

10 6. Nevertheless, the Full Court in the exercise of its appellate jurisdiction under s 15(1)(d) of the *Supreme Court Civil Procedure Act 1932* (Tas) and federal jurisdiction under s 39(2) of the *Judiciary Act 1903* (Cth)) considered that the Tribunal was able to determine its jurisdiction by considering the very issues which its jurisdiction did not empower it to consider. It was a consideration of those issues which led the Full Court to hold that:

(1) there was no direct or indirect inconsistency between s 34 of the *Disability Discrimination Act 1992* (Cth) (**DD Act**) and the requirements of the AD Act;[7] and

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1 Appeal Book, 16; *Cawthorn v Citta Hobart Pty Ltd* [2019] TASADT 10, [45] – [46].

2 Appeal Book, 34, 36; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, [26] – [27] (Blow CJ, Wood J substantially agreeing at [29], [39]).

3 *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 142 [236], 143 [239] (Kenny J).

4 *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 132 – 133 [205] – [207], 147 [253] (Kenny J); see also *Meringnage v Interstate Enterprises Pty Ltd T/A Tecside Group and Ors (according to the schedule attached) and Attorney-General of Victoria* (2020) 60 VR 361, 394 – 395 [102] – [103] (Tate, Niall and Emerton JJA).

5 *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 123 [204] – [205] (Kenny J).

6 *Burns v Corbett* (2018) 265 CLR 304, 340 [54] (Kiefel CJ, Bell and Keane JJ) 363 – 364 [118] – [119] (Gageler J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

7 Appeal Book, 32 – 33; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, [17] (Blow CJ, Wood J substantially agreeing at [29]).

(2) where s 34 of the DD Act applies it only operates to exempt a person from the requirements of that Act, and not the AD Act.[8] As such, the Tribunal was not bound to make findings as to whether the Disability Standards had been complied with and was, thus, not required to exercise federal adjudicative authority.[9]

The Full Court then purported to remit the matter to the Tribunal to determine 'according to law' on the apparent assumption that such determination no longer involved the exercise of federal jurisdiction.[10]

7. In doing so, the Full Court did not appreciate that the Tribunal is unable to embark upon a consideration of those issues. Its judgment departed from the clear rule that 'once a federal defence is raised … the *whole* matter is to be determined in exercise of federal jurisdiction'[11] unless the defence is 'colourable'[12] or there exists 'an independent and disparate cause of action of a non-federal kind.'[13] The Full Court also departed from the clear rule that once a matter is in federal jurisdiction it remains so regardless of whether the federal claim fails.[14]

8. The Full Court's holding that the Tribunal did not need to exercise federal judicial authority elides the distinction between the grant of authority to adjudicate and the law to be applied or the subject of adjudication.[15] The Full Court's approach requires the Tribunal to form an opinion about whether it has jurisdiction by adjudicating the controversy it does not have the jurisdiction to adjudicate. This approach occasions the

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[8] Appeal Book, 33; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, [20] – [21] (Blow CJ, Wood J agreeing at [29]).

[9] Appeal Book, 34; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, [26] (Blow CJ, Wood J agreeing at [29]).

[10] Appeal Book, 34; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, [26] (Blow CJ, Wood J agreeing at [29]).

[11] *Qantas Airways v Lustig* (2015) 228 FCR 148, 167 [82] (Perry J) citing *Felton v Mulligan* (1971) 124 CLR 367, 373 (Barwick CJ); *Moorgate Tobacco Company Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 476 (Stephen, Mason, Aickin and Wilson JJ, Barwick CJ agreeing at 467) (emphasis in original).

[12] *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, 219 (Bowen CJ, Morling and Beaumon JJ).

[13] *Moorgate Tobacco Company Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 476 (Stephen, Mason, Aickin and Wilson JJ, Barwick CJ agreeing at 467).

[14] *Rana* v *Google Inc* (2017) 254 FCR 1, 7 [21] (Allsop CJ, Besanko and White JJ); see also: *Moorgate Tobacco Company Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 476 (Stephen, Mason, Aickin and Wilson JJ, Barwick CJ agreeing at 467); *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481, 481 – 482 (Neaves, Ryan and Gummow JJ); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 597 [85] (French J).

[15] *Fencott v Muller* (1983) 152 CLR 570, 606 (Mason, Murphy, Brennan and Deane JJ) quoting *Felton v Mulligan* (1971) 124 CLR 367, 393 (Windeyer J).

'extremely inconvenient result that the existence or absence of [a tribunal's] jurisdiction to deal with a particular claim would depend upon the substantive result of that claim.'[16]

9. Once the appellants raised the defence under s 34 of the DD Act (as the Full Court accepted they, in good faith, did)[17] it was necessary for that issue to be determined by a body with authority to decide it.

B 'Matter' attracting Federal Jurisdiction

10. A 'matter', as a justiciable controversy, concerns the 'subject matter for determination in a legal proceeding – "controversies which *might* come before a Court of Justice".'[18] For a matter to arise, all there must be is a 'claim' that raises a 'genuine' controversy about an 'immediate right, duty or liability to be established by the determination of the Court.'[19] The merits of a genuine claim do not, otherwise, prevent a matter arising: '[a] matter can exist even though a right, duty or liability has not been, and may never be, established.'[20]

11. It is submitted that a matter attracting federal jurisdiction arose in this case when the appellants made the claim that because they had complied with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth), in accordance with ss 31 and 34 of the DD Act the respondent's complaint could not be established.[21]

12. It is well recognised that a federal matter may, as here, be raised by a defence.[22] Barwick CJ said in *Felton v Mulligan*[23] federal jurisdiction is attracted 'where the matter … became or involve[s] by reason of the defence raised … either wholly or partly a matter

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16 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, 219 (Bowen CJ, Morling and Beaumont JJ).

17 *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, [5] (Blow CJ, Wood J agreeing at [29]).

18 *Palmer v Ayres* (2017) 259 CLR 478, 490 [26] (Kiefel, Gageler, Keane, Nettle and Gordon JJ) (emphasis in original) citing *South Australia v Victoria* (1911) 12 CLR 667, 675; *Abebe v Commonwealth* (1999) 197 CLR 510, 523 – 524 [24] (Gleeson CJ and McHugh J); *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1, 14 [50] (Wilcox, Sackville and Katz JJ).

19 *Palmer v Ayres* (2017) 259 CLR 478, 491 [27] (Kiefel, Gageler, Keane, Nettle and Gordon JJ).

20 *Palmer v Ayres* (2017) 259 CLR 478, 491 [27] (Kiefel, Gageler, Keane, Nettle and Gordon JJ).

21 Appeal Book, 10; *Cawthorn v Citta Hobart Pty Ltd* [2019] TASADT 10, [20].

22 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1136 (Griffith CJ, Barton O'Connor JJ).

23 (1971) 124 CLR 367.

arising under a law made by the [Commonwealth] Parliament.'[24] As Menzies J explained:

> A matter arises under a law when it is necessary in litigation to determine whether that law confers a right or affords a defence which is an issue in the litigation. A matter arises under a law of the [Commonwealth] Parliament when in a proceeding it is necessary that there should be a decision upon a claim made by one of the parties to the litigation which is based upon that law ... A "matter" need not be a "proceeding"; it may be part of a proceeding, e.g. a defence that the law authorizing the proceeding is unconstitutional. So it is that a matter may arise under a law made by the Parliament in a proceeding which does not arise under that law.[25]

13. In this case, the defence raised a federal matter by calling into issue the application of provisions of a Commonwealth Act and seeking the resolution of a point concerning s 109 of the Constitution.[26] The Full Court did not address itself to this. It fastened instead on the principle that the Tribunal is entitled to form an opinion about its jurisdiction.[27]

14. It was not to the point, however, that the Tribunal could form an opinion about whether the DD Act and the AD Act were capable of concurrent operation for the purposes of s 109 of the Constitution.[28] That question should not have arisen. There is a clear distinction between jurisdiction in the sense of authority to determine the existence of jurisdiction, and jurisdiction to determine the substance of a matter. Jurisdiction in the first sense is only 'a preliminary or qualified jurisdiction' which does not, as it does in the second sense, empower the hearing and determination of a justiciable controversy.[29] The Full Court's determination that s 34 of the DD Act afforded the appellants no defence must have accepted that there was a justiciable controversy arising under that Act that was susceptible, and in need, of determination. It is submitted that once a

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[24] *Felton v Mulligan* (1971) 124 CLR 367, 374.

[25] *Felton v Mulligan* (1971) 124 CLR 367, 383.

[26] *Agrtrack (NT) Pty Ltd v Hatfield* (2005) 233 CLR 251, 261 [26] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[27] *Re Adams and the Tax Agent's Board* (1976) 7 ATR 87, 88 (Brennan J).

[28] Cf *Re Adams and the Tax Agent's Board* (1976) 7 ATR 87, 88 (Brennan J).

[29] *Pretorimor Companhia de Petroleos SARL and anor v Commonwealth of Australia* (2003) 128 FCR 507, 510 [11] (Black CJ and Hill J).

tribunal forms that view, as the Tribunal did, it identifies it has no jurisdiction to determine that controversy.

15. Accordingly, whether a justiciable controversy attracting federal jurisdiction arises or not does not depend upon the answer to its resolution. Once the appellants raised a defence under s 34 of the DD Act it was 'necessary' for that issue to be determined by a body with authority to decide it. The defence raised was self-evidently sourced in a law of the Commonwealth. Accordingly, to ascertain its jurisdiction, the Tribunal had no occassion to form an opinion about whether s 109 of the Constitution operated to invalidate any part of the AD Act so as to make the defence good. The only question for the Tribunal was whether the defence raised a 'matter' for the purposes of s 76(i) and (ii) of the Constitution.

16. The answer to that question was informed by the requirement that the defence claimed must not be colourable. Perry J in *Qantas Airways Ltd v Lustig and Ors*[30] described colourability in the following terms:

> The raising of a federal claim will ordinarily give rise to a federal matter unless it is colourable in the sense that it is made for the "improper purpose of fabricating jurisdiction": *Burgandy Royale* at 219 (the Court). The question, therefore, of whether a claim is tenable will be relevant to that question but not determinative save (rarely) where a claim is so obviously untenable, and would have been so to those who propounded it, that the claims is found to be colourable.[31]

The tribunal in *Lustig*, like the Full Court in this case, fell into error when it purported to determine whether Qantas's defences were 'valid defences'.[32] Unlike the Full Court, Perry J determined that she was 'seized only of the jurisdiction issue' and that consequently it was 'not appropriate to go further and to consider otherwise whether the defence is valid.'[33] Her Honour also rejected the first and second respondents' contention that the tribunal's description of Qantas' defences as 'fanciful' was, in substance, a determination that the defence was 'colourable'. Treating the tenability of Qantas' claim as simply a question of whether there was a genuine controversy attracting federal jurisdiction she made clear that '[t]here is nothing which lends any support in my

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[30] (2015) 228 FCR 148.

[31] *Qantas Airways Ltd v Lustig and Ors* (2015) 228 FCR 148, 169 [88].

[32] *Qantas Airways Ltd v Lustig and Ors* (2015) 228 FCR 148, 170 [91].

[33] *Qantas Airways Ltd v Lustig and Ors* (2015) 228 FCR 148, 153 [8].

view to any suggestion that [the defences] were not raised genuinely by Qantas in good faith.'[34]

17. It is submitted that there is a clear nexus between the tenability of a claim and whether or not it is colourable. However, the tenability of a claim may not be determinative of a claim's colourability. French J, with whom Beaumont and Finkelstein JJ agreed, in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (***Johnson Tiles***)[35] explained that:

> In the ordinary course the contention that a claim is not tenable will not go to jurisdiction unless dependent upon a submission that the claim is outside jurisdiction. And indeed, within that class a claim may be untenable because its very nature denies its character as an element of any matter or controversy in respect of which the Court can exercise jurisdiction. So a proceeding based upon the proposition that the Commonwealth Constitution is invalid does not disclose a matter arising under the Constitution or involving its interpretation – *Nikolic v MGICA Ltd* [1999] FCA 849. A claim may be a sham reflecting no genuine controversy and therefore establishing no matter in respect of which the Court may exercise jurisdiction. There has been discussion of so called "colourable" claims made under the Trade Practices Act for the improper purpose of fabricating jurisdiction. The mere fact that a claim is struck out as untenable does not mean it is colourable in that sense.[36]

French J observed that the pleading of the Trade Practices Act claim in that case advanced the 'legitimate forensic purpose of endeavouring to establish a cause of action which would not require proof of a duty of care.'[37] His Honour accepted that such an endeavor, despite its 'precipitate initiation and chequered history',[38] was not colourable '*in the sense* that would deprive the court of jurisdiction.'[39] That is, it did not have the effect that there was no 'real controversy' involving federal jurisdiction.[40]

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[34] *Qantas Airways Ltd v Lustig and Ors* (2015) 228 FCR 148, 170 [92].

[35] (2000) 104 FCR 564

[36] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 598 – 599 [88].

[37] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 599 [88].

[38] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 599 [88].

[39] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 599 [88] (emphasis added).

[40] See *Nikolic v MGICA Ltd* [1999] FCA 849, [9], [11] – [12] (French J); see also *Ahmed c Harbour Radio Pty Ltd* (2009) 180 FCR 313, 329 [64]; *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* (2007) 242 ALR 370, 378 [32] – [33] (Finn J).

18. That being so, contrary to the Full Court's reasoning in this case, it is not to the point that an otherwise genuine claim is 'misconceived'.[41] The relevant question is whether federal jurisdiction is properly invoked.[42] The distinction was illustrated in *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (***Elna***).[43] Gummow J observed that '[o]nce federal jurisdiction is attracted it is not lost because the claim or assertion which attracted it has not or cannot be substantiated, or has been displaced by some countervailing claim or assertion.'[44] His Honour referred to two authorities. The first was *R v Carter; Ex Parte Kisch*[45] in which Evatt J held that 'the constitutional objection is untenable … [t]he jurisdiction of this Court is not lost by reason of the
10 rejection of the constitutional point.'[46] The second authority was *R v Bevan; Ex parte Elias*[47] in which Starke J accepted the same proposition.[48] In *Elna*, the respondent submitted that the applicant's trade practices claims ought to be struck out as disclosing no reasonable cause of action.[49] Gummow J held, however, that '[e]ven if, as I am not, I were minded to strike out the two trade practices claims, that would, as I have indicated, not remove or vacate the Court's jurisdiction in respect of the contract claim.'[50]

C The capacity of the Tribunal to form an opinion about its jurisdiction

19. On this point, the Attorney-General gratefully adopts paras [23] – [28] of the Attorney-General for the Commonwealth's submissions.

D Conclusion

20 20. The possibility that once a Chapter III Court has adjudicated issues involving the exercise of federal judicial power, the matter can return to a tribunal for it to exercise statutory

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41 Appeal Book, 29; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, [5] (Blow CJ, Wood J agreeing at [29]).

42 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564, 598 [87] (French J) citing *Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd* (1986) 161 CLR 543, 553 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

43 (1987) 16 FCR 410.

44 *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410, 415.

45 (1934) 52 CLR 221.

46 *R v Carter; Ex Parte Kisch* (1934) 52 CLR 221, 224.

47 (1942) 66 CLR 452.

48 *R v Bevan; Ex parte Elias* (1942) 66 CLR 452, 466.

49 *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410, 411, 416

50 *Elna Australia Pty Ltd v International Computers (Aust) Pty Ltd (No 2)* (1987) 16 FCR 410, 416.

powers as if no federal issue had been raised is incompatible with *Felton v Mulligan*.[51] The Tribunal correctly recognised that where a defence owed its existence to a Commonwealth statute the 'Federal jurisdiction is enlivened regardless of the merits ... [a]ny attempt to assess those merits would necessarily involve an exercise of federal adjudicative authority which has not been conferred on the Tribunal.'[52] This determination is consistent with the reasoning of the Full Court of the Federal Court in *Rana* v *Google Inc*,[53] quoting with approval the following passage from the reasons of Allsop J in *Macteldir Pty Ltd* v *Dimovski*[54]:

> It is a 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.'[55]

21. There was, therefore, no basis on which the Full Court could remit the matter to the Tribunal.

Part V: Estimate of Time Required for Presentation of Oral Argument

22. The Attorney-General estimates she will require approximately 10 minutes for the presentation of her oral submissions.

Dated 26 November 2021

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[51] Cf *Sunol v Collier* (2012) NSWLR 619, 624 (Bathurst CJ, Allsop P and Basten JA) referring to *Felton v Mulligan* (1971) 124 CLR 367.

[52] Appeal Book, 15; *Cawthorn v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd* [2019] TASADT 10, [43].

[53] (2017) 254 FCR 1, 7 [21].

[54] (2005) 226 ALR 773.

[55] *Macteldir Pty Ltd* v *Dimovski* (2005) 226 ALR 773, 784 [36].

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BETWEEN:

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First Appellant

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and

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Respondent

ANNEXURE TO THE ATTORNEY-GENERAL FOR THE STATE OF TASMANIA (INTERVENING)'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Tasmanian Attorney-General sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No	Description	Version	Provisions
	Constitutional Provisions		
1	*Australian Constitution*	Current	ss 75, 76, 109
	Legislation		
2	*Anti-Discrimination Act 1998* (Tas)	Current from 24 June 2015 to 8 April 2018	

3	*Disability Discrimination Act 1992* (Cth)	Compilation no 31 (1 July 2016 to 11 October 2017)	ss 31, 34
4	*Disability (Access to Premises – Buildings) Standards 2010* (Cth)	Compilation prepared on 1 May 2011	
5	*Judiciary Act 1903* (Cth)	Compilation no 46 (25 August 2018 to 31 August 2021)	s 39(2)
6	*Supreme Court Civil Procedure Act 1932* (Tas)	Current from 9 September 2019 to date).	s 15(1)(d)