HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H7 of 2021

B E T W E E N:

CITTA HOBART PTY LTD
First Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

AND

DAVID CAWTHORN
Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to section 78A of the *Judiciary Act 1903* (Cth), in respect of ground 1 only, in support of the respondent.

Date of Document: 26 November 2021

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PART III: ARGUMENT

3. This case relates to construction of a building called Parliament Square with only two of three entrances which provide mobility access for wheelchair users with spinal cord injuries. The building is being constructed by the appellants, as developer and landowner. The respondent has complained to the Tasmanian Anti-Discrimination Tribunal ("**Tribunal**") that the lack of mobility access at the third entrance is discriminatory, contrary to sections 14, 15 and 16(k) of the Tasmanian *Anti-Discrimination Act 1998* (Tas) ("**Tasmanian Discrimination Act**").

4. The appellants have raised an inconsistency defence under section 109 of the *Constitution*, claiming that there cannot be discrimination contrary to the Tasmanian Discrimination Act where:

   (a) the building complies with the *Disability (Access to Premises – Buildings) Standards 2010* (**Access Standards**) formulated pursuant to section 31 of the Commonwealth *Disability Discrimination Act 1992* (Cth) ("**Commonwealth Discrimination Act**"); and

   (b) if a person acts in accordance with a disability standard formulated pursuant to section 31, the anti-discrimination provisions contained in Part 2 of the Commonwealth Discrimination Act do not apply: section 34.

5. The appellants also raise an antecedent point, which is the subject of appeal ground 1. They say that determination of the existence of any inconsistency involves the exercise of federal jurisdiction by the Tribunal, which is beyond the jurisdiction of the Tribunal. Based upon the implied constitutional limitation identified in ***Burns v Corbett***,[1] the appellants therefore contend that the Tribunal correctly refused to hear, and correctly dismissed, the respondent's complaint.[2]

6. The Tribunal accepted the appellants' submissions on the antecedent issue and dismissed the complaint.[3] The Full Court unanimously allowed the appeal. It considered that, as there was no inconsistency between the Tasmanian and Commonwealth Discrimination Acts, the Tribunal had a duty to hear and determine

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1 [2018] HCA 15; (2018) 265 CLR 304.
2 [2019] TASADT 10, [25]-[27].
3 [2019] TASADT 10, [46] and order 1.

the respondent's complaint. The Full Court remitted the matter to the Tribunal for hearing.[4]

7. The Tribunal and the Full Court considered that the appellants' inconsistency defence was not "colourable".[5] It was not invoked only for the purpose of "fabricating jurisdiction" or, in other words, to thwart a decision by the Tribunal, without any real prospect of success.[6]

8. The critical threshold issue, raised by appeal ground 1, is whether the Tribunal can form a view about whether there is an inconsistency between State and Federal discrimination legislation in order to decide whether it has jurisdiction to hear a complaint; or does forming a view on that issue involve the exercise of federal jurisdiction by a State tribunal, which is prohibited by Ch III of the Commonwealth *Constitution*?

Distinction between Existence and Exercise of Jurisdiction

9. The Tribunal is not a "court of a State" within the meaning of section 77(iii) of the *Constitution*. At the material time, members of the Tribunal held office at will, by reason of section 12 of the Tasmanian Discrimination Act.[7] The effect was that the Tribunal lacked the necessary impartiality and independence to be a Ch III court: see ***Commonwealth v Anti-Discrimination Tribunal (Tas)***.[8] It is not suggested otherwise in this appeal.

10. There is a distinction between two propositions:

    (a) a statutory tribunal must determine the existence of its own jurisdiction before it can act; and

    (b) a statutory tribunal cannot exercise adjudicative authority within federal jurisdiction to determine a matter between parties before it.

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4 [2020] TASFC 15, Order 3.
5 [2019] TASADT 10, [43]; [2020] TSAFC 15, [5], [29] (Blow CJ, Wood J generally agreeing).
6 Compare ***Qantas Airways Ltd v Lustig*** [2015] FCA 253; (2015) 228 FCR 148 at 169 [88] (Perry J).
7 This provision was repealed on 5 November 2021 by section 9 of the *Tasmanian Civil and Administrative Tribunal (Consequential Amendments) Act 2021* (Tas). The Anti-Discrimination Tribunal was replaced by the Tasmanian Civil and Administrative Tribunal, which was created by the *Tasmanian Civil and Administrative Act 2020* (Tas) and amended by the *Tasmanian Civil and Administrative Tribunal Amendment Act 2021* (Tas).
8 [2008] FCAFC 104; (2008) 169 FCR 85 at 143 [239] (Kenny J).

The first enquiry is anterior to the second: ***Wilson v Chan & Naylor Parramatta Pty Ltd*** ("***Wilson***").[9]

11. As to the first proposition: a statutory tribunal always has a duty to determine the existence of its own jurisdiction. That is a consequence of its obligation to act lawfully. A tribunal must identify the law applicable to the task which it has to consider. If a constitutional question arises about the applicable law, the Tribunal must consider the constitutional question, although the opinion of the Tribunal will not bind the parties. Precisely what it means for the Tribunal to consider the constitutional question requires elaboration and raises the critical issue for appeal ground 1. This issue is elaborated in the next section.

12. Subject to the elaboration in the next section, the matters stated in the last paragraph were first established in relation to constitutional issues by Brennan J in the Administrative Appeals Tribunal: ***Re Adams and The Tax Agents' Board*** ("***Adams***").[10] See also in the NSW Court of Appeal: ***Sunol v Collier,***[11] ***Attorney General for New South Wales v Gatsby***,[12] ***Gaynor v Attorney General for New South Wales*** ("***Gaynor***"),[13] ***Wilson***;[14] and in the Federal Court: ***Qantas Airways Ltd v Lustig*** ("***Lustig***").[15]

13. In ***Wilson***, Leeming JA said (with the agreement of Macfarlan JA) that the New South Wales Civil and Administrative Tribunal ("**NCAT**"):[16]

> "is under a duty to satisfy itself whether a claim made to it is within its limited authority … That duty carries with it authority to determine, either positively or negatively, whether it has jurisdiction to determine a claim. In deciding that question, NCAT is not exercising federal judicial power – *even if it concludes that it lacks jurisdiction because the claim invokes federal jurisdiction*. Rather, NCAT forms an opinion on whether the claim amounts to one invoking federal jurisdiction, and acts upon that opinion by dismissing the proceedings for want

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9 [2020] NSWCA 213; (2020) 103 NSWLR 140 at 145 [17] (Leeming JA, Macfarlan JA agreeing), 156 [73] (White JA).
10 (1976) 12 ALR 239 at 241-242.
11 [2012] NSWCA 14; (2012) 81 NSWLR 619 at 624 [20] (The Court).
12 [2018] NSWCA 254; (2018) 99 NSWLR 1 at 60 [281] (Leeming JA, Bathurst CJ agreeing at 20 [96] and Beazley P agreeing at 39 [197]).
13 [2020] NSWCA 48; (2020) 102 NSWLR 123 at 131 [22] (Bell P), 148 [100] (Basten JA), 155-156 [130]-[131] (Leeming JA).
14 [2020] NSWCA 213; (2020) 103 NSWLR 140 at 144 [14] (Leeming JA, Macfarlan JA agreeing), 156 [73]-[74] (White JA).
15 [2015] FCA 253; (2015) 228 FCR 148 at 170 [91] (Perry J).
16 [2020] NSWCA 213; (2020) 103 NSWLR 140 at 144 [14].

> of jurisdiction, or transferring them to a court, if it is of the opinion that the claim is outside its jurisdiction." (emphasis present in judgment)

14. As to the second proposition: Ch III of the *Constitution* prevents, by implication based upon its structure and purpose, the exercise of adjudicative authority within federal jurisdiction by a statutory tribunal which is not a Ch III court.

15. In ***Burns v Corbett***,[17] Kiefel CJ, Bell and Keane JJ, and Gageler J (writing separately), held that the terms, structure and purpose of Ch III leave no room for the possibility that adjudicative authority in respect of matters described in sections 75 and 76 might be exercised by, or conferred by any party to the federal compact upon, an organ of government, federal or State, other than a court referred to in Ch III of the *Constitution*.

Determining the Existence of Jurisdiction in relation to Constitutional Questions

Two Approaches

16. There is a difference in approach about what it means for a statutory tribunal to determine the existence of its own jurisdiction in relation to constitutional questions:

    (a) on one view, this means that a tribunal must be satisfied that it will not be called upon to exercise federal jurisdiction;

    (b) on another view, a tribunal will not be satisfied that it has jurisdiction if, arguably, there is a non-colourable claim which arises in federal jurisdiction (the "**alternative view**").

17. In ***Adams***, Brennan J appears to have adopted the first view.[18] His Honour said:[19]

> "If it be allowed that there is, in Australian legal theory, a competence in an administrative body to consider and form an opinion upon the constitutional validity of a statute in order that that body may act in accordance with law, the competence to form the opinion and to be informed on the question of constitutional invalidity should not be treated as a jurisdiction invested in the administrative body to reach a conclusion having legal effect. It is merely a means which the administrative body may adopt in moulding its conduct to

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17 [2018] HCA 15; (2018) 265 CLR 304 at 337 [46] (Kiefel CJ, Bell and Keane JJ), 363-364 [118] (Gageler J).

18 See ***Attorney-General (NSW) v 2UE Sydney Pty Ltd*** [2006] NSWCA 349; (2006) 236 ALR 385 at 393 [37] (Spigelman CJ, Ipp JA concurring).

19 (1976) 12 ALR 239 at 245.

> accord with the law. The formation of the opinion is not a power vested in the administrative body which the members must personally exercise. They may be guided by the competent legal advice of others and they will be held to act reasonably if they act on "the faith of a statute not yet held to be invalid"… "

18. Likewise, in ***Attorney-General (NSW) v 2UE Sydney Pty Ltd*** ("***2UE***"),[20] Spigelman CJ said:

> "A state tribunal may, in my opinion, consider the constitutional validity of state legislation in the course of the exercise of its statutory powers. However, no state tribunal can exercise the judicial power of the Commonwealth."

19. Similarly, in ***Sunol v Collier***,[21] the NSW Court of Appeal said:

> "… a decision of the Tribunal in respect of a particular matter may depend upon a view about the constitutional validity of State legislation, but that opinion is not registered as a judgment, nor is it enforceable as such against any person. 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. It did not have jurisdiction to determine the question: the validity of the order will depend upon the conclusion of the Supreme Court (and if challenged, the High Court) as to the correct answer to the constitutional question."

20. In ***Sunol v Collier***, the Court of Appeal held that a question of potential constitutional invalidity of State legislation, due to the operation of section 109 of the *Constitution*, did not arise in the proceedings before an appeal panel of the NSW Administrative Decisions Tribunal and therefore could not be referred to the Court pursuant to a relevant statutory power to refer questions of law arising in an appeal. The question involved a jurisdictional question about which the panel should form its own opinion. The question was not part of the appeal itself.

21. The principles underpinning ***Sunol v Collier*** also appear to have been adopted in ***Gaynor***.[22] In particular, Leeming JA considered that the task of a statutory tribunal is similar to that of a court determining its own jurisdiction.

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20 [2006] NSWCA 349; (2006) 236 ALR 385 at 399 [80].
21 [2012] NSWCA 14; (2012) 81 NSWLR 619 at 624 [20].
22 [2020] NSWCA 48; (2020) 102 NSWLR 123 at 131 [22] (Bell P), 148 [100] (Basten JA), 155-156 [130]-[132] (Leeming JA).

22. By contrast, the approach of Perry J in ***Lustig*** exemplifies the alternative view. Her Honour said:[23]

> "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" …
>
> Both the State and Qantas submitted that the same test of colourability applies to the question here, as to whether the raising of a federal defence gives rise to the matter arising under a Commonwealth law so as to take the matter outside VCAT's jurisdiction. Messrs Lustig and De Simone appeared to accept the test although it is clear that they took a much broader view of when a defence might be "colourable". Their submissions assumed that the Court (and VCAT) could find that no federal defence was raised where it was not supported in law or otherwise valid which does not accord with the authorities to which I referred and must be rejected.
>
> In this regard, all parties accepted that VCAT has power to form a view as to the existence of its own jurisdiction and therefore as to whether a federal defence to a claim is or is not colourable. I agree with that position. As the State pointed out in its submissions, there is a well-recognised distinction between jurisdiction (in the sense of authority) to determine jurisdiction, and jurisdiction to determine the substance of the matter … As VCAT is not a court, its opinion on the question of jurisdiction is not binding in the sense of an authoritative decision of a court, although that does not prevent VCAT from forming an opinion: *Re Adams*. However, the State rightly submitted that the Tribunal fell into error in dealing with the merits of the federal defence raised by Qantas and did not confine itself to forming a view on the jurisdictional issue. That is apparent from the Tribunal's conclusion … that it had power to determine whether the defences raised by Qantas are "valid defences" and of its subsequent assessment of the "validity" of Qantas's defences: … While, therefore, the Tribunal described the defence raised by Qantas in reliance on the Carriers' Liability Act as "fanciful", its reasoning does not suggest that the Tribunal intended thereby to find that the defence was "colourable" in the relevant sense. I reject the submission of Messrs Lustig and De Simone to the contrary."

The Genesis of the Alternative View

23. The decision in ***Lustig*** is the first time that the alternative view was suggested. The only case considered by Perry J which concerned a tribunal's duty to consider the existence of its own jurisdiction was ***Adams***. However, Perry J's reference to ***Adams*** was not directly relevant to which of the views about the existence of jurisdiction should be adopted. It was on the point that the opinion of a tribunal

[23] [2015] FCA 253; (2015) 228 FCR 148 at 169 [88], 170 [90]-[91].

upon the question of its own jurisdiction is not binding in the sense of an authoritative decision of a court.[24]

24. ***Lustig*** purported to transfer the non-colourability principles from the question of whether the Federal Court of Australia has jurisdiction to hear all claims before it, to the issue of whether a state tribunal can form an opinion as to whether it has no jurisdiction to determine any matter in front of it. Prior to the Tribunal's decision in the present case, ***Lustig*** was the only case which had transported the principles about non-colourable claims from one context to another. It did so without any explanation why this should occur. That attempt should be rejected.

10 ***The Conceptual Basis for the Alternative View***

25. The conceptual basis underlying the alternative view is the assumption that a tribunal exercises federal judicial power in a matter by forming a non-binding opinion about the existence of its own jurisdiction whenever a non-colourable federal claim is raised. All that Perry J said in ***Lustig*** was:

> "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."[25]

26. Essentially, the argument proceeds in two steps:

(a) any decision about a constitutional matter, including a Tribunal forming a non-
20 binding opinion about the extent of its jurisdiction, involves an exercise of federal judicial power; and

(b) once any aspect of a case involves an exercise of federal judicial power, the whole case is within federal jurisdiction, subject to the federal claim not being colourable.

27. The first step in the argument is critical to the appellant's position and supporting interveners.[26] It should not be accepted. Essentially, for reasons explained in the next section, that is because a tribunal which forms a correct view as to the

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24 [2015] FCA 253; (2015) 228 FCR 148 at 170 [91].
25 [2015] FCA 253; (2015) 228 FCR 148 at 169 [88].
26 See Appellants' Submissions, [24]-[25], [40]-[41]; Commonwealth's Submissions, [11], [28]; NSW's Submissions, [35].

existence of its jurisdiction, including forming a view on a constitutional question, does not exercise federal judicial power in a matter.

The Reasons Why the Alternative View Should be Rejected

28. There are five reasons why, in principle, the alternative view should be rejected.

29. First, the formation of a non-binding opinion by a tribunal about its jurisdiction is not an exercise of adjudicative authority about a "matter" within federal jurisdiction. The decision of a tribunal about the existence of its own jurisdiction does not determine in an enforceable way any legal rights, duties or liabilities of the parties to any dispute before it. It is only such a determination which involves any exercise of judicial power.[27]

30. This point has been accepted by the decisions in the NSW Court of Appeal referred to previously at paragraphs [18]-[21] above.[28] In particular, in ***Wilson,*** Leeming JA (with the agreement of Macfarlan JA) upheld the power of the NCAT to make costs orders in respect of NCAT forming an opinion about whether a claim invoked federal jurisdiction and in respect of the fact that costs had been incurred in connection with non-jurisdictional aspects of a proceeding. Leeming JA distinguished the formation of opinion about whether a claim invoked federal jurisdiction, and the costs incurred in connection with non-jurisdictional aspects of a proceeding, from the costs incurred in a purported exercise of non-existent jurisdiction. His Honour said only costs in the last category related to an exercise of adjudicative authority about a matter within federal jurisdiction[29] and were precluded by the implied constitutional limitation identified in ***Burns v Corbett***. He considered that: "where the implied constitutional limitation bites is to prevent costs orders which are consequent upon or linked to the adjudication of aspects of the matter which are in federal jurisdiction".[30] That comment need not have been confined only to costs orders.

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27 ***Brandy v Human Rights and Equal Opportunity Commission*** (1995) 183 CLR 245 at 260 (Mason CJ, Brennan and Toohey JJ), 269 (Deane, Dawson, Gaudron and McHugh JJ).

28 See especially ***Gaynor v Attorney General (NSW)*** [2020] NSWCA 48; (2020) 102 NSWLR 123 at 131 [22] (Bell P), 148 [100] (Basten JA), 155-156 [130]-[131] (Leeming JA); ***Wilson v Chan & Naylor Parramatta Pty Ltd*** [2020] NSWCA 213; (2020) 103 NSWLR 140 at 144-145 [13]-[15] (Leeming JA, Macfarlan JA agreeing), 156 [73] (White JA).

29 [2020] NSWCA 213; (2020) 103 NSWLR 140 at 145-148 [17]-[31].

30 [2020] NSWCA 213; (2020) 103 NSWLR 140 at 142 [4].

31. Another way of putting this is to say that if a tribunal does not have the ability to exercise adjudicative authority within federal jurisdiction, it never has any power or authority to make any binding orders between parties before it. Accordingly, there is and never will be any constitutional "matter" for Ch III purposes.

32. If a tribunal correctly forms the opinion that it has no jurisdiction, as determination of a claim will involve the exercise of federal judicial power, the tribunal will simply dismiss the complaint for want of jurisdiction and there will never have been any exercise of judicial power in any constitutional "matter". Dismissing a claim for want of jurisdiction does not involve the exercise of any federal judicial power.[31] However, as ***Wilson*** demonstrates, upon such a dismissal, costs may nevertheless still be ordered in respect of all aspects of the case. Where a claim is dismissed for want of jurisdiction there will never be costs incurred in the purported exercise of non-existent jurisdiction.

33. On the other hand, if a tribunal is wrongly of the opinion that it has jurisdiction, when it does not, by reason that it is purporting to exercise federal judicial power, it is the subsequent attempt to exercise federal judicial power which is capable of challenge. Any purported orders would themselves be liable to be set aside upon the basis that they were made without jurisdiction.[32] Although the anterior opinion about jurisdiction may have been incorrectly reached, what is prohibited by the implied constitutional limit based upon Ch III is (as Leeming JA said in ***Wilson***)[33] the tribunal making purported orders "which are consequent upon or linked to the adjudication of aspects of the matter which are in federal jurisdiction".[34]

34. Secondly, the foundational obligation of a tribunal is to act lawfully. The requirement that any tribunal should satisfy itself as to the existence of its

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31 ***Wilson v Chan & Naylor Parramatta Pty Ltd*** [2020] NSWCA 213; (2020) 103 NSWLR 140 at 145 [17] (Leeming JA, Macfarlan JA agreeing), referring to ***Residual Assco Group Ltd v Spalvins*** [2000] HCA 33; (2000) 202 CLR 629 at 640-641 [17] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) in the opposite situation of a federal court not determining a State matter.

32 ***Sunol v Collier*** [2012] NSWCA 14; (2012) 81 NSWLR 619 at 624 [20] (The Court); ***Wilson v Chan & Naylor Parramatta Pty Ltd*** [2020] NSWCA 213; (2020) 103 NSWLR 140 at 145 [18] (Leeming JA, Macfarlan JA agreeing).

33 ***Wilson v Chan & Naylor Parramatta Pty Ltd*** [2020] NSWCA 213; (2020) 103 NSWLR 140 at 142 [4].

34 The consideration in paragraphs [32]-[33] of these submissions means that it is unnecessary to resolve whether the Tasmanian Anti-Discrimination Tribunal in fact exercises judicial power, as submitted by the AHRC.

jurisdiction is a fundamental aspect of the rule of law. [35] Ch III does not alter this principle. The obligation of a tribunal to consider its own jurisdiction is not transformed simply because a constitutional question is raised. Tribunals do not have a diluted constitutional obligation only to consider whether they would arguably act unlawfully just because a constitutional question is involved. A tribunal exercising or not exercising[36] its jurisdiction will be the subject of judicial review. This is the basis of constitutional duty of Courts to prevent jurisdictional error.[37] It follows that a tribunal has to decide whether it has jurisdiction, and to act on that basis. It does not discharge that obligation by considering whether arguably it does not have jurisdiction, because there is a non-colourable question of federal jurisdiction which has been raised.

35. Thirdly, the underlying reason as to why there is an implication that only Ch III courts, and not tribunals, may exercise adjudicative authority within federal jurisdiction, is to ensure that federal jurisdiction is only exercised by independent courts, which operate as a proper check and balance against State and federal excesses of executive and legislative power. In a federal system, the powers of the federal judicature must be paramount and secured from encroachment by the States and the Commonwealth, so that ultimate responsibility for the limits of the respective powers of all levels of government is placed in the federal judicature.[38] That purpose is not at all jeopardised by a principle which requires a tribunal to form a non-binding opinion about its own jurisdiction, to ensure that it considers that it is acting lawfully before determining a question between parties before it. The tribunal's opinion will always be subject to review by an independent federal judiciary.

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35 ***R v Blakeley; Ex parte The Association of Architects, Engineers, Surveyors and Draughtsmen of Australia*** (1950) 82 CLR 54 at 90-91 (Fullagar J), citing ***Federated Engine-Drivers' and Firemen's Association of Australasia v Broken Hill Pty Co Ltd*** (1911) 12 CLR 398 at 415 (Griffith CJ),428 (Barton J), 454 (Isaacs J). See also the analysis of Leeming JA in ***Gaynor v Attorney General (NSW)*** [2020] NSWCA 48; (2020) 102 NSWLR 123 at 155 [130].

36 As to the obligation to consider whether to exercise jurisdiction, see ***Owen v Menzies*** [2012] QCA 170; [2013] 2 Qd R 327 at 364 [132] (Muir JA, de Jersey CJ concurring at 333 [6]).

37 ***MZAPC v Minister for Immigration*** [2021] HCA 17; (2021) 95 ALJR 441 at 452 [27]-[29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

38 ***R v Kirby; Ex parte Boilermakers' Society of Australia*** (1956) 94 CLR 254 at 267-268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), quoted in ***Burns v Corbett*** [2018] HCA 15; (2018) 265 CLR 304 at 338 [48] (Kiefel CJ, Keane and Bell JJ).

36. That is precisely the point which Leeming JA had in mind when he said: "That is not contrary to the Commonwealth Constitution; rather, it vindicates the constitutional limitation."[39] Nothing in the principle about the separation of powers suggests that it is impermissible for non-judicial branches of government even to consider non-colourable questions of federal jurisdiction. To the contrary, the other branches of government should always be keenly aware of the limits of their own authority.

37. Fourthly, the principles[40] about non-colourable federal claims (ie, that all claims in a matter are within federal jurisdiction, and this continues even if the federal claims are struck out) were in fact developed in a context which had nothing to do with the jurisdiction of a tribunal. They were adopted in the context of ensuring that a federal court had jurisdiction to determine all aspects of a claim commenced before it, ie to attract or enlarge jurisdiction. They were not recognised for the purpose of preventing a tribunal from forming an opinion about its own jurisdiction.

38. The particular significance of this point is that the principles about non-colourability were developed in a context of whether a federal court could hear claims which all necessarily involved the exercise of judicial power. The only issue was the character of the judicial power (state or federal) to be exercised. The non-colourability principles were not developed for the purposes of developing any constitutional principle that a tribunal could not form a definite opinion about whether it could act lawfully. As explained, the formation of such an opinion does not involve the exercise of judicial power at all. It follows that the precise formulation of the non-colourability principles is irrelevant to the outcome of the present case.

39. Fifthly, the proposed distinction between permitting a tribunal to consider whether a claim in federal jurisdiction is colourable or clearly untenable, but preventing a tribunal from considering non-colourable federal claims, does not provide any sure test which delineates a bright line or conceptual distinction between when a tribunal

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39 ***Wilson v Chan & Naylor Parramatta Pty Ltd*** [2020] NSWCA 213; (2020) 103 NSWLR 140 at 144 [13].

40 See, eg, ***Fencott v Muller*** (1983) 152 CLR 570 at 608 (Mason, Murphy, Brennan and Deane JJ); ***Stack v Coast Securities (No 9) Pty Ltd*** (1983) 154 CLR 261 at 290 (Mason, Brennan and Deane JJ), 281-282 (Gibbs CJ); ***Re Wakim; Ex parte McNally*** [1998] HCA 28; (1998) 198 CLR 511 at 585-586 [140] (Gummow and Hayne JJ).

may or may not consider its own jurisdiction. There is no principled difference between considering whether a claim does not require, or alternatively clearly does not require, the exercise of federal jurisdiction. They are different points along the same spectrum. If constitutional principle prevents a tribunal from considering the exercise of federal jurisdiction at all, that should apply equally both to considering whether a federal claim is untenable on its merits, or is clearly untenable on the merits.

Present Case

40. The proposition that a tribunal does not exercise federal adjudicative authority when it determines whether a matter before it is within federal jurisdiction means that the Tribunal in the present case incorrectly considered that, by simply raising the inconsistency defence, the appellants had invoked federal jurisdiction.

41. The correct course for the Tribunal was that it ought to have considered for itself what law was applicable to determining the respondent's complaint. This would have involved considering the inconsistency defence for itself, although its decision on this issue would not have been binding on the parties. If it were of the opinion that there was no inconsistency, the Tribunal ought to have proceeded to determine the complaint according to applicable State law. If it considered that there was an inconsistency, the matter would have been in federal jurisdiction, and the Tribunal ought to have dismissed the complaint for want of jurisdiction.

42. The Full Court in fact followed this path. It was of the view that the Tribunal ought to have considered whether there was an inconsistency, and concluded that there was no inconsistency. In those circumstances, the Tribunal was bound to apply the relevant State law. Consequently, the Tribunal was bound to hear and determine the complaint. That is consistent with the orders made by the Full Court.

43. Whether a defence which has been raised is "colourable", ie raised to "fabricate" jurisdiction and only for the purpose of avoiding a Tribunal's jurisdiction without adequate prospects of success, is irrelevant on this analysis. The question of "colourability" assumes that raising a defence which contains a federal issue will

necessarily mean that a State tribunal cannot hear a matter, unless the defence is "colourable".[41] That is not so, for reasons explained above.

44. As the NSW Court of Appeal said in ***Sunol v Collier***: "… it does not follow that the powers and authority conferred on the [NCAT] by State law in some way evaporate immediately an issue is raised in a case, as to, for example, the constitutional validity of a provision of the State law under which a claim has been made".[42] Contrary to the Appellants' submissions at [44], there was no error by the Full Court in saying that such an approach by the Tribunal was misconceived.

45. Likewise, in ***Owen v Menzies***,[43] Muir JA considered that it was accepted in ***2UE*** and ***Sunol v Collier*** that the fact that a question giving rise to a federal issue arises in a proceeding in respect of a state issue before a tribunal does not deprive the tribunal of the jurisdiction vested in it by the State and that not only may the tribunal, for the purposes of its adjudication on matters remaining properly before it, form a view on the federal issue, it may be obliged to do so.

46. To the extent that it is suggested that the matter was plainly within federal jurisdiction because there was a defence arising under laws made by the Commonwealth Parliament (section 76(ii) of the *Constitution*) or a question of inconsistency (section 76(i) of the *Constitution*), it was necessary for the Tribunal to consider:

(a) whether the Commonwealth Discrimination Act applied—not simply whether it arguably applied or that there was a non-colourable argument that it applied; and

(b) whether there was inconsistency between the Commonwealth and Tasmanian Discrimination Acts—not simply whether such inconsistency was arguable or that there was a non-colourable argument that there was inconsistency.

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41 Appellants' submissions, [41].
42 [2012] NSWCA 14; (2012) 81 NSWLR 619 at 621-622 [8] (The Court).
43 [2012] QCA 170; [2013] 2 Qd R 327 at 364 [132] (Muir JA, de Jersey CJ concurring at 333 [6]).

PART IV: LENGTH OF ORAL ARGUMENT

47. It is estimated that the oral argument for the Attorney General for Western Australia will take 15 minutes.

Dated: 26 November 2021

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H7 of 2021

B E T W E E N:

CITTA HOBART PTY LTD
First Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

AND

DAVID CAWTHORN
Respondent

ANNEXURE TO SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

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

	Description	**Version**	**Provision**
	Constitutional Provisions		
1.	*Commonwealth Constitution*	Current	Ch III, ss 75, 76, 77, 109
	Statutory Provisions		
2.	*Anti-Discrimination Act 1998* (Tas)	Version current from 8 May 2019 to 4 November 2021	ss 12, 14, 15, 16(k)
3.	*Disability Discrimination Act 1992* (Cth)	Current	Pt 2 (ss 31, 34)
4.	*Disability (Access to Premises – Buildings) Standards 2010* (Cth)	Compilation prepared on 1 May 2011	
5.	*Tasmanian Civil and Administrative Act 2020* (Tas)	Current (version from 5 November to date)	
6.	*Tasmanian Civil and Administrative Tribunal Amendment Act 2021* (Tas)	No. 17 of 2021	
7.	*Tasmanian Civil and Administrative Tribunal (Consequential Amendments) Act 2021* (Tas)	No. 18 of 2021	s 9