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 AUSTRALIAN HUMAN RIGHTS COMMISSION (INTERVENING)

PART I: CERTIFICATION

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

PART II: OUTLINE OF ORAL SUBMISSIONS

Even on the assumption that there is a federal matter, the Tribunal was not invalidly exercising federal jurisdiction in hearing the complaint before it

2. The limitation articulated in ***Burns*** (2018) 265 CLR 304 is a constraint on the States' legislative power to confer State *judicial power* on a body other than a court with respect to the subject matters identified in ss 75 and 76: *Burns* at [3], [45], [106]; AHRCS[1] [8].

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[1] Outline of written submissions of the Australian Human Rights Commission (intervening) dated 24 November 2021.

3. The Tribunal's functions included to "inquir[e] into [the] complaint" (s 13(a))[2] and, if it found that the complaint is substantiated, to make one or more of the orders described in s 89(1). The making of orders under s 89(1) was not the only way a complaint could be resolved. The Tribunal could also order an apology and retraction (s 92) or refer the complaint to conciliation (s 94(1)) or dismiss the complaint (s 99). Where there were orders under s 89(1), there was a capacity or legislative privilege to file the orders in the Supreme Court: s 90(1). Upon registration, the orders were enforceable as if they were orders of the Supreme Court: s 90(2). Similarly, if the parties reached agreement, the agreement could be registered under s 90(1), and was enforceable as an order of the Supreme Court (s 90(2)).

10 4. Putting aside s 90, the Tribunal was not exercising "judicial power". The reasoning of this Court in *Brandy* (1995) 183 CLR 245 is instructive in that regard.

(a) The Tribunal is an executive body, and powers given to it presumptively take their character from the executive character of the Tribunal: AHRCS [41], [59].

(b) The Tribunal's decisions were not inherently binding, authoritative and conclusive and, if infected by jurisdictional error, they were void ab initio and amenable to the supervisory jurisdiction of the Supreme Court of Tasmania: AHRCS [34], [60].

(c) The Tribunal had no power to enforce its own determinations: AHRCS [35], [61].

(d) The Tribunal had power to create rights and obligations: eg an order varying a contract or arrangement (s 89(1)(f)): AHRCS [36], [62].

20 (e) That the Tribunal exercised adjudicative functions, formed opinions on matters of fact and law and made determinations does not entail that its powers were judicial in character: AHRCS [38]-[40], [64]-[65]. Its powers in this respect were not relevantly different from the many other executive tribunals around Australia, such as the AAT, which plainly exercise non-judicial power.

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[2] References are to the ***Anti-Discrimination Act*** *1998* (Tas) as it stood at 23 December 2020, prior to the amendments made on 5 November 2021 by the *Tasmanian Civil and Administrative Tribunal (Consequential Amendments) Act 2021* (Tas).

5. The insertion of section 90 into the analysis does not change the position.

   (a) The implication recognised in *Burns* is a limitation on power. Section 90 is readily read as "subject to" clear constitutional limitations, including those arising from Ch III: AHRCS [69]; *Industrial Relations Act Case* (1996) 187 CLR 416, 502-3.

   (b) Section 90(1) is not self-executing. A person "may" file the applicable documents.

   (c) The term "may" is readily read as conferring a privilege subject to Ch III, much as statutory discretions are read as subject to clear constitutional limitations: eg *Miller* (1986) 161 CLR 556 at 613-614.

   (d) Alternatively, the word "order" in s 90(1) is readily read as referring only to orders made following the determination of federal matters, similar to *Graham* (2017) 263 CLR 1 at [66] in which "court" was read not to refer to the High Court or Federal Court when exercising jurisdiction given in the terms of s 75(v).

   (e) While a similar submission was not accepted in *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85, that reasoning is wrong: AHRC [79].

6. The scheme, so read, is workable. The Tribunal *always* has power to hear and determine complaints. If, in determining the complaint, the Tribunal is determining a federal matter, the orders do not attract to themselves the capacity to be filed under s 90(1). It is unnecessary to decide what, if any, consequences the making of orders have if they do not attract to themselves the capacity to be filed under s 90(1). The legal and practical significance of any such orders is a matter that would arise for determination if and when orders were made and an attempt were made to give them legal or practical significance. If it is necessary to decide that issue, the orders should be seen to create new rights and obligations in the manner described in *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 408: AHRCS [75].

Craig Lenehan David Hume

Dated: 8 February 2022