



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 27F - Outline of oral argument for A-G Tasmania
Filing party: Interveners
Date filed: 07 Feb 2022

Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H7 of 2021

BETWEEN:

CITTA HOBART PTY LTD
Appellant

PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

and

DAVID CAWTHORN
Respondent

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

Part I: Certification

1. The Attorney-General for the State of Tasmania (Intervening) certifies that this submission is suitable for publication on the internet.

Part II: Submissions

Duty to determine jurisdiction

2. Before proceeding to hear the respondent's complaint, the Tribunal had a duty to determine its jurisdiction.

3. Upon the appellants' raising of a defence¹ that relied upon a law of the Commonwealth Parliament, the Tribunal was required to determine whether the matter fell within federal jurisdiction.²
4. In doing so, the extent of the Tribunal's duty was to do no more than to identify whether, as part of the controversy before it, a claim arose which involved a federal element under s 75 or 76 of the Commonwealth Constitution.
5. Having identified that the defence involved a matter arising under a law of the Commonwealth³, it was appropriate and correct for the Tribunal to "stay its hand"⁴ and dismiss the respondent's complaint.⁵ The Tribunal had no authority to proceed⁶ as the matter was in federal jurisdiction (s 76(ii) and, relatedly, s 76(i) of the Constitution).

Colourability and tenability

6. In the circumstances, the Tribunal would only have had authority to determine the respondent's complaint if the appellants' claim under s 34 of the *Disability Discrimination Act 1992* (Cth) reflected no genuine controversy: thereby failing to establish a federal matter in respect of which the Tribunal could not exercise its jurisdiction.
7. The test of colourability⁷ ought to be accepted as a means of avoiding the pursuit of improper claims of federal jurisdiction. The concept reflects the requirement that a matter must involve a claim which raises a genuine justiciable controversy. If a claim is a mere pretence, the claim will not form part of the justiciable controversy and so will not attract the exercise of federal jurisdiction.

¹ **JBA pt C vol 6 at 2125**; *Felton v Mulligan* (1971) 124 CLR 367, 374 (Barwick CJ).

² **JBA pt C vol 11 at 4174**; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 291 (Mason, Brennan and Deane JJ).

³ **AB 15 at [40]**.

⁴ **JBA pt C vol 6 at 2153**; *Felton v Mulligan* (1971) 124 CLR 367, 402 (Walsh J).

⁵ **AB 16 at [46]**.

⁶ **JBA pt C vol 5 at 1568**; *Burns v Corbett* (2018) 265 CLR 304, 340 [54] (Kiefel CJ, Bell and Keane JJ), 363-364 [118]-[119] (Gageler J).

⁷ **JBA pt D vol 13 at 4870**; *Burgundy Royale* (1987) 18 FCR 212, 219; **JBA pt D vol 14 at 5478 – 5479**; *Qantas Airways v Lustig* (2015) 228 FCR 148, 169 – 170 [88] – [92] (Perry J).

8. The question as to whether the test may be extended or a further exception introduced by direct reference to notions of tenability does not immediately arise for consideration. It may readily be accepted that the defence raised before the Tribunal was neither colourable nor so obviously untenable so as to not stand a chance of succeeding.
9. In determining its own jurisdiction, a State tribunal ought not consider the tenability of a claim by assessing the strength of a claim by reference to its merits. Such an approach would occasion the extremely inconvenient result that the existence or absence of a State tribunal's jurisdiction to deal with a particular claim would depend on the substantive result of that claim.

Remitting the complaint to the Tribunal

10. The Full Court's determination to remit the complaint to the Tribunal overlooks the principle that once the federal claim is raised, the matter falls within federal jurisdiction and remains in federal jurisdiction. That is so regardless of whether or not the federal claim turns out to be a bad one⁸.

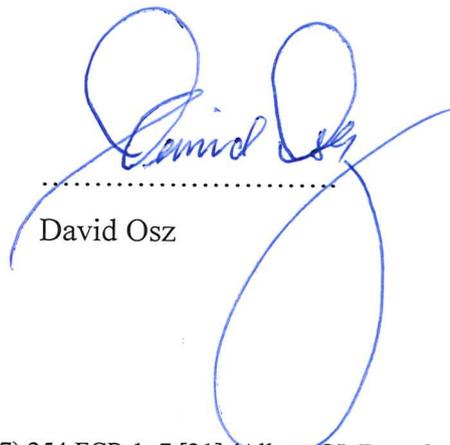
Judicial Power

11. The Australian Human Rights Commission, intervening, contends that the assumption that the Tribunal would be exercising judicial power is unsound. It is unnecessary to consider this argument. It was dealt with by the Tribunal and not challenged in the Full Court or by the parties in these proceedings. It is also contrary to authority.⁹

Dated: 7 February 2022



Sarah K Kay SC
SOLICITOR-GENERAL



David Osz

⁸ **JBA pt D vol 14 at 5492**; *Rana v Google Inc* (2017) 254 FCR 1, 7 [21] (Allsop CJ, Besanko and White JJ).

⁹ **JBA pt D vol 13 at 5088 – 5089, 5103**; *Commonwealth v Anti-Discrimination Tribunal (Tas)* 2008 169 FLR 85, 132-133 [205]-[207]; 147 [253] Kenny J.