



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY**

B E T W E E N:

CITTA HOBART PTY LTD
First Appellant

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PARLIAMENT SQUARE HOBART LANDOWNER PTY LTD
Second Appellant

AND

DAVID CAWTHORN
Respondent

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**ORAL OUTLINE OF SUBMISSIONS OF THE ATTORNEY GENERAL FOR
WESTERN AUSTRALIA (INTERVENING)**

Date of Document: 8 February 2022

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PART I: SUITABILITY FOR PUBLICATION

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

PART II: ARGUMENT

2. Leaving aside questions of federal jurisdiction, there is no doubt that an administrative tribunal has power to determine the existence of its own jurisdiction. It is always obliged to do so, before deciding any matter before it.
3. This case raises the extent to which a State Tribunal is obliged to consider the existence of its own jurisdiction where this question depends upon resolving a conflict between State and Commonwealth law.
- 10 4. The starting point is the limitation in *Burns v Corbett* (JBA 5/32/1532) eg at [46]. This limitation prevents a State or Federal Parliament conferring adjudicative authority in respect of the matters in ss 75 and 76 of the *Constitution* upon an organ of government, federal or State, other than a court referred to in Ch III of the *Constitution*.
5. Expressed in this way the limitation does not prevent a State Parliament conferring power upon an administrative tribunal to determine whether it has jurisdiction to determine a matter - unless consideration by a State Tribunal of whether it has jurisdiction to determine a matter itself involves the exercise of adjudicative authority.
- 20 6. As a matter of principle, the decision of a State Tribunal about the existence of its own jurisdiction does not determine in an enforceable way any rights, duties or liabilities of the parties to any dispute before it. It is only a determination of the rights, duties and liabilities of parties which involves any exercise of adjudicative authority or judicial power: *Brandy v Human Rights and Equal Opportunity Commission* (JBA 5/31/1504) at 260.
7. There is a line of New South Wales Court of Appeal decisions adopting the principle in [6], and spelling out its implications. See *Sunol v Collier* (JBA 14/119/5557) at [20], *Gaynor v Attorney General (NSW)* (JBA 14/103/5218) at [137], *Wilson v Chan & Naylor Parramatta Pty Ltd* (JBA 14/120/5564) at [4],
30 [14]-[15], [18]-[19]. A State Tribunal considering the existence of its jurisdiction is acting distinctly from when it exercises adjudicative authority.

8. Notwithstanding the separate nature of these questions, it seems to have been assumed that a State Tribunal cannot avoid exercising adjudicative authority within federal jurisdiction, if it is necessary to consider the same question as part of forming an opinion about the extent of its own jurisdiction. Consequently, the view adopted in *Qantas Airways Ltd v Lustig (JBA 14/112/5457)* at [91] has emerged, which permits a State Tribunal to consider its own jurisdiction only up to the point of being satisfied that there is a non-colourable federal claim.
9. Conceptually, however, that view does not distinguish between the antecedent question as to whether a Tribunal has jurisdiction, and the exercise of adjudicative authority within jurisdiction. Further, there is no previous case which suggests that the two questions about the existence of jurisdiction and the exercise of adjudicative authority may be collapsed where a constitutional question arises.
10. Whether a federal claim or defence is colourable, or is not arguable, concerns whether a federal court has jurisdiction to determine a matter involving that claim or defence. These principles define the extent of a federal court's jurisdiction to determine matters involving non-federal claims before it. They do not do the converse.
11. Whether a State Tribunal should be prevented from considering a matter because it involves federal jurisdiction raises different considerations from whether a court may continue to exercise judicial power over non-federal matters which have been associated with a federal matter within federal jurisdiction.
12. On the one hand, the existence of federal jurisdiction means that no federal or related matters can be heard by a State Tribunal, whereas on the other hand the presence of federal jurisdiction means that all matters before a federal court may be determined. As well, the limiting principle applied to a State Tribunal depends upon a distinction between the existence of jurisdiction and the exercise of adjudicative authority within jurisdiction. However, where the principle of non-colourability is applied to a federal court, it is only concerned with the exercise of adjudicative authority within jurisdiction, and has nothing to do with the existence of jurisdiction.
13. The problem with applying the non-colourability principle in the context of Tribunals can be illustrated by considering a different type of federal question. If

the issue was whether a matter was within the diversity jurisdiction, a Tribunal could determine whether each of the parties was actually resident, rather than arguably resident, in different States. There is no relevant difference in determining whether a matter actually involves, rather than arguably involves, the exercise of adjudicative authority within federal jurisdiction because there is a section 109 inconsistency claim.

- 10 14. In this particular case, when the appellants raised the inconsistency question based upon the Commonwealth *Disability Discrimination Act 1992*, the Tribunal was obliged to consider whether there was before it a matter within sections 75 and 76 of the *Constitution*. The jurisdictional question for the Tribunal was whether the Tasmanian legislation operated according to its terms, or whether there was an inconsistency between the Commonwealth and Tasmanian legislation. As a matter of law, the Full Court considered there was no inconsistency. The Tribunal was therefore under a statutory duty to proceed to hear and determine the claim, applying the Tasmanian legislation only. The Full Court gave effect to that obligation by its decision.

Dated: 8 February 2022



J A Thomson SC



S R Pack