



HIGH COURT OF AUSTRALIA

4 May 2022

CITTA HOBART PTY LTD & ANOR v CAWTHORN
[2022] HCA 16

Today, the High Court allowed an appeal from the Full Court of the Supreme Court of Tasmania. The primary issue in the appeal concerned whether the Anti-Discrimination Tribunal had jurisdiction under the *Anti-Discrimination Act 1998* (Tas) ("the State Act") to determine a complaint made by the respondent that he had been discriminated against by the appellants, in circumstances where the appellants had asserted that parts of the State Act were inconsistent with the *Disability Discrimination Act 1992* (Cth) ("the Commonwealth Act") and a standard made under the Commonwealth Act, and were therefore inoperative by force of s 109 of the *Constitution*. This issue arose against the background of the High Court's decision in *Burns v Corbett* (2018) 265 CLR 304, which held that a State Parliament lacks legislative capacity to confer on a State tribunal that is not a court of a State within the meaning of the *Constitution* judicial power with respect to any matter of a description in ss 75 and 76 of the *Constitution* including, relevantly, ss 76(i) (matters arising under the *Constitution*) and 76(ii) (matters arising under a Commonwealth law).

The first appellant is undertaking the development of Parliament Square in Hobart on land owned by the second appellant. When the development is completed, one of the entrances will provide access only by way of stairs. The respondent, who relies on a wheelchair for mobility, made a complaint to the Tribunal that this entrance constituted direct and indirect disability discrimination under certain provisions of the State Act. The appellants, as part of their defence ("the constitutional defence"), argued that these provisions were inconsistent with the federal scheme for disability access and that, as a result of this inconsistency, those provisions of the State Act were rendered inoperative because of s 109 of the *Constitution*. Applying *Burns v Corbett*, the Tribunal formed the opinion that if it determined the complaint it would be exercising judicial power and, as it was not a court of a State, it did not have jurisdiction to hear the matter because the constitutional defence arose under the *Constitution* or arose under a law made by the Commonwealth Parliament and was "not colourable". Accordingly, without considering the merits of the constitutional defence, the Tribunal dismissed the complaint for want of jurisdiction. The Full Court, on appeal, addressed the merits of the constitutional defence and rejected it. The Full Court set aside the order of the Tribunal dismissing the complaint and remitted the complaint to the Tribunal for hearing and determination.

The High Court held that the Tribunal had reached the correct conclusion on the primary issue of its jurisdiction. The Tribunal exercises judicial power in hearing and determining a complaint under the State Act. The Court, by majority, held that for a claim or defence in reliance on the *Constitution* or a Commonwealth law to give rise to a matter of a description in ss 76(i) or 76(ii) of the *Constitution*, it is enough that the claim or defence be genuinely raised and that it not be incapable on its face of legal argument. The constitutional defence had been genuinely raised in answer to the complaint in the Tribunal and, whatever its merits, it was not incapable on its face of legal argument. On that basis, the Tribunal was correct to order that the complaint be dismissed for want of jurisdiction.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*