

CITTA HOBART PTY LTD V CAWTHORN

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As established in *Burns v Corbett* (*'Burns'*), it is impermissible for State tribunals that are not State courts to exercise judicial power with respect to any matter described in s 75 or 76 of the *Constitution*.¹ State parliaments cannot confer judicial power to a State tribunal. Matters of a constitutional nature are reserved for Chapter III courts. *Citta Hobart Pty Ltd v Cawthorn* (*'Citta Hobart'*) concerns the limits on State tribunal jurisdiction when a matter that relies on the *Constitution* or a law of the Commonwealth arises from a tribunal proceeding.²

I CONTEXT

The case derives from a complaint made by Mr Cawthorn (the respondent in the High Court) under the *Anti-Discrimination Act 1998* (Tas) (*'the State Act'*) against the appellant, the Citta Group, the developer of Hobart's new Parliament Square development. Mr Cawthorn, who has paraplegia, claimed that the appellants had failed to provide adequate wheelchair access in the proposed development. He alleged that this constitutes direct and indirect disability discrimination under the State Act. The complaint was referred to the Anti-Discrimination Tribunal of Tasmania (*'the Tribunal'*).

In their defence, the appellants asserted that the *Disability Discrimination Act 1992* (Cth) (*'the Commonwealth Act'*) is exhaustive in its coverage of disability discrimination standards rendering any additional standards imposed by the State Act inoperative under s 109 of the *Constitution*. The appellants contended that the construction of Parliament Square complied with the Commonwealth Act standards.

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¹ (2018) 266 CLR 304 (*'Burns'*).

² [2022] HCA 16 (*'Citta Hobart'*).

The Tribunal dismissed Mr Cawthorn's complaint maintaining that it did not have jurisdiction to consider a matter arising under the *Constitution*.³ On appeal, the Full Court of the Supreme Court of Tasmania unanimously rejected the constitutional defence forwarded by the appellant. It made orders for the Tribunal to decide Mr Cawthorn's complaint.⁴ On further appeal, the High Court overturned the Full Court's decision. The High Court unanimously held that the Tribunal was correct in dismissing Mr Cawthorn's original complaint on the basis that it raised a matter under the *Constitution*. The High Court found it inappropriate to determine whether there was any inconsistency between the State and Commonwealth Acts.

Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ delivered a joint judgement. Edelman J wrote separately.

II THE HIGH COURT JUDGEMENT

A *The Tribunal exercises judicial power in hearing and determining a complaint*

The Court first dealt with an issue raised by the Australian Human Rights Commission ('the AHRC') (intervening) as to whether the jurisdiction conferred on the Tribunal by the State Act involves the exercise of judicial power. The AHRC submitted that, on its proper construction, an order made under s 90 of the State Act is not binding until it is registered with the Supreme Court. Therefore, relying on the authority of *Brandy v Human Rights and Equal Opportunities Commission* ('*Brandy*'), any fact-finding process and resulting orders made by the Tribunal are entirely administrative.⁵ However, the Court unanimously rejected this claim stating that unlike the circumstances in *Brandy*, the registration of the order under s 90 was not a precondition to a requirement to comply.⁶ The Court held on its proper construction, the State Act 'makes clear' that a Tribunal

³ *David Cawthorn and Paraquad Association of Tasmania Incorporated v Citta Hobart Pty Ltd and Parliament Square Hobart Landowner Pty Ltd* [2019] TASADT 10.

⁴ *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15.

⁵ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ('*Brandy*').

⁶ n (2) *Citta Hobart* [14]-[15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

order ‘takes immediate effect as an order with which the person to whom it is directed is bound to comply’.⁷ As such, the Tribunal, in determining complaints, exercised the State’s judicial power.⁸

B The Tribunal has authority to determine whether they have jurisdiction

Second, both the plurality and Edelman J held that the ‘first duty’ arising from a hearing and determination of a claim or complaint by a court or tribunal is the determination of jurisdiction.⁹ The plurality reasoned that the State tribunal must ‘be taken to have incidental jurisdiction’ to determine the ‘legislated limits of its State jurisdiction’.¹⁰ A determination by a State tribunal that a claim or complaint is a constitutional matter is, therefore, an exercise of State judicial power conferred by the State legislation¹¹ used to form an opinion for the purpose of ‘moulding its conduct to accord with the law’.¹² In essence, the plurality argued that the State tribunal had jurisdiction to determine its own jurisdiction.¹³ Edelman J held that determining jurisdiction is not, by definition, an exercise of jurisdiction.¹⁴ Rather, determination of jurisdiction was a necessary step anterior to any exercise of judicial power.¹⁵

Despite Edelman J and the plurality forwarding different reasoning, the substantive effect of both arguments is that a court or tribunal itself must make a determination of jurisdiction before considering a claim or complaint.¹⁶ The Court unanimously held that the State tribunal was

⁷ Ibid [16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

⁸ Ibid [12]-[16] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [53]-[57] (Edelman, J).

⁹ Ibid [22]-[23] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [62] (Edelman J).

¹⁰ Ibid [25] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ),

¹¹ Ibid [25]-[26] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ),

¹² *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 618 (Dixon, J).

¹³ *Citta Hobart* (n 2) [23] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

¹⁴ Ibid [62] (Edelman J).

¹⁵ Ibid [63] (Edelman J).

¹⁶ Ibid [22]-[26] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [62]-[64] (Edelman J).

correct in considering and forming a view as to whether it had jurisdiction to determine Mr Cawthorn's complaint.

C Determining the relevant limit of the Tribunal's State jurisdiction

Finally, the Court held unanimously that the test for determining whether a proceeding involves a 'matter arising under the constitution or involving its interpretation' is objective and must be the same for tribunals and courts.¹⁷ The plurality formulated that a constitutional matter may arise 'where a Commonwealth law is relied on as the source of a claim or a defence that is asserted in the course of a controversy' or 'where the invalidity or inoperability of a Commonwealth or State law is asserted in the course of the controversy in reliance on the *Constitution*'.¹⁸ In both instances, the characterisation of a matter as constitutional encompasses the totality of the controversy and all subject matter that arises from it.¹⁹

The Court rejected the submission that a defence relying on the *Constitution* must meet a threshold degree of arguability. The plurality described that 'it is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument'.²⁰ Justice Edelman offered a test with a slightly higher threshold stating that a constitutional claim or defence must raise a 'real question' that is not 'manifestly hopeless'.²¹ Irrespective of the test used, the Court held that the s 109 defence raised by the Citta Group in response to Mr Cawthorn's complaint was a matter that was not 'manifestly hopeless' or 'incapable on its face of legal argument'.²²

¹⁷ Ibid [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [60]-[61], [68] (Edelman J).

¹⁸ Ibid [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

¹⁹ *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 571 [7].

²⁰ *Citta Hobart* (n 2) [35] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

²¹ Ibid [69], [73] (Edelman J).

²² Ibid [10], [45] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ), [79], [81] (Edelman J).

III PRACTICAL IMPLICATIONS

Citta Hobart highlights that the limits on the jurisdiction of State tribunals, which are not courts of a State under the *Constitution*, are significant. The low threshold for establishing whether a proceeding involves a matter arising under the *Constitution* or involving its interpretation means that matters that can potentially be excluded from a tribunal's jurisdiction are vast. To defend a claim determined by a tribunal, the defence must only raise a matter that relies on the *Constitution* or a law of the Commonwealth that 'on its face is not incapable of legal argument'.²³

Despite Tasmania adopting some of the country's most progressive anti-discrimination laws, in the case of *Citta Hobart*, the State Act was incapable of ensuring that these provisions were fulfilled. Using a defence based on the premise that Mr Cawthorn's original complaint under the State Act involved a *Constitutional* matter, the developers have effectively side-stepped the central issue of whether the new development was in breach of State anti-discrimination laws. As with the case of *Burns*, this threatens the ability of State tribunals to resolve complaints effectively.²⁴

In the wake of *Burns*, several reform options were suggested to protect the efficacy of State tribunals.²⁵ The limitations established in *Burns* and *Citta Hobart* only exist when a tribunal is not a court. If State tribunals were established as courts under Ch III of the *Constitution*, the issues relating to jurisdiction would be eliminated.²⁶ Alternatively, legislation can provide that federal matters arising in State tribunal proceedings be referred to a State court which does have jurisdiction over the matter.²⁷

The Tasmanian Parliament has now enacted such legislation.²⁸ Since Mr Cawthorn's original complaint was lodged, Tasmania's Anti-Discrimination Tribunal has been subsumed under the Tasmanian Civil and Administrative Tribunal, a body constituted under the *Tasmanian Civil*

²³ *Ibid* [35] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

²⁴ Anna Olijnyk and Stephen McDonald 'The High Court's Decision in *Burns v Corbett*: Consequences, and Ways Forward for State Tribunals' (2018) 95 *AIAL Forum* 10.

²⁵ *Ibid*.

²⁶ *Ibid* 18.

²⁷ *Ibid* 19; see *Civil and Administrative Tribunal Act 2013* (NSW), s 34B; *Civil and Administrative Tribunal Act 2013* (SA), s 38B.

²⁸ *Civil and Administrative Tribunal Act 2000* (Tas).

and Administrative Tribunal Act 2000 (Tas) ('*Civil and Administrative Tribunal Act*'). Section 131(2) of this Act provides that if the Tribunal considers that it does not have jurisdiction to determine an application because its determination may lead to the exercise of federal jurisdiction, the matter can be transferred to the Magistrates Court. Suppose a new complaint was lodged regarding the accessibility of the Parliament Square development and its compliance with the State Act. In that case, if the *Constitutional* defence was raised, the complaint under s 131(2) of the *Civil and Administrative Tribunal Act* would be transferred to a Ch III court, and the matter of inconsistency between the State and Commonwealth Acts could be addressed.

IV CONCLUSIONS

The High Court unanimously held that the constitutional defence forwarded by the appellants was not incapable on its face of legal argument.²⁹ Mr Cawthorn's complaint and the defence together comprised a single justiciable controversy within ss 76(i) and 76(ii) of the *Constitution*, and as such, determining the complaint would exercise judicial power.³⁰ The State Tribunal was correct in dismissing the complaint on the basis that it lacked jurisdiction. While *Citta Hobart* answers the jurisdictional question arising from Mr Cawthorn's complaint to the Tribunal, the question of disability access and whether the State and Commonwealth Acts are inconsistent under s 109 of the *Constitution* remains.

²⁹ *Citta Hobart* (n 2) [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

³⁰ *Ibid.*