Question from Senator O'Neill: The Law Council have clearly identified procedural problems with this as not being about whether there is a well-developed interpretation of clause 12. The problem is that many state tribunals cannot apply federal law, no matter how certain that law may be. Do you still maintain that the procedural issues with clause 12 will diminish rapidly over time as a body of law develops concerning the interpretation of clause 12?

Response: In *Burns v Corbett*[1] the High Court held that a State Tribunal that is not a 'court of a state' is unable to exercise judicial power to determine matters between residents of two States. The non-binding headnote provided with the judgement summarises the principle:

> A State tribunal which is not a "court of a State" is unable to exercise judicial power to determine matters between residents of two States because the State law which purports to authorise the tribunal to do so is inconsistent with the conditional investment by s 39(2) of the Judiciary Act of all such jurisdiction in State courts, and therefore rendered inoperative by virtue of s 109 of the Constitution.

The concern raised by the Law Council of Australia to which I am asked to reply was summarised by a representative of the Law Council of Australia before the Parliamentary Joint Committee on Human Rights as follows:

> If a section 12 defence were raised then one view—the extreme view—is that the tribunal could not hear it, and that would be the end of that complaint and no further complaint could be made or, alternatively, it would go to a chapter III court.[2]

By way of illustration, a Tribunal hears a matter in which the respondent asserts that their statement is a 'statement of belief' and section 12 of the Commonwealth *Religious Discrimination Act* overrides State law. The Tribunal is required to form a view as to whether it has jurisdiction. The comments of Brennan J, sitting as the President of the Administrative Appeals Tribunal in *Re Adams and the Tax Agents' Board*, are informative:

> An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect.[3]

Assume that the Tribunal determines it has no jurisdiction (a recent example of a Tribunal making such a determination may be found in *Murphy v Trustees of Catholic Aged Care Sydney*[4]). That determination is then appealed to a Court with jurisdiction. The Court determines that the statement is not a 'statement of belief', as defined at section 5(1) of the (then enacted) *Religious Discrimination Act*. It may then return the matter to the Tribunal for decision on the remaining issues, or determine those issues itself (depending on the jurisdiction and powers of the Court). The recently delivered decision of the Full Court of the Supreme Court of Tasmania *Cawthorn v Citta Hobart Pty Ltd*[5] provides an illustration of such an eventuality.

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[1] [2018] HCA 15.

[2] Commonwealth of Australia, Proof Committee Hansard, Parliamentary Joint Committee on Human Rights, Religious Discrimination Bill 2021, 14 January 2022, 30.

[3] (1976) 12 ALR 239 at 242. See also *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254

[4] [2018] NSWCATAP 275.

[5] [2020] TASFC 15.

Where a subsequent respondent makes a claim that their statement is a 'statement of belief' protected under the *Religious Discrimination Act* in differing proceedings, the subsequent Tribunal hearing the matter will be bound to apply the principles stated in the prior Court decision when determining whether it has jurisdiction, to the extent that they are relevant to the facts under consideration.

If the subsequent Tribunal, relying on the Court decision, determines that the matter does not give rise to an inconsistency with the Commonwealth law, the Tribunal will proceed to determine the matter according to the powers vested to it. The decision of the Tribunal would, of course, be subject to the ability of the respondent to appeal the Tribunal's decision that it has jurisdiction. As Justice Mark Leeming clarifies, ex-curially, 'Such a body's view about the validity of a law may dispose it to grant or withhold relief; of course, it may be wrong and, if so, its decision is liable to be set aside.'[6]

As noted above, the recently delivered decision of the Full Court of the Supreme Court of Tasmania *Cawthorn v Citta Hobart Pty Ltd*[7] provides an illustration of these principles. Therein the Tribunal at first instance held that it did not have jurisdiction. On appeal the Court held that the particular set of facts do not give rise to an inconsistency between Commonwealth and State law. It remitted the decision to the Tribunal for determination according to law. Presuming the matter had not gone on further appeal (it is now on appeal before the High Court), the Tribunal would have an authoritative statement as to the interaction of the Federal and State Acts, as promulgated by the Supreme Court. Where the facts arising in a future matter fall appropriately within the scope of the law as stated by the Supreme Court, an issue of Commonwealth inconsistency would not arise and the Tribunal would be able to determine the matter.

A further illustration may assist. A Court ruling on section 12's scope may state substantive propositions, such as, only an individual may make a 'statement of belief' as corporations can't hold beliefs (such is a pure hypothetical, I have not concluded that such would be the case under the Act). If that were to be declared by a Court, a Tribunal could then state in a future matter in which a corporate body seeks protection under clause 12 that the question of whether a corporation can make a statement of belief does not give rise to a question of jurisdiction due to the prior court ruling. Effectively the Court has cleared the path for the Tribunal to exercise its functions. This is effectively what occurred in *Cawthorn v Citta Hobart Pty Ltd*.

Where a claim is 'colourable', in the sense that it was 'made for the improper purpose of fabricating jurisdiction', a Tribunal can also determine that it does not attract federal jurisdiction.[8]

As Bathurst CJ, Allsop P, Basten JA stated in *Sunol v Collier,* just because a Tribunal is not a Chapter III Court does not mean that 'the powers and authority conferred on the Tribunal by State law in some way evaporate immediately an issue is raised in a case, as to, for example, the Constitutional validity of a provision of the State law under which a claim has been made'.[9]

Where matters give rise to novel facts that would distinguish the matter from existing precedent thus giving rise to a real dispute as to whether the Tribunal has jurisdiction, the Tribunal would need to determine that it cannot resolve the dispute. Where a Tribunal does not have jurisdiction, any order must issue from a Court of competent jurisdiction. That body of law will further clarify the scope of the protections afforded under clause 12.

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[6] Leeming, Mark *Authority to Decide* (Federation Press, 2020), 20.
[7] [2020] TASFC 15.
[8] *Burgandy Royale Investments Pty Ltd v Westpac Banking Corporation* [1987] 18 FCR 212, 219.
[9] *Sunol v Collier* (2012) 81 NSWLR 619; [2012] NSWCA 14 [8].

The prospect of a clash between State and Federal law is not a novel circumstance within Australian law. The areas of law in which such a situation arises are common, comprising a feature of our Federated system (arising, for example, in discrimination law,[10] insurance law,[11] criminal law[12] and contract law[13]).

Justice Leeming has said ex-curially, 'Suggestions that this gives rise to difficulties in practice, and the need to develop a "contingent jurisdiction", tend to overstate the position; the scope of justiciable controversy may be clear from correspondence which precedes litigation, and, if not, whether or not a defendant is relying on a defence based on federal law may promptly be brought to a head.'[14]

For these reasons, according to the long-settled doctrine of precedent the areas in which the Tribunal can exercise jurisdiction and also the scope of the protections afforded by clause 12 will be clarified over time. An increasing body of law will therefore become available to guide claimants and respondents negotiating complaints under State discrimination law. Most of these complaints are settled by conciliation prior to referral to a Tribunal, or prior to a Tribunal decision. As it develops, this body of law will provide increasing certainty to claimants and respondents seeking to ascertain the prospects of their respective positions.

Question from Senator Pratt: Mr Fowler, can you take on notice, in that context, your view, the legal view, on inherent requirements when a school might employ someone not of that religion or any organisation but still determine that there are other attributes of that person where to have particular attributes is part of that inherent religious requirement, but that being of that particular faith is not one of them, which is often the case in some of the examples of discrimination that have been seen to have happened.

I understand the question to be illustrated by the following facts:

> A religious school employs a maths teacher who does not adhere to (in the sense of believe in) the school's religion. This is known to the school. Subsequently the maths teacher engages in conduct that is inconsistent with conduct that would be expected of a person who adheres to the religion of the school.

The question is whether the school can, under an inherent requirements test, take disciplinary action against the maths teacher. This is a complex area of the law, and the outcome will be determined according to the relevant statutory provisions.

The question of whether an inherent requirements exception applies must be addressed according to a range of factors, including the requirements of the instant role under consideration and the circumstances of the employer. Where an employer demonstrates that the requirements of a role may be fulfilled in the absence of a particular characteristic by employing a person that does not display that characteristic to fill the role, the school will have in effect provided evidence that the attribute is not an inherent requirement of the role. An illustration of such a circumstance is

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[10] *Murphy v Trustees of Catholic Aged Care Sydney* [2018] NSWCATAP 275; *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15.

[11] *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 4)* [2010] FCA 482; 268 ALR 108.

[12] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 87 (Dawson J) and *New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26, [77] (Gageler J).

[13] *National Australia Bank Ltd v Nautilus Insurance Ltd (No 2)* [2019] FCA 1543, [95] (Allsop J).

[14] Leeming, Mark *Authority to Decide* (Federation Press, 2020), 203.

provided by *Walsh v St Vincent de Paul Society Queensland (No.2)*[15] where the Queensland Anti-Discrimination Tribunal reached the conclusion that 'the position of [President of a local chapter of the SVDP] … would be essentially the same if the [role] were not required to be' Catholic in light of the fact that the person fulfilling the role of President for the preceding three years was not a Catholic.[16] In that case SVDP had effectively declared that the holding of the Catholic faith is not a genuine occupational requirement for the instant position.

However, this position may be altered by statute. For example, the conventional reading of subsections 25(2) & (3) of the Queensland *Anti-Discrimination Act 1991* is that a religious school may rely on the stated exception to the Act where a 'person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs', regardless of their personal beliefs, where 'it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs.'

Senator Scarr: You made a number of suggestions in relation to a number of matters, including one in relation to the burden of proof with respect to requirements that might be set by employers and also in relation to a reasonable adjustments clause. Could you speak to why those changes are important?

The following provides proposed drafting that would address these two issues.

The following drafting would place the burden of proof under the indirect reasonableness test upon those asserting that the conduct is reasonable.

Insert new subsection 14(3)

Burden of proof

(3) For the purposes of subsection (1), the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.

A similar provision would also be included at section 15 in respect of the 'essential requirements' test.

The following wording would introduce a 'reasonable adjustments test' into the Bill**.** It is modelled on the *Disability Discrimination Act 1992,* with the necessary amendments *mutatis mutandis*. As I indicated before the Committee, a reasonable adjustments test was included in the that Act following the High Court decision in *Purvis v New South Wales (Department of Education and Training),* [17] as one of several means to address problems identified with the comparator test.

[15] [2008] QADT 32.
[16] Ibid [89].
[17] (2003) 217 CLR 92.

Insert at section 5(1)

> ***reasonable adjustment:*** an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.

Renumber section 13 to be section 13(1) and insert new subsections 13(2) & (3)

> (2) A person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the aggrieved person in relation to their religious belief or activity; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of their religious belief or activity treated less favourably than a person without the religious belief or activity would be treated in circumstances that are not materially different.
>
> (3) For the purposes of this section, circumstances are not materially different because of the fact that, because of their religious belief or activity, the aggrieved person requires adjustments.

Insert new subsections 14 (4), (5) & (6)

> (4) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the religious belief or activity, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
>
> (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons who hold the religious belief, or who engage in, the religious activity.
>
> (5) Subsection (4) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.
>
> (6) For the purposes of subsection (5), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person who holds the religious belief, or who engages in, the religious activity to comply with the requirement or condition.

A definition of 'unjustifiable hardship' and a provision equivalent to section 11 of the *Disability Discrimination Act 1992* should be inserted to provide certainty as to when a religious person's proposed conduct would amount to an unjustifiable hardship for employers. Again, consistent with the *Disability Discrimination Act,* the burden of proving 'unjustifiable hardship' should be on the person seeking to assert reliance on that provision. In formulating the definition of 'unjustifiable hardship', the provision should also ensure that the clause cannot be relied upon in a way that

would impose an '*unnecessary'* burden on the free exercise of religion in a manner that is not consistent with international law.

The remaining areas in which the Bill could be improved are set out at paragraph 4 of my submission to the Inquiry.