



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S39 of 2024

BETWEEN:

State of New South Wales
Appellant

and

Paulina Wojciechowska
First Respondent

Registrar of NSW Civil and Administrative Tribunal
Second Respondent

Commissioner of Police NSW Police Force
Third Respondent

Secretary of NSW Department of Communities and Justice
Fourth Respondent

Registrar of District Court of New South Wales
Fifth Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Internet publication

This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. *No legal rights*: The Tribunal's performance of an administrative review of public sector agency conduct under s 55 of the PPIP Act (**JBA Vol 1 Tab 6**) does not determine a controversy about any existing legal rights: AS [15]-[45]; [54]-[62]; Reply [4]-[7], [10]-[14].

(a) The subject-matter of the information protection principles indicates they are bureaucratic rather than legal norms: PPIP Act, ss 8-19, 33 (**JBA Vol 1 Tab 6**). The principles may be modified by Ministerial order, including to adopt policy standards inapt for judicial application: PPIP Act, ss 29-31, 33.

(b) The consequences of an agency breaching any information protection principle are limited to administrative review, by the agency itself and then by the Tribunal, in accordance

with Part 5 of the PPIP Act: PPIP Act, ss 21, 32, 69. The specification of those exclusive consequences points against an invocation of judicial power: *Attorney-General (Tas) v Casimaty* (2024) 98 ALJR 1139 at [31]-[33] (**JBA N/A**).

(c) Review under Part 5 is merits review: PPIP Act, ss 53, 55; ADR Act, ss 3, 6-7, 63-64, 66 (**JBA Vol 1 Tab 4**); *Attorney-General (NSW) v FJG* (2023) 111 NSWLR 105 at [93]-[95] (**JBA Vol 8 Tab 61**). The Tribunal stands in the shoes of the agency and determines the correct and preferable conduct to have been engaged in. The Tribunal's powers under s 55 of the PPIP Act are explicative of ways in which its merits review function may be carried out. The power to award compensation is not exclusively judicial. In this merits review context, so-called "damages" are a discretionary means to effect practically the variation or substitution of an original decision.

2. Decisions not binding or enforceable: The Tribunal's decision in a s 55 review is not binding or enforceable: AS [67]-[72]; Reply [2], [8].

(a) Section 78 of the CAT Act does not apply to orders made under s 55(2)(a) of the PPIP Act: CAT Act, s 78 (**JBA Vol 1 Tab 5**).

(b) The Tribunal's decision is not otherwise relevantly binding. Unlike the legislation considered in *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [13]-[16] (**JBA Vol 3 Tab 28**), the PPIP Act contains no textual indication that the Tribunal's decisions are binding. The legislative assumption is that an agency will comply by bureaucratic convention rather than legal obligation. That is the notion of "compliance" reflected in express objects of the ADR Act.

3. Section 78 enforcement not sufficient to characterise as judicial power: Even if s 78 of the CAT Act applies, so that a Tribunal decision to award "damages" under s 55(2)(a) is registrable, enforceability is not sufficient to characterise the Tribunal's function as judicial: AS [73]-[75]; Reply [3].

(a) An enforceable order for compensation under s 55(2)(a) of the PPIP Act would not be underpinned or accompanied by any determination of a legal right, duty or liability (see Proposition 1 above). That is distinct from cases like *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (**JBA Vol 3, Tab 25**).

(b) There being no strict separation of powers in a State, it cannot be inferred merely from the ultimate enforceability of an order that the anterior decisional function is necessarily to be characterised as judicial.

4. *Alternatively, no “matter”*: Even if s 78 of the CAT Act applies, and even if it imparts a judicial character to the entire function performed by the Tribunal in a s 55 review, it does not involve a “matter” and is therefore not denied by the *Burns v Corbett* limitation on State legislative power: AS [76]-[77]; Reply [15]-[19].

(a) There is no matter because there is no determination of any immediate right, duty or liability (see Proposition 1);

(b) The *Burns v Corbett* limitation on State legislative power depends on implication from logical or practical necessity. Chapter III is exhaustive of the judicial power that may be exercised in “matters” described in ss 75 and 76. It is not exhaustive of the judicial power that may be exercised where there is no immediate right, duty or liability to be adjudicated. The logically or practically necessary monopoly of “courts” (observing minimum characteristics and being subject to appeal to the High Court) is a monopoly over the authoritative quelling of controversies about legal rights, duties and liabilities of the kind described in ss 75 and 76. There is no necessity for any more extensive monopoly into areas where such legal relations are not determined: *Burns v Corbett* (2018) 265 CLR 304 at [43], [45], [46], [52]-[53], [58] (Kiefel CJ, Bell and Keane JJ) (**JBA Vol 3 Tab 26**); *Citta Hobart Pty Ltd v Cawthorn* (2022) 276 CLR 216 at [1] (**JBA Vol 3 Tab 28**); *Commonwealth v Queensland* (1975) 134 CLR 298 (**JBA Vol 3 Tab 29**).



Dated: 5 February 2025

Brendan Lim